# REPORT OF CASES

DECIDED IN THE

# SUPREME COURT

OF THE

# STATE OF NORTH DAKOTA

NOVEMBER, 1909 TO FEBRUARY, 1910

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F. W. AMES
REPORTER

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VOLUME 19

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## OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. D. E. MORGAN, Chief Justice.
HON. BURLEIGH F. SPALDING, Judge.
HON. CHARLES J. FISK, Judge.[1]
HON. JOHN CARMODY, Judge.[2]
HON. S. E. ELLSWORTH, Judge.[2]

F. W. AMES, Reporter.
R. D. HOSKINS, Clerk.

[1]Elected to fill vacancy caused by resignation of Judge Young, and qualified January 10, 1907.

[2]By constitutional amendment, adopted November 3, 1908, the membership of the court was increased to five, and Judges Carmody, who qualified January 18, 1909, and Ellsworth, who qualified January 18, 1909, were appointed additional members.

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.

## JUDGES OF THE DISTRICT COURT.

| Dist. | Name. |
|---|---|
| 1. | CHAS. F. TEMPLETON. |
| 2. | JOHN F. COWAN. |
| 3. | CHAS. A. POLLOCK. |
| 4. | FRANK P. ALLEN. |
| 5. | J. A. COFFEY. |
| 6. | W. H. WINCHESTER. |
| 7. | W. J. KNEESHAW. |
| 8. | K. E. LEIGHTON. |
| 9. | A. G. BURR. |
| 10. | W. C. CRAWFORD. |
| 11. | FRANK FISK. |
| 12. | S. L. NUCHOLS. |

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# CASES

ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH DAKOTA

---

W. S. HYDE v. ADOLPH THOMPSON AND THEODORE G. THOMPSON, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THOMPSON BROS.

Opinion filed April 14, 1909.

**Money Had and Received — Trial — Directed Verdict — Promise to Pay Proceeds of Converted Property.**

1. In an action for money had and received to plaintiff's use, it was reversible error to direct a verdict in defendant's favor, where plaintiff's proof tended to show that he had a prior lien on certain personalty, which defendants seized under a chattel mortgage, and which they sold at foreclosure sale; the proof disclosing an express agreement by which defendants promised, for due consideration, to pay to plaintiff the proceeds of such property at such sale, and the evidence showing a breach of such promise.

**Same — Implied Promise to Pay.**

2. In the absence of an express agreement to that effect, a promise will be implied on defendant's part, under such facts, to turn over the proceeds of such sale to plaintiff.

**Same — Evidence.**

3. Evidence examined, and *held* amply sufficient to sustain the allegations of the complaint, both as to the existence of plaintiff's lien and the promise aforesaid; hence the direction of a verdict in defendants' favor constitutes reversible error.

Appeal from District Court, Griggs county; *Burke*, J.

Action by W. S. Hyde against Adolph Thompson and Theodore G. Thompson.

Judgment for defendants and plaintiff appeals.

Reversed.

*Lee Combs,* for appellant.

Agreement to pay money may be express or implied. Rev. Codes 1905, Sec. 5711; Luther v. Hunter, 7 N. D. 544, 75 N. W. 916;

Where one receives property agreeing to convert into cash and pay the owner's debts he is liable upon either express or implied promise to pay. Potts & Potts v. First National Bank, 102 Ala. 286; Kreutz v. Livingston, 15 Cal. 345; Bender v. Wooten, 35 Ark. 31; Davis v. Benton, 24 Conn. 556; Whitton v. Barringer, 67 Ill. 551; Johnson v. Collins, 14 Ia. 63; Sterling v. Ryan, 72 Wis. 36; Webb v. Meyer, 64 Hun. 11; 27 Cyc. 857.

If there is a substantial conflict in evidence, case is for jury. Finch v. Park, 80 N. W. 155; Siems v. Bank, 64 N. W. 167; Brand & Co. v. Williams, 13 N. W. 42.

*Benjamin Tufte,* for respondent.

Assumpsit will not be in favor of mortgage against purchaser at execution sale. Carpenter v. Graham, 3 N. W. 974; Randal v. Higbee, 37 Mich. 41; Hathaway v. Town of Cincinnatus, 62 N. Y. 434.

Authority from relationship of client and attorney cannot be inferred. Isaccs v. Zuggsmith, 103 Pa. St. 77; Rev. Codes 1905, section 502.

FISK, J. The sole question on this appeal is the correctness of the ruling below in directing a verdict in defendant's favor. Plaintiff seeks to recover for money had and received by defendants to his use. Briefly stated, the facts are that plaintiff had a seed lien upon certain wheat, which defendants had taken into their possession under a chattel mortgage for the purpose of foreclosure, and in addition to the facts necessary to show the validity of plaintiff's lien the complaint alleges an express contract between plaintiff and defendants whereby the latter agreed in consideration of being permitted to foreclose their said mortgage, which covered said wheat and other personal property, to pay to plaintiff the proceeds from the sale of such wheat and that thereafter they foreclosed accord-

ingly, and received on the sale of the wheat the sum of $165.64 and refused to turn the same over to plaintiff as promised, although payment thereof had been demanded by him. At the trial plaintiff introduced testimony tending to substantiate the allegations of his complaint in all particulars, and rested his case, whereupon the trial court, on motion of defendant's counsel, directed a verdict in defendant's favor, as above stated.

We are entirely clear that such ruling was erroneous. The reasons urged by respondents' counsel in support of such ruling merit but brief notice. These reasons, as stated in his brief, are the following: "(1) That, where adverse claimants are asserting rights to property covered by their adverse liens, the law will not imply a promise to pay. (2) In the case at bar there is no express promise and no agreement to pay, either by the defendants or any one authorized to enter into any agreement on their behalf. (3) That plaintiff has failed to prove that he had a seed lien upon the grain taken by defendants under their chattel mortgage."

The first proposition advanced is not necessarily involved in the case. Plaintiff does not rely for a recovery solely upon an implied promise on defendant's part to pay to plaintiff the proceeds of such wheat. He relies upon their express promise to do so. But, were it otherwise, we think that under the undisputed evidence, showing the priority of plaintiff's lien, the law would raise an implied promise on defendants' part to pay to plaintiff the proceeds of such wheat. Brand & Co. v. Williams, 29 Minn. 238, 13 N. W 42; Siems v. Bank, 7 S. D. 338, 64 N. W. 167; Finch et al v. Park, 12 S. D. 63, 80 N. W. 155, 76 Am. St. Rep. 588. This being true, it necessarily disposes of respondents' second contention also.

Their second contention is wholly untenable for another reason. The plaintiff's testimony is clear and specific to the effect that an express promise was made as alleged. The proof shows that Coffey, the person who made such agreement on defendants' behalf, was not only expressly authorized to do so, but his acts were subsequently ratified by defendants. Such contention, therefore, flies in the teeth of the facts as testified to by plaintiff, and which must be accepted as true on this appeal.

This is equally true as to respondents' third contention, which merits no further consideration.

Judgment reversed, and new trial ordered. All concur except MORGAN, C. J., who did not participate on account of illness.

(120 N. W. 1095.)

FRANK FLORA AND FRANK TOWNE, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF FLORA & TOWNE, v. EMMA L. MATHWIG.

Opinion filed April 14, 1909.

**Appeal and Error — Statement of Case — Specifications of Error.**

1. Whether a verdict is sustained by the evidence or not will not be considered on appeal to this court, in the absence of specifications in the statement of the case of the particulars in which the evidence fails to sustain the verdict.

**Trial — Evidence — Grounds of Objection to be Stated.**

2. Objection to evidence, on the alleged ground that it is incompetent, irrelevant and immaterial is too indefinite in cases where the ground of the objection might be remedied.

**Evidence — Conclusion of Witness.**

3. A question calling for the conclusion of a witness as to what another party understood as to the nature of a transaction is objectionable, as calling for a conclusion not based on facts.

**Objections to Evidence.**

4. Various objections to evidence considered, and *held* to be without merit.

Appeal from District Court, Barnes county; *Burke*, J.

Action by Frank Flora and Frank Towne against Emma L. M. Mathwig. Judgment for plaintiffs. Defendant appeals.

Affirmed.

*J. W. Tilly* and *Herman Winterer*, for appellant. *Lee Combs*, for respondents.

MORGAN, C. J. This is an action upon two promissory notes for the sum of $250 and $55, respectively. As to the latter no defense is made. As to the former the sole defense interposed is that the defendant signed the same as surety, and that the note was signed by her in part payment of certain machinery sold by plaintiffs to one Haessley, and plaintiffs took security from said Haessley upon the machinery, and also took an earnings contract as security for the purchase price, and that the plaintiffs subsequently purchased said machinery from said Haessley and sold the same to a third person, and that the note which she signed as surety was thereby paid, and defendant released from all liability thereunder. The action was tried to a jury, which found a verdict in plaintiff's favor for the

full amount claimed. Defendant made a motion for a new trial, which was denied, and defendant appeals.

It is claimed that the verdict is not supported by the evidence. The record on appeal, as prepared, compels a disregard of this assignment. There is no specification of the particulars in which the evidence fails to sustain the verdict. The statute governing what a statement of the case shall contain provides as follows: "There shall be incorporated in every such statement specification of the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision, and of the errors of law upon which the party settling the same intends to rely. If no such specification is made, the statement shall be disregarded on motion for a new trial and on appeal." Section 7058, Rev. Codes 1905. The rules of practice of this court as shown by rule 7 (91 N. W. vi) expressly state that such specifications of the particulars in which the evidence is insufficient to justify the verdict are deemed vital parts of every statement of the case. There was no attempt to comply with this statute, or with rule 7 (91 N. W. vi) in this case, and the statement is entirely wanting in specifications of such particulars. Under the express terms of the statute we cannot do otherwise than disregard the statement so far as the specification that it is contrary to the evidence is concerned. There are 74 specifications of error in the statement of the case. Sixty-eight of these relate to the admission or rejection of evidence. The assignments in the brief of the errors relating to the admission or rejection of evidence is in this language: "The court erred in its ruling on the competency and admission of evidence during the trial, as specified in appellant's specifications of error. Abstract, pp. 115-134, folios 454-434, inclusive." The assignments are therefore to be found in about 20 pages of the abstract. In the body of the brief, however, the reference to the abstract is more definite. For instance, the first assignment of error argued or referred to in the brief is prefaced by this statement by the attorney: "We call the court's attention to error of law 4, abstract, p. 115, which appears in abstract, p. 10, folio 36." Turning to the abstract at folio 36, we find the question, the objection, the ruling, and an exception showing what the assignment was based upon. We call attention to this manner of making assignments in the brief as not in accordance with the rules of practice. Rule 14 (91 N. W. viii) states that an assignment of error in the brief must point out the errors objected to in a way as

specific as the case will allow, and only such assignments are to be therein incorporated as the attorney expects to rely upon. This rule further requires that the assignment in the brief shall refer to the page of the abstract where the particular specification is found, and also to the page, or pages, of the abstract on which the matter is found upon which the error is predicated. The assignment itself in this case utterly fails to comply with this rule. By referring to the body of the brief it is possible, however, to find in what part of the record the proceedings on which is predicated the assigned error are to be found. But it should not be necessary to refer to the body of the brief to find where the original exception or objection is to be found. The assignment itself in the brief should state that fact. The object of the rules is to give assistance to the court, and that will be accomplished with the greaest effect by a strict compliance therewith. In this case, however, we have carefully considered the assignments relating to the exclusion or admission of evidence, notwithstanding the failure to comply with the rules. Forty-four of these assignments are based on objections stated to be incompetent, irrelevant, and immaterial. Objections so framed are too indefinite where the cause for objection might be remedied, and are deemed the same as no objection at all. In Kolka v. Jones, 6 N. D. 461, on page 480, 71 N. W. 558, on page 565, 66 Am. St. Rep. 615 the court said: "We have had occasion before to consider the importance of the rule of practice that a mere general objection is not sufficient to raise any question which could have been obviated had it been specifically pointed out, but no case has hitherto arisen in this state calling for its enforcement. We shall in all cases strictly enforce this highly just rule. A suitor should be fairly appraised by the language of the objection or the motion, as the case may be, just what point is made against his evidence, or what defect in proof is claimed by his antagonist, to the end that he may then and there, if possible, save himself from the consequences of error." See also Hogen v. Klabo, 13 N. D. 327, 100 N. W. 847; Olsen v. Burlington, C. R. & N. Ry Co., 12 S. D. 326, 81 N. W. 634. Many of the other assignments are based on objections that the evidence is incompetent, irrelevant, and immaterial, and that the question was leading, or called for a conclusion, or was not proper cross-examination. We have considered these objections and find that no prejudicial error was committed in the rulings. While some of the questions were somewhat leading, no possible prejudice could have

followed the rulings, and the discretion reposed in the trial court in such matters was not abused. The defendant offered in evidence a letter known in the record as "Exhibit 7." That was a letter to the defendant from Reeves & Co., to whom the defendant and Haessley had given a note for $250 of the purchase price of the machinery, which, with the note in suit, made up the total sum for which the defendant signed notes. The offer of the note in evidence was accompanied by an offer to prove by Exhibit 7 that Reeves & Co., understood that the defendant was a surety on that note. An objection to the offer was properly sustained, as it was immaterial that Reeves & Co. understood. The contract was made by plaintiffs and the defendant, and not by Reeves & Co. and the defendant. Even if the offer was material, Exhibit 7 does not tend to show that the defendant signed the note as surety, or that she signed it at all. While Haessley, who purchased the machinery from the plaintiffs and signed all the notes as maker, was under cross-examination, he was asked this question: "So they understood, so far as you know, that you was the owner of the machinery when you purchased it, and she was merely surety." It referred to what the plaintiff thought or understood, and was improper. It did not call for anything that was said or done by plaintiffs, but for the conclusion of the witness as to what the understanding of plaintiff was as to the transaction. In calling for a conclusion of this nature, unaccompanied by anything to show a basis for the witness' conclusion, the objection was properly sustained.

We have examined all other exceptions properly taken, but we find no error in the court's rulings, and the assignments present no questions worthy of consideration.

Judgment affirmed. All concur.

(121 N. W. 63.)

EMERSON MANUFACTURING COMPANY, A CORPORATION, v. I. K. TVEDT AND JOHN RUSTAD.

Opinion filed April 14, 1909.

**Guaranty — Notice of Acceptance.**

1. Defendant signed and delivered the following written instrument, contained on the back of a contract between plaintiff and one T., whereby T., a local dealer, purchased certain farm implements from plaintiff: "In consideration of one dollar to me in hand paid by Emerson Manufacturing Company, the receipt of which I hereby acknowledge, I hereby guranatee the fulfillment of the within contract and the prompt payment of all obligations given under or arising out of it, and all renewals of the same, on the part of I. K. Tvedt, Kindred, N. D., and waive demand and notice of nonfulfillment and nonpayment. This guaranty is given at the time of the execution of the within contract, and is made a part of the same." *Held,* that such instrument constitutes an absolute guaranty, and hence notice to defendant of plaintiff's acceptance thereof was unnecessary in order to bind him.

**Case Distinguished.**

2. Standard Sewing Machine Company v. Church et al., 11 N. D. 420, 92 N. W. 805, distinguished.

Appeal from District Court, Cass county; *Pollock*, J.

Action by the Emerson Manufacturing Company against John Rustad and another. Judgment for defendant Rustad, and plaintiff appeals. Reversed.

*Stambaugh & Fowler,* for appellant.

*M. A. Hildreth,* for respondent.

FISK, J. In the month of March, 1905, plaintiff, Emerson Manufacturing Company, a manufacturer of farm implements at Rockford, Ill., entered into the usual contract with defendant Tvedt, whereby the latter, who was a local dealer in farm machinery at Kindred, this state, ordered from plaintiff certain machinery at stipulated prices, to be shipped to Kindred, and said defendant was given the exclusive sale during said season of such machinery in the territory tributary to Kindred and other designated points near there. Upon the back of the printed order the respondent, Rustad, signed the following guaranty: "In consideration of one dollar to me in hand paid by Emerson Manufacturing Company, the receipt of which I hereby acknowledge, I hereby guar-

antee the fulfillment of the within contract and the prompt payment of all obligations given under or arising out of it, and all renewals of the same, on the part of I. K. Tvedt, Kindred, N. D., and waive demand and notice of nonfulfillment and nonpayment. This guaranty is given at the time of the execution of the within contract, and is made a part of the same. (Signed) John Rustad. Post Ofice, Kindred, N. D." Tvedt defaulted in making payments due plaintiff under the contract, and this action was brought against both Tvedt and Rustad to recover the amount of Tvedt's indebtedness to plaintiff. The amount of such indebtedness is not in dispute, and plaintiff had judgment against Tvedt in the court below; but the trial court directed a verdict in favor of Rustad upon the theory that there was no liability against him, because plaintiff never notified him of its acceptance of the Tvedt contract or order, and such ruling constitutes the sole error complained of.

The learned trial court no doubt considered the instrument which respondent signed as a mere offer of guaranty, and not an absolute guaranty, and hence, under the well-established rule recognized by this court in Standard Sewing Machine Co. v. Church et al., 11 N. D. 420, 92 N. W. 805, no liability arose thereunder, because plaintiff failed to notify Rustad of its acceptance of and reliance upon the same. This was clearly erroneous. The instruments in these cases are widely different, and such difference is plainly pointed out by the authorities hereinafter cited. The guaranty in the case at bar recited a consideration moving directly from plaintiff, the guarantee, to Rustad, the guarantor, and this is held sufficient everywhere to show an absolute contract of guaranty, as distinguished from a mere offer of guaranty. As stated by eminent authority, "a contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract." Machine Company v. Richards, 115 U. S. 524, 6 Sup. Ct. 173, 26 L. Ed. 480. Nor is the fact that the consideration was merely nominal, or not in fact paid, at all material. Lawrence v. McCalmont, 2 How. 426, 11 L. Ed. 326; Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686. In addition to the above authorities, see,

also, the following as lending support to the views here expressed: Furst & Bradley Mfg. Co. v. Black, 111 Ind. 308, 12 N. E. 504; Wright v. Griffith, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639; Bank v. Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64; 20 Cyc. 1407-1409, and numerous cases therein cited. The fact that the Tvedt order or contract contains a clause to the effect that the same is made subject to the approval and acceptance in writing of Emerson Manufacturing Company at its home office, and the same was not thus accepted, does not exonerate respondent from liability. The proof conclusively shows that plaintiff in fact approved such contract and acted thereunder in furnishing machinery to Tvedt.

Judgment reversed, and new trial ordered as to respondent Rustad. All concur.

(120 N. W. 1094.)

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FIRST INTERNATIONAL BANK OF PORTAL v. JOHN J. LEE.

Opinion filed April 14, 1909.

**Sheriffs and Constables — Failure to Levy Execution — Pleading — Evidence.**

Action to recover damages for the alleged failure and neglect of defendant as sheriff to levy an execution upon certain personal property held by him under a writ of attachment. At the conclusion of plaintiff's testimony, the trial court directed a verdict in defendant's favor, such ruling being made presumably upon the theory that the complaint failed to state facts sufficient to constitute a cause of action and that the plaintiff's proof failed to show a cause of action; there being neither allegation nor proof negativing any facts justifying defendant's official acts. *Held,* error, as the burden was on defendant to justify his failure and neglect to make such levy. The complaint was therefore sufficient, and the plaintiff's testimony established a prima facie case against defendant.

Appeal from District Court, Ward county; *Goss,* J.

Action by the First International Bank of Portal against John J. Lee. Judgment for defendant, and plaintiff appeals.

Reversed.

*S. M. Lockerby* and *Turner & Wright,* for appellant.

*Le Sueur, Bradford & Hurley,* for respondent.

FISK, J. Appellant seeks to recover damages from respondent, who was sheriff of Ward county, for the latter's neglect to levy upon certain property under an execution issued upon a judgment recovered by appellant against one Shuler. At the conclusion of plaintiff's testimony, counsel for defendant moved for a dismissal of the action upon certain designated grounds which, are unnecessary here to enumerate. The trial court stated that he would treat the motion as one for a directed verdict in defendant's favor, and such motion was granted and a verdict was accordingly directed. Plaintiff moved for a new trial, which motion was denied and judgment was entered on such verdict. The appeal is both from the judgment and from the order aforesaid

The only grounds urged by respondent's counsel in support of the correctness of the court's rulings are (1) insufficiency of the complaint in that it fails to state a cause of action; and (2) insufficiency of the evidence to prove a cause of action. We are clear that there is no merit to either contention, and that the judgment and order are erroneous, and must be reversed.

The complaint, omitting formal parts, is substantially as follows: (1) That plaintiff is a corporation. (2) That during all of the time herein recited the defendant was and now is the duly elected, qualified, and acting sheriff of the said county of Ward, state of North Dakota. (3) That on the 16th day of August, A. D. 1905, plaintiff delivered to defendant, as sheriff aforesaid, an execution duly issued out of the above-named court on said day in a certain action in said court wherein this plaintiff was plaintiff and one John Shuler was defendant against certain specific personal property theretofore attached in said action, and then in the custody and under the control of the said defendant, as such sheriff directing this defendant, as sheriff aforesaid, to satisfy the said execution out of the personal property of the defendant John Shuler, then within said Ward county, in his possession under and by virtue of the said writ of attachment aforesaid. That said execution was issued in said action by the clerk of said court upon a certain judgment of $1,291.25, in favor of the above-named plaintiff and against the said John Shuler, and rendered, entered, and docketed on the 15th day of August, A. D. 1905. (4) That defendant as such sheriff totally neglected to serve, execute, and return the said execution according to the command therein given by reason whereof the said plaintiff has wholly lost the benefit of its said judgment. (5) That

defendant, after receiving said writ of execution as aforesaid, willfully and wrongfully released the said property held by him under the writ of attachment aforesaid, and surrendered the same to the said John Shuler, to wit: One frame building, used as a meat market in the village of Portal, in said Ward county, of the reasonable worth and value of the sum of $1,000; one set of butcher's tools of the reasonable worth and value of $150; the furniture and fixtures in said meat market of the reasonable worth and value of the sum of $150; that said defendant so released the same to said John Shuler without due authority of law and contrary to the express wish of this plaintiff, and against its instruction and protest. (6) That said judgment is in full force and unsatisfied. That the said John Shuler is insolvent. Wherefore plaintiff prays judgment against the said defendant for the sum of $1,300, together with the costs and disbursements of this action.

It is asserted in effect by counsel for respondent that the portion of the complaint charging or attempting to charge defendant with actionable negligence or failure to discharge his official duty to make a levy under the execution is not a pleadable fact, but merely a legal conclusion. This contention is based upon the use of the words "willfully and wrongfully" found in the fifth paragraph. The gist of plaintiff's cause of action is defendant's failure and neglect to levy upon the property of the judgment debtor under the execution as he was therein commanded to do, and not, as counsel seem to think, his act releasing the property from the attachment. The fourth paragraph, and not the fifth, contains the gist of the charge necessary to plaintiff's cause of action, and the matters set out in paragraph 5 are merely by way of inducement to what is alleged in the preceding paragraphs. In any event, it is too plain for serious debate that paragraphs 4 and 5, when considered together, clearly charge defendant with actionable neglect in failing to levy the execution as commanded, even if we eliminate as surplusage the words "willfully and wrongfully" from paragraph 5.

It is equally clear that plaintiff's proof constituted a prima facie case in its favor. It was not incumbent upon it, as respondent's counsel contend, to negative the existence of facts showing respondent's right to release the attached property, nor to show the absence of justification for his failure and neglect to make a levy under the execution. The burden was on respondent to justify his official conduct. The authorities are a unit on this question. We cite the

following: 25 Am. & Eng. Enc. of L. 707, and cases cited; Bonnell v. Bowman, 53 Ill. 460; People v. Palmer, 46 Ill. 398, 95 Am. Dec. 418; Sage v. Dickinson, 33 Grat. (Va.) 361; 12 Am. & Eng. Enc. of L. 261; 2 Freeman on Ex. (3d Ed.) § 252, and cases cited; Terrell v. State, 66 Ind. 570; Bank v. Gilbert, 174 Ill. 485, 51 N. E. 584, 66 Am. St. Rep. 306, and note.

The judgment and order appealed from are accordingly reversed, and a new trial ordered. All concur.

(120 N. W. 1093.)

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T. E. YERXA v. W. E. RUTHRUFF AND L. L. RUTHRUFF.

Opinion filed March 19, 1909.

**Principal and Surety — Failure to Present Claims Against Principal's Estate.**

Surety not released. The defendants, who were husband and wife, executed to respondent a promissory note jointly and as joint makers. Appellant signed with her husband as joint maker, but as surety only. Prior to the commencement of this action her husband and co-defendant died intestate, leaving an estate in Clay county, Minn., of the appraised value of $3,500, which was duly probated in said county. While said probate proceedings were pending and after due notice to creditors to present their claims against said estate had been given, respondent was requested by appellant's attorney to file said note as a claim against said estate, which he wholly failed and neglected to do. His failure to file said note as a claim against said estate did not release respondent as surety.

Appeal from District Court, Cass county; *Pollock*, J.

Action by T. E. Yerxa v. W. E. Ruthruff and L. L. Ruthruff. Judgment for plaintiff, and L. L. Ruthruff appeals.

Affirmed.

*J. W. Tilly*, for appellant.

Failure to establish claim against solvent principal's estate discharges the surety. Roberts, Thorpe & Co., v. Laughlin, 4 N. D. 167, 59 N. W. 967; Stackpole v. D. L. & T Co., 10 S. D. 389, 73 N. W. 258; Brown v. Ch. R. I. & P. Ry. Co., 107 N. W 1024.

*Glassford & Lacy*, for respondent.

Failure to sue solvent principal at surety's request does not discharge the latter. National Bank of South Reading v. Sawyer, 59 N.

E. 76, 83 Am. St. Rep. 292; Story's Eq. Juris. Sec. 639; Streetor v. Jefferson County National Bank, 147 U. S. 36, 37 L. Ed. 68; Myers v. Farmers State Bank, 74 N. W. 252; Morrison v. Equitable National Bank, 6 Ohio N. P. 7th; Montpelier Bank v. Dixon, 4 Ver. 599; Page v. Webster, 15 Me. 269; Bull v. Allen, 19 Conn. 101; Mahurin v. Pearson, 8 N. H. 539; Abercrombie v. Knox, 3 Ala. 728, 37 Am. Dec. 721; Bank of Maywood v. McAlister, 76 N. W. 552; Tideman on Commercial Paper, Sec. 424; Parsons Notes and Bills, Vol. 1, p. 237, Vol. 2, p. 243; Daniel Neg. Int. Vol. 2, Secs. 1326 and 1339; Ingels et al, v. Sutliff, 36 Kan. 444; Brandt on Suretyship, Vol. 1, Sec. 265.

CARMODY, J. This action was brought by respondent to recover judgment on a promissory note of date January 11, 1902, executed and delivered by defendants to respondent for the sum of $300, due October 1, 1902. It appears from the face of the note that the same was executed by defendants to respondent jointly as joint makers. The facts, so far as may be necessary to a decision of the case, are as follows: At the time of the making and delivery of said note to respondent the defendant W. E. Ruthruff and appellant, L. L. Ruthruff, were husband and wife, and lived in the city of Fargo. Defendant W. E. Ruthruff was on said 11th day of January, 1902, indebted to respondent for goods sold and delivered to him by said respondent in the sum of $300, and on said date executed the note in question. Appellant, L. L. Ruthruff, who was the wife of the defendant, signed said note with her husband as joint maker, but as surety only, for and as an accommodation party. On the 27th day of June, 1902, defendant W. E. Ruthruff died intestate, leaving an estate in Clay county, Minn., of the appraised value of $3,500. Claims were filed against said estate and approved to the amount of $2,467.08; and said estate had not at the time of the trial of this action been closed, and no final accounting or report by the administrator had been made. Said estate was probated in the county of Clay and state of Minnesota, and an administrator thereof duly appointed. Notice to creditors to present their claims against said estate was duly given. After said probate proceedings were started, J. W. Tilly, who was then the attorney for appellant, informed Fred Yerxa, who represented the respondent, that the estate of W. E. Ruthruff was being probated in Clay county, Minn., and that there was money or would be money in the estate coming into the

hands of the administrator for the payment of debts, and notified him to file the note or claim with the administrator or probate court of Clay county, and that he said he would; but respondent wholly failed and neglected so to do. Appellant paid no part of said note, and it remains wholly unpaid, and did not file the claim against the estate of her codefendant for the amount of said note, or any part thereof. This action was tried in the district court of Cass county before Judge Pollock; a jury having been waived by both parties. At the close of the case the court made its separate findings of fact and conclusions of law, and ordered judgment in favor of the respondent and against the appellant for the amount of the note and interest. A motion for a new trial by appellant was made and denied, and judgment was entered in favor of respondent and against the appellant for the amount due on said note and interest. From the order denying the motion for a new trial, and the said judgment, this appeal was taken.

Appellant cites sections 6105 and 6106 of the Revised Codes of 1905. Section 6106 provides: "A surety has all the rights of a guarantor, whether he becomes personally responsible or not." Section 6105 provides: "A surety is exonerated: (1) In like manner with a guarantor. (2) To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights or which lessens his security; or (3) to the extent to which he is prejudiced by an omission of the creditor to do anything when required by the surety which it is his duty to do." She contends that under the provisions of these sections of our Code she is exonerated and discharged as surety on said note for the reason that she was an undoubted surety only, and has been prejudiced by the failure and neglect of the respondent to present said note against the estate of her codefendant, W. E. Ruthruff. In this connection she cites sections 4511, 4513 and 4514 of the Grand Statutes of Minnesota of 1894, which were in force both at the time of the making of said note and the probating of said estate, and which read as follows: Section 4511: "All claims arising upon contracts whether the same be due, not due, or contingent, must be presented to the probate court within the time limited in said order, and any claim not so presented is barred forever." Section 4513: "No claim or demand shall be allowed that is barred by the statute of limitations, nor shall any offset that is barred by the statute of limitations be

allowed." Section 4514: "No action at law for the recovery of money only shall be brought in any of the courts in this state against any executor, administrator or guardian upon any claim or demand which may be presented to the probate court except as provided in this Code." She further contends that by reason of the failure of the respondent to present the note as a claim against the estate of her codefendant, as hereinbefore stated, and by reason of the foregoing sections of the Minnesota statutes, if she is obliged to pay this note she will have no redress against the estate of the principal, and can in no way protect herself or recover from any person the amount she may be obliged to pay by reason of the judgment against her on said note in this action.

We are agreed that she was not prejudiced by reason of the failure of the respondent to present his claim against the estate of her codefendant, and that she is not exonerated from her liability as surety on said note. In Taylor v. Beck, 13 Ill. 376, which was an action by the plaintiff against a surety, the court uses the following language: "There is no rule of the common law, nor principle of equity, that will enable a surety to relieve himself from liability by a simple request to the creditor to proceed against the principal. The English cases uniformly agree that mere passiveness on the part of the creditor will neither exonerate the surety at law nor in equity; and, independent of the decisions based upon particular statutes, such is decidedly the weight of authority in this country. The notion that the surety can compel the creditor to active diligence against the principal, at the hazard of releasing the surety, is expressly repudiated in the following cases: Bellows v. Lovell, 5 Pick. (Mass.) 307; Leavitt v. Savage, 16 Me. 72; Bull v. Allen, 19 Conn. 101; Executors of Baker v. Marshall, 16 Vt. 522, 42 Am. Dec. 528; Davis v. Huggins, 3 N. H. 231; Croughton v. Duvall, 3 Call (Va.) 69; Manning v. Shotwell, 5 N. J. Law, 585, 8 Am. Dec. 622; Carr v. Howard, 8 Blackf. (Ind.) 190; Executors of Dennis v. Rider, 2 McLean, 451, Fed. Cas. No. 3,797. * * * There is no sound reason for permitting a surety to discharge himself by requesting the creditor to proceed against the principal. The undertaking of a surety is absolute in its terms, and not conditional, as is the engagament of an indorser. He is directly and not contingently liable to the creditor. The latter has a direct remedy against both principal and surety. If the obligation is joint and several, he has an undoubted right to proceed against the surety alone. It is

no part of his contract that he will take active measures to collect the debt. The duty to act rests with the debtors. All that the surety has the right to require of the creditor is that no affirmative act shall be done that will operate to his prejudice, such as an extension of the time of payment by a binding arrangement with the principal, or the giving up of other securities for the payment of the same debt. The law affords the surety a sufficient protection. He can pay the debt the moment it falls due, which is doing more than he agreed to do, and immediately resort to the principal for reimbursement."

In the case at bar appellant could have paid the note and filed the amount she was obliged to pay as a claim against the estate of her codefendant, or she could, without paying it, have filed it as a contingent claim against the said estate, and thus have protected herself. So we cannot see that she was prejudiced by reason of the failure of the respondent to present or file said note as a claim against the estate of her codefendant. She relies upon the decision of the Supreme Court of the state of Minnesota in Seibert v. Quesnel, 65 Minn. 107, 67 N. W. 803, 60 Am. St. Rep. 441, which seem to bear out her contention that, because the respondent failed to have his claim presented against the estate of her codefendant, she was released from her liability as a surety. The soundness of this decision seems to be doubted in the later case, decided by the same court, of Board of County Commissioners v. Security Bank, 75 Minn, 174, 77 N. W. 815. At any rate, the great weight of authority, and we think the better reasoning, is that, in the absence of a statute requiring him to do so, failure of the payee to present his claim against the estate of the deceased principal by request of the surety or otherwise does not release the surety. Villers v. Palmer, 67 Ill. 205; Banks v. State, 62 Md. 88; Sichel v. Carrillo, 42 Cal. 493; Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235. The above sections of our Code, cited and relied upon by appellant, do not change the general rule as herein announced.

Finding no error in the record, the order and judgment appealed from are affirmed. All concur.

(120 N. W. 758.)

## J. A. CHESLEY v. SOO LIGNITE COAL COMPANY, F. E. BALL G. H. HOLLISTER AND C. G. WELTON.

Opinion filed March 11, 1909.

Rehearing denied May 15, 1909.

**Contracts — Recission — Return of Consideration.**

1. A rescission of an express contract renders the same of no force or validity so far as its enforcement or damages for its breach are concerned; but the implied obligation of the parties to restore everything of value received thereunder remains in force, and may be enforced after rescission.

**Foreign Corporations — Failure to Comply With Local Laws — Liability of Officers and Stockholders — Implied Contracts — Return of Benefits.**

2. Under section 4698, Rev. Codes 1905, making officers, agents and stockholders of non-resident corporations doing business within this state without complying with the statutes thereof "liable on any and all contracts of such corporation * * * made within this state," these officers, agents and stockholders are liable on the implied contracts or obligations of such corporations to return everything which was received by the corporation under an express contract with it by a party who has rescinded the express contract.

Appeal from District Court, Cass county; *Pollock*, J.

Action by J. A. Chesley against the Soo Lignite Coal Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

*Engerud, Holt & Frame,* for appellants.

Penal statutes are strictly construed. Attril v. Huntington, 16 Atl. 652; Manhattan Trust Co. v. Davis, 58 Pac. 718; Merchants Bank v. Bliss, 35 N. Y. 412; Stokes v. Stickney, 96 N. Y. 326; Powder River Cattle Co. v. Custer Co., 22 Pac. 383; Halsey v. McLean, 12 Allen 438; Commonwealth v. Biddle, 21 Atl. 134; Commonwealth v. Reinoche, 29 Atl. 896; Providence & C. Co. v. Hubbard, 101 U. S. 188, 25 L. Ed. 786; Larsen v. James, 29 Pac. 183; State Savings Bank v. Johnson, 45 Pac. 662; Wethey v. Kemper, 43 Pac. 716; Derrickson v. Smith, 27 N. J. L. 167.

Choice of remedy and mode is irrevocable. Sonnysen v. Akin, 14 N. D. 248, 104 N. W. 1026; Butler v. Hildreth, 46 Mass. 49; Connihan v. Thompson, 111 Mass. 272; Bowen v. Mandelville, 95 N. Y. 239; Morris v. Rexford, 18 N. Y. 552.

Express contracts are proved by the words, implied contracts by the acts of the parties showing the promise. Sec. 5329, Rev. Codes 1905; Columbus Ry. v. Gaffney, 61 N. E. 152; McCoun v. N. Y. C. & C. Ry., 50 N. Y. 176; Chilcot v. Trimble, 13 Barb. 502; Wood v. Ayres, 39 Mich. 345; City Council v. Montgomery, 77 Ala. 248; Milford v. Commonwealth, 10 N. E. 516; Sceva v. True, 53 N. H. 627; Hertzog v. Hertzog, 29 Pa. St. 465; Columbus & C. Ry. v. Gaffney, 65 Oh. St. 104; Wood v. Ayres, 39 Mich. 345; Bixby v. Moore, 51 N. H. 402.

Officers of the corporation in default can be charged only upon contract made by consent of parties. National Bank v. Pick, 13 N. D. 74, 99 N. W. 63; Powder River & Co. v. Custer Co., 22 Pac. 383; Dusenbury v. Spier, 77 N. Y. 144; Milford v. Commonwealth, supra; O'Brien v. Young, 95 N. Y. 428; Chase v. Curtis, 113 U. S. 452, 28 L. Ed. 1038; Heacock v. Sherman, 14 Wend. 58; Bruce v. Platt, 80 N. Y. 379; Kirkland v. Kille, 99 N. Y. 390; Commonwealth v. Biddle, 21 Atl. 134.

*Ball, Watson, Young & Hardy,* for respondent.

Stockholders liability under the statute is as principal debtor not surety. Cook on Stocks and Stockholders, Sec. 224; Marshall-Wells Co. v. New Era Co., 13 N. D. 396, 100 N. W. 1084.

MORGAN, C. J. The Soo Lignite Coal Company is a corporation organized under the laws of the state of South Dakota, and was engaged in the business of operating a coal mine in Pennington, in this state. The defendants Ball, Hollister & Welton were officers of said corporation during all the times covered by the transactions hereinafter set forth. The plaintiff was during all the time mentioned engaged in the business of selling coal in the city of Fargo. In February, 1904, he made a contract with said Soo Lignite Coal Company, by which he was to take 1,000 shares of stock in said company at the agreed price of $1,000, and he was also to receive the exclusive agency for the selling of that company's coal in Fargo, and he had a further right under said contract to receive each year 1,000 tons of the coal mined by said company at a reduced cost, the same to be shipped by the company whenever ordered by the plaintiff. Under the terms of said contract plaintiff was to execute to the said coal company 10 notes for the sum of $100 each, to be due at stated times therein set forth, and the plaintiff did execute and deliver to said company the 10 notes as provided for by the con-

tract. The defendant Ball, as president of said company, indorsed said notes, and the same were transferred to the Merchants' State Bank of Fargo by the defendant Hollister. The money received upon the transfer of the notes was turned over to said coal company, and used by it for its own business purposes. Among the other considerations for said contract between the plaintiff and said company was the promise of said company that it would convey 11 lots in the town of Pennington to the plaintiff. The stock certificates of said company to the amount of 1,000 shares, and also the deed to the said lots in the town of Pennington were deposited with the Northern Trust Company for the plaintiff, but he never demanded their possession, although he was notified that they were in the office of said trust company subject to his order, and the same were never, as a matter of fact, taken by the plaintiff. In the month of February, 1904, the plaintiff ordered two carloads of coal from the defendant company under the terms of said contract, but the coal was never shipped to him nor delivered to him in any way. The notes which the officers of the company transferred to the Merchants' State Bank were protested for non-payment and were thereafter paid by the plaintiff prior to the commencement of this action. On the 22d day of April, 1905, the plaintiff canceled and rescinded the contract upon the ground that he was induced to make it by the false and fraudulent representations of the defendant company's agents, and upon the further ground that the company had failed to perform its agreement, and had not complied with the law of this state relating to foreign corporations.

The action came to trial before a jury, and at the close of the testimony the plaintiff and each of the defendants moved for a directed verdict. The court denied the defendants' motion, and, in pursuance of a direction of a verdict in plaintiff's favor, the jury brought in a verdict against the defendants for the sum of $1,091.89. testimony the plaintiff and each of the defendants moved for a judgment notwithstanding the verdict, and for a new trial, if such motion for judgment was denied. These motions were severally denied by the court, and the defendants appealed from said order and from the judgment entered on the verdict of the jury. The ground on which the trial court directed a verdict against all the defendants was that the defendant coal company never complied with any of the provisions of sections 4463, 4695-4697, Rev. Codes 1905. These sections pertain to the filing of a copy of the charter of corpora-

tions organized under the laws of a foreign state with the Secretary of State and the appointment of a resident agent upon whom service of process can be had and the doing of certain other acts by them before they are authorized lawfully to transact business in this state. The liability of the defendants in this case is based by the plaintiff, and it was sustained by the trial court upon section 4698, Rev. Codes 1905, which reads as follows: "Any failure to comply with the provisions of the last three sections, and with section 3116 (4463) of this Code shall render each and every officer, agent or stockholder of that corporation, association or joint stock company, failing to comply therewith, jointly and severally liable on any and all contracts of such corporation, association or joint stock company made within this state." It is conceded by the appellants that judgment was properly rendered against the corporation company, and the corporation has not appealed from the judgment of the district court. The contention of the appellants is that the provisions of section 4698 have no application to them under the facts of this case. In other words, that said section pertains alone to liability under the existing contract of the corporation, and, the contract having been entirely annulled and rescinded by the plaintiff, no liability attached to appellants as officers of said corporation under said section or otherwise. The respondent urges that the provisions of the contract were not as a matter of law rescinded so far as the plaintiff's right to demand a return of everything of value received by the corporation under the contract is concerned, nor as to the obligations of the corporation to restore everything of value received by it pursuant to the contract; that these rights and obligations remained in force, although the express contract may have been rescinded. The appellants contend that said section 4698 is penal and should therefore receive a strict construction, and, further, it is contended by them that said section does not apply to implied contracts nor to any other contracts not expressly consented to by the corporation. We do not decide whether said section is penal in its nature, or whether it imposes a liability based on contract, as it is not necessary to do so in this case.

Nor is it necessary to decide the contention of the defendants which is disputed by the plaintiff that the statute should be strictly construed. Appellants' contention is that the statute imposes a liability upon stockholders and officers now existing under the common law, and that a strict construction only should be given to it. Re-

spondent contends that the rule contended for by appellants is not in force in this state; it having been abolished by section 6724, Rev. Codes 1905, which provides that the provisions of the Civil Code "are to be liberally construed with a view to effect its objects, and to promote justice." The statute is broad enough in its language to create a liability against the defendants under a strict construction of its terms.

The liability of the officers must be measured by the terms of the statute as such liability is created solely by the statute. The precise question before us is: What was the status of the contract and of the parties thereto after plaintiff had rescinded it? The recission of it wiped out the contract, so far as basing any affirmative action on it relating to its enforcement, or for damages for its breach. It destroyed all its vitality, and the relation of the parties thereto as an express contract was the same as though it never had been entered into. This much is conceded by both parties. Whether the conceded obligation of the defendant company to restore everything of value which had been received by it under the contract before it was rescinded can now be enforced against the officers of the company is the disputed issue in this case. In other words, does section 4698, supra, make officers of a foreign corporation not complying with our statute pertaining to their right to transact business in this state liable on the implied contracts of the corporation? The language of the section is that they are liable "on any and all contracts of the corporation." This language is broad enough to include contracts implied by law. We think it would be failing to give effect to the language of the section to restrict its application to express contracts. The rescission of the express contract does not effect rights growing out of it thereafter as implied obligations on the part of the defendant company. Contracts are classified as express or implied by the statute of this state, and section 4698 in effect makes officers liable upon a breach of either by the corporation. Stress is laid upon the use of the word "made" in said section; and it is argued that express contracts only are made or can be "made." It is true that implied contracts are not entered into by express words, but are manifested by conduct of the parties; but they are made by the parties as a matter of law with equal effect as though the terms are stated expressly. No cases are cited by either party which are in point as to the meaning and construction of this section, and we have failed to find any. Appellant relies on Dusenbury v. Spier, 77

N. Y. 144; Melford v. Commonwealth, 144 Mass. 64, 10 N. E. 516; Sceva v. True, 53 N. H. 627; Hertzog v. Hertzog, 29 Pac. 465; Bank v. Pick, 13 N. D. 74, 99 N. W. 63; Powder River Cattle Co. v. Custer Co., 9 Mont. 145, 22 Pac. 383, and similar cases, but we do not deem them to be in point. Whereas they pertain to causes of action attempted to be enforced under implied contracts they are not based on statutes containing the broad language that section 4698 does.

The judgment is affirmed. All concur.

(121 N. W. 73.)

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VICTORIA SOULES v. THE BROTHERHOOD OF AMERICAN YEOMEN.
Opinion filed March 19, 1909.

**Life Insurance — Misrepresentations — Warranties — Effect of.**

1. Section 5934, Rev. Codes 1905, providing that misrepresentations in applications or contracts for insurance shall not be deemed material unless made "with actual intent to deceive or unless the matter misrepresented increased the risk of loss," includes statements in applications called warranties by the law of insurance. Such statutes are remedial and liberally construed.

**Same — Burden of Proof as to Suicide — Proofs of Death — Effect of Statements Therein.**

2. The burden is on the defendant in an action to recover on a life insurance certificate to show that death was caused by suicide, although the proof of death stated on information and belief that the insured committed suicide, where such statement was made under circumstances that this statement could not be attributed to the plaintiff. The proof was not made by her or her agent.

**Same — Suicide Question for Jury — When.**

3. The question whether an insured person committed suicide is for the jury, when there are circumstances which are conflicting, and show that death may have been caused through a criminal assault by another.

**Appeal and Error — New Trial — Extension of Time in Discretion of Court.**

4. Motions for extension of time within which to file exceptions to a charge, and motions for leave to file an amended motion for a new trial, so as to show newly discovered evidence as an additional ground, are matters resting within the sound discretion of the trial courts, and their decisions thereon will not be disturbed, except in cases of manifest abuse of that discretion.

**Same—Trial—Offer of Proof.**

5. Errors, if any, in sustaining objections to questions put to a party who is under cross-examination as an adverse party, under section 7252, Rev. Codes 1905, cannot be taken advantage of when there is no offer or showing that the answers would be material under the issue formed by the pleadings.

Appeal from Stutsman County Court; *Burke,* J.

Action by Victoria Soules against the Brotherhood of American Yeomen. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Affirmed.

*R. G. McFarland, J. H. Fraine,* and *S. L. Glaspell,* for appellant.

Intention to show mistake in proof of loss must be pleaded. Travelers Ins. Co. v. Robbins, 27 U. S. App. 547; Travelers Ins. Co. v. Melick, 65 Fed. 178; Mutual Bene. Life Assoc. v. Newton, 22 Wall. 32; Keels v. Mut. Res. Fund Life Assoc. 29 Fed. 198-201; McMaster v. Ins. Co. of N. A. 55 N. Y. 222; Parmalee v. Hoffman F. Ins. Co., 54 N. Y. 193.

Burden is on plaintiff to disprove suicide. Home Benefit Assoc. v. Sargent, 142 U. S. 691; Ingram v. National Union, 72 N. W. 559; Sartell v. Royal Neighbors of Am. 88 N. W. 985; Chambers v. Modern Woodmen, 99 N. W. 1107; Hale v. Life Ind. & Inv. Co., 68 N. W. 182.

Failure to produce documentary evidence in one's possession warrants the presumption that it is prejudicial to him concealing it. Agen v. Met. Life Ins. Co., 80 N. W. 1020; Secs 5952 to 5961, Rev. Codes N. D. 1905; Satterlee v. Modern Brotherhood, 15 N. D. 92, 106 N. W. 561; Brady v. United life Ins. Assn., Fed. 727; Mead v. N. W. Ins. Co., 7 N. Y. 530.

If suicide is established beyond controversy defendant is entitled to a verdict. Rev. Codes 1905, Sec. 5952, 5961.

If statements in application are made warranties, such effect must be given them. Johnson v. Dak. F. Ins. Co., 1 N. D. 167, 45 N. W. 799; Satterlee v. Modern Brotherhood, supra; Mead v. N. W. Ins. Co., supra; Brady v. United Life Ass. 60 Fed. 727; 25 Cyc. 811.

*John Knauf* and *M. C. LaSell,* for respondent.

Statements in proofs of loss do not bind as to person who did not make them. Mutual Benefit L. Asso. v. Newton, 22 Wall. 32, 32 L.

Ed. 793; Parmalee v. Hoffman Fire Ins. Co., 54 N. Y. 193; McMasters v. Pres. & C. Ins. Co., 55 N. Y. 229.

Plaintiff can explain and contradict statements in proofs of death. Beckett v. N. W. Mas. Aid Assn., 69 N. W. 923; Bentz v. N. W. Aid Assn., 41 N. W. 1037; Keels v. Association, 29 Fed. 198; Sargent v. Association, 35 Fed. 711; Waldeck v. Ins. Co. 10 N. W. 88.

Only a certificate of attestation required by state renders copies of court record admissible. Secs. 905, 906, U. S. Rev. S. 1887, (2nd Ed.); Bank of Alabama v. Dalton, 9 How. 522, 13 L. Ed. 242; Sykes v. Beck 12 N. D. 260, 96 N. W. 844; 1 Gr. on Ev. Sec. 504, 506 (14th Ed.); Carpenter v. Strange, 141 U. S. 87; Church v. Hubbert, 2 Cranch 187; Pugh v. Schlindler, 86 N. W. 515; Hurley v. City of St. Paul, 86 N. W. 427.

Misstatements of fact, whether called warranties or misrepresentations, are misrepresentations. White v. Prov. S. W. L. Assoc. 27 L. R. A. 398; Mut. Life Ins. Co. v. Simpson, 28 L. R. A. 765; Barnes v. F. Mut. Life Asso. 45 L. R. A. 264.

MORGAN, C. J. This is an action to recover upon a policy of fraternal life insurance issued to the plaintiff's husband for her benefit on the 25th day of July, 1899, for the sum of $2,000. The complaint alleges the payment of the premiums and the issuance of the policy or certificate of insurance and the subsequent death of the insured on the 22nd day of July, 1902, and that proof of death was furnished to the defendant as required by the certificate of insurance and rules of the company, and that payment of the amount has been refused by the defendant, although duly demanded. The answer alleges as defenses (1) that the insured made false answers to certain questions propounded to him in his application for insurance, and that such statements were made warranties by the terms of the application and were false, and rendered the policy null and void; (2) that the insured came to his death through suicide, which under the terms of the policy rendered it null and void. The action came to trial on the 16th day of January, 1907, before a jury which brought in a verdict in favor of the plaintiff for the full amount. A motion for a new trial was duly made upon statutory grounds and was denied, and judgment rendered on the verdict. On the 23d day of September, 1907, the defendant appealed from the judgment and from the order denying the defendant's motion for a new trial. There are 48 assignments of error, but the points especially urged in the brief and on oral arguments are: (1) That the

verdict was not sustained by the evidence because the same shows that the insured came to his death through suicide. (2) Error at law in the admission and rejection of evidence, and errors in refusing to give requested instructions. (4) The charge given was prejudicially erroneous. (5) Error in not granting an extension of time for the filing of exceptions to the charge. (6) Error in refusing an application to amend the motion for a new trial to include a new ground, to wit, newly discovered evidence. (7) Insufficiency of the evidence to justify the verdict. We will consider these assignments in the order given.

On the question of the cause of death, it may be said that the application and the policy provided that if the insured came to his death through suicide, whether sane or insane, the policy would be null and void. It is claimed by the appellant that the evidence shows that the cause of death was suicide. The jury was fully instructed on the question, and was told that, if the evidence showed that death was caused by suicide, the verdict must be for the defendant. Upon a careful review of the evidence, we are satisfied that the verdict is not against the weight of the evidence; whereas, there are circumstances indicating suicide. There are also circumstances showing that death may have been caused by an assault with a hammer, on which there was blood when it was found close to the body of the insured when his death was discovered. It is clear to us that the verdict should not be disturbed under such circumstances, as the question is one for the jury. When found dead, it appeared that he might have been struck with a hammer from the condition of his head, and a razor was found near his body which did not belong to him, and it may have been that his throat had been cut by some one else with this razor. There was some evidence also that the insured had had some trouble with one of his men who had threatened to get even with him. In this state of the record we would not be justified in saying that the verdict is not sustained by the evidence.

Great stress is laid upon the fact that in the proof of death sent to the company it was stated on information and belief that death was caused by suicide. The claim is made by the appellant that the fact so stated as to the cause of death cannot be contradicted by the beneficiary, in the absence of a pleading showing that the proof stated the cause of death to be suicide through a mistake. This contention cannot be sustained. There are cases holding that the bene-

ficiary will be permitted to show that statements made in proofs of loss or death were made by mistake except on a showing that they were made under such circumstances as to have misled the defendant. But we find no cases, and none are cited, holding that, if a mistake is made in a proof of death as to the cause of death, the same cannot be contradicted without first pleading the mistake. If the jury are satisfactorily shown that the contents of the proof of loss or death were mistakenly made, the misstatement is not material unless there is an estoppel, but there is nothing in the record to show grounds for such an estoppel, even if the proof had been directly made by the plaintiff. The plaintiff, however, did not submit the proofs in this case. She wrote the defendant a letter informing it of her husband's death and gave the number of the policy, and demanded payment. The company answered this letter, but sent no blanks to her for proof of death, but stated in the letter that the local lodge would attend to the matter of proof. Proof of death was thereafter submitted to the company by the local lodge without conference with the plaintiff, and the same was retained by the company, and the plaintiff was never asked to submit anything additional. So far as the plaintiff is concerned, all defects have been waived. Under such circumstances, we see no good reason for now permitting the company to insist or show that the proofs are incomplete or insufficient. It would not be proper to hold the plaintiff to be bound by any statement in such proof. The evidence does not show that she was aware that the cause of death had been stated in the proof to have been suicide. The burden of showing that death was attributed to suicide remains on the defendant, notwithstanding such statements in the proof. The local lodge was not the agent of the plaintiff. It was requested by the defendant to submit proof of death. We do not think that plaintiff should be bound by any statements in the proof, although she says that she authorized the local lodge to submit proofs. By this we think that she must have meant that she acquiesced in the action of the local lodge in assuming the duty of submitting the proofs at the request of the company. The following cases sustain the foregoing principles: Home Benefit Ass'n v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; Beckett v. N. W. Masonic Aid Ass'n, 67 Minn. 298, 69 N. W. 923; Bentz v. N. W. Aid Ass'n, 40 Minn, 202, 41 N. W. 1037, 2 L. R. A. 784.

It is claimed by the appellant that the insured made false answers to the questions propounded to him on his application for the policy, and that such false answers to such questions rendered the policy void on the ground that by the terms of the policy such answers were made warranties. The questions which the insured is claimed to have answered falsely are: "(1) Have you ever had any personal injuries or accidents? Give full particulars. (2) Have you ever been away because of impaired health? (3) Give name and residence of physicians who have attended upon and been consulted by you?" The answer to the last question was "None" and to the others "No."

The principal and most difficult question in this case is whether section 5934, Rev. Codes 1905, can be applied in the decision of this case in view of such answers. That section reads as follows: "No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss." This section was enacted in this state in the year 1895, and was not therefore in force when the case of Johnson v. Insurance Co., 1 N. D. 167, 45 N. W. 799, was decided. In Satterlee v. M. B. A. 15 N. D. 92, 106 N. W. 561, the section was referred, but a consideration of it was held unnecessary. It will be noticed that this section applies only to misrepresentations if its language cannot be made to include warranties by a liberal construction of its provisions. The contents of the certificate of insurance and of the application were couched in such language that there is no room for contention that the answers to certain questions were not made warranties, as will be shown by the following extracts: In the certificate of insurance it is stated "this benefit certificate is issued and accepted upon the following express warranties, conditions, and agreements: First, that the application of the above-named member, and medical examination for membership in this order, which is hereby referred to and made a part of this contract for benefits is true in all respects, and that the literal truth of such application, and each part thereof, shall be held to be a strict warranty, and to form the only basis of the liability of this order to such member, and to beneficiary, or to beneficiaries, the same as fully set forth in this certificate." The policy was indorsed by the following

certificate which was signed by the insured: "I * * * accept the above benefit certificate and agree to all the conditions therein contained." In the above application the insured made the following statements: "I am in sound physical condition and warrant the statements together with the answers made by me are true, and I warrant same to contain all the facts relative to my condition, past and present, and they shall form the basis of contract for membership in said association, and certificates between me and my beneficiary, and all parties who may at any time have an interest therein, and the said brotherhood and any other. Untrue answer or suppression of facts, in regard to my health, personal habits or physical condition, * * * shall immediately make said benefit certificate null and void." From these extracts we are convinced that the answers to the questions propounded in the application are warranties, and should be construed as such, unless a different result can be reached through a liberal construction of said section 5934. That section was in force when the application for the policy in suit was made in the year 1899, and its provisions became in effect a part of every contract of insurance made after its enactment. We are satisfied that it was the legislative intention that all misrepresentations should be without effect unless made with intent to defraud or unless the risk was increased by reason of any misrepresentations. It is true that there is a well defined distinction in the law of insurance between what are called warranties and misrepresentations. Warranties become merged in the contract, and are therefore conditions precedent that must be strictly complied with before the contract can be enforced. Warranties, in the absence of statutes, have always received a strict construction, and must be strictly complied with, and matters of intention or materiality, the existence of good faith or bad faith, whether prejudice followed the statements warranted, are not at all controlling, as the contract is to be enforced as it reads. "There is no room for construction; no latitude; no equity." May on Ins. § 156. Where misrepresentations merely are concerned, matters of good or bad faith or prejudice and the other matters before mentioned may be considered to determine whether the misrepresentations affect the contract or not. Representations do not become conditions precedent, but are simply inducements to the contract. We reach the conclusion that said section should be construed to include warranties for these reasons: First, because such construction is within the language of the sec-

tion. All false warranties are included within the word "misrepresentations." In the second place, the statute is remedial in its evident purpose. It is a matter of common knowledge that insurance policies have often been rendered of no benefit on account of the fact that misstatements as a matter of fact immaterial were made warranties by the contract. It must have been the intention of the Legislature to effectuate some change by the enactment of this statute. If it be construed to apply only to misrepresentations as understood in insurance law, then no material change was made from the law as it existed before section 5934 was enacted. Prior to the enactment of that section as shown by the following quotation from 25 Cyc. p. 811, 812, the construction given to misrepresentations in applications was as follows: "If the statements are made warranties, it is immaterial whether or not the insured had knowledge of their falsity; but, as to statements relied upon by the company as constituting misrepresentations, it is necessary to show that they were false to the knowledge of the insured unless they materially affect the risk."

A section of the insurance law of the state of Massachusetts which is identical with section 5934 was construed by the Supreme Court of that state in the year 1895, and that court used the following language in its decision: "It is easy to see how an insurer, by multiplying immaterial statements to be made by the insured, and giving to them by the wording of the policy the technical character of warranties, can, in the absence of any statute provision upon the subject, place the assured in a position in which it will be difficult, if not impossible, for him, although he has acted in good faith, to recover upon his contract because of some inaccurate statement on his part. If he is held to have warranted the truth of a statement, its exact and literal truth is a necessary condition of his right to recover, however immaterial the statement may be, and however honest may have been his conduct. In the opinion of the majority of the court it was the intention of the Legislature by St. 1878, c. 157, to change this rule to some extent, and to enact in place of it one which should hold a contract valid, unless the misstatement, if made in the negotiation of the contract, was made with actual intent to deceive, or unless the misstatement was of a character which actually increased the risk of loss, and this with reference to statements which may be said by the parties to be warranties, as well as those which were only representations. Such was already the law as to statements not technical warranties. As to mere representa-

tions the statute may be held to be only declaratory, but as to warranties it made a new rule. In the opinion of a majority of the court it speaks in terms neither of warranties nor of representations technically so called, but deals with all misrepresentations made in negotiating the contract or policy. Misstatements of fact, whether the statement is said to be by the parties a warranty or a representation, are equally misrepresentations, and are placed in each case upon the same footing by the statute which applies to them if the statements are called warranties by the parties no less than if they are mere representations." White v. Provident Savings Life Assur. Society, 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398. A similar statute is also in force in the state of Missouri, and that statute was under consideration. In Jenkins v. Covenant Mutual Life Insurance Company, 171 Mo. 375, 71 S. W. 688, the court said: "It is indisputable that before the passage of the act in question and up to the time of the decision in Jacobs v. Life Ass'n, 146 Mo. 523, 48 S. W. 462, it was always held by the Supreme Court that there was a very material distinction between warranties and representations, and where a policy was applied for and the applicant warranted some matter, however immaterial to the risk, and whether or not the assured died of any disease warranted against, if the warranties were shown to be untrue, the policy was held to be void (citing cases). But they were by that case placed upon the same footing and rightly held to be embraced within the provisions of section 7890, supra. There is no more reason why a warranty not material to the risk should vitiate a policy than there is that misrepresentations as to a nonmaterial fact should do so." In Jacobs v. Life Ass'n, 146 Mo. 523, 48 S. W. 462, the court said: "It is not pretended that the matters misrepresented contributed to the death of Jacobs; and the contention resting solely on the ground that the misrepresentations were warranties, and as such exempt from the operation of this statute for the reason that the defendant's insurance contracts were upon the assessment plan, this contention must fail. In 25 Cyc. p. 807 the rule is stated as follows: "Although the provisions of the statute may expressly relate only to false statements and misrepresentations, they are construed as applicable to such statements or misrepresentations as are made warranties in the policy itself or by reference to the application and also to statements contained in an application for reinstatement." See also, Dolan v. Mutual Reserve Fund Ass'n, 173 Mass, 197, 53 N. E.

398, Kidder v. Order Golden Cross, 192 Mass. 326, 78 N. E. 469; 25 Cyc. p. 811, 812, and cases cited; Waterbury v. Insurance Co., 6 Dak. 468, 43 N. W. 697; 2 Cooley's Briefs on Insurance Law, p. 1189, and cases cited.

The appellants also insist that the court should have given the jury an instruction which was requested to the effect that if they found that the plaintiff had in her possession a certain note which was found upon the person of the decedent, and failed to produce the same, it would be presumed that the contents of such note would be prejudicial to the claim of the plaintiff. It is sufficient answer to this contention to say that the evidence showed without any contradiction that the note referred to was not in the possession of the plaintiff or her attorney at the trial. The evidence also shows that the note had been lost without fault of the plaintiff or her attorney. The requested instruction, therefore, had no applicability to the evidence.

It is also contended by the defendant that the court erred in sustaining objections to the questions propounded to the plaintiff when called for cross-examination under the statute. All these questions referred to a lawsuit which the plaintiff's husband brought against the Northern Pacific Railway Company to recover for an injury which he had received through the alleged carelessness of said company in the year 1891. There is nothing in the record showing in the remotest degree that the injury so received and for which the suit referred to was brought increased the risk under the policy taken out by the plaintiff's husband in the year 1899. Such answers were therefore immaterial in the absence of an offer to prove or a showing that such injuries affected the risk under the policy in suit.

It is also urged by the appellant that the trial court erred in refusing an extension of time for filing exceptions to the charge. These matters are so completely within the discretion of the trial court that this court will not interfere with its action unless there is a manifest abuse of discretion. In this case, after a review and consideration of what transpired in regard to the filing of exceptions, we are convinced beyond a doubt that there was no abuse of discretion.

It is contended by the appellant that judgment was entered for a sum in excess of the amount actually payable under the policy, conceding liability thereunder. At the close of the trial the defendant

asked leave to open the case to introduce certain mortality tables, showing what was the expectancy of the insured's life at the time of the taking out of this policy. The court stated that it would not be necessary to open the case for that purpose, but that he would make any deductions shown to be allowable under the terms of the policy, providing the defendant would furnish him with such mortality tables. The defendant took an exception to this ruling. We do not think that any prejudice followed on account of this ruling. Appellant should have made an application to modify the judgment or in some way brought the error, if any, of not making deductions in entering the judgment to the attention of the court. This alleged error is not even specified as such in the statement of the case, nor is it included in any of the grounds set forth in the motion for a new trial. There is therefore no merit in this contention in view of the state of the record. There is nothing to show that the trial court passed on this precise question; that is, that the verdict and judgment are for an excessive amount. The defendant made an application to amend its motion for a new trial to include an additional ground, to wit, newly discovered evidence, and based the motion upon affidavits. The statements in such affidavits were denied in a counter affidavit submitted by the plaintiff. We do not think there was any abuse of discretion in denying the motion. The alleged newly discovered evidence pertained to the injury of the insured in 1891. There is nothing in the affidavit showing that such injury in any manner affected the plaintiff's physical condition at the time the policy was taken out. Under our construction of section 5934, the statements in these affidavits showing misrepresentations or false warranties would become immaterial if proved, unless made with intent to defraud or in case the risk was increased. We are also satisfied that it was not an abuse of discretion to deny that motion for the reason that the defendant did not exercise diligence in producing the testimony at the trial. It is urged generally that the verdict is not sustained by the evidence. The basis of this contention is that the evidence shows that misrepresentations of certain matters were made by the insured when he applied for this insurance. So far as the record shows, they were immaterial representations or warranties under our construction of said section 5934, and would not be any ground for a new trial if proved.

Finding no reversible error in the record, the judgment is affirmed. All concur.

(120 N. W. 760.)

P. J. McLAUGHLIN, AS RECEIVER OF EQUITABLE MUTUAL FIRE INSURANCE COMPANY OF ST. PAUL, MINNESOTA, v. THORE A. THOMPSON AND THEODORE G. THOMPSON, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THOMPSON BROS,

Opinion filed March 11, 1909.

**Appeal and Error — Specifications of Error.**

1. Errors of law not appearing on the judgment roll cannot be reviewed on appeal without specifications duly settled in the statement of the case.

**Same—Statement of Case.**

2. A paper purporting to contain specifications of error, which is left with the trial judge after the settlement of the statement of the case, does not become a part of the statement unless so ordered by the judge, and such specifications must be disregarded on appeal.

Appeal from District Court, Griggs county; *Burke*, J.

Action by P. J. McLaughlin, receiver of the Equitable Mutual Fire Insurance Company of St. Paul, against Thore A. Thompson and Theodore G. Thompson. Judgment for defendants. Plaintiff Appeals.

Affirmed.

*Pierce, Tenneson & Cupler* and *P. M. McLaughlin*, pro se, for appellant. *Benj. Tufte* and *Lee Combs*, for respondents.

MORGAN, C. J. This is an action to recover an assessment against the defendants, which was made by the plaintiff, as receiver of the Equitable Mutual Fire Insurance Company of St. Paul, adjudged to be an insolvent corporation, by the district court of Ramsey county, Minn. The trial resulted in a directed verdict in favor of defendants. Plaintiff has appealed on a settled statement of the case.

We are confronted at the outset with a record that does not warrant a review of any of the assigned errors. There is no demurrer in the record, and the judgment is sustained by the judgment roll. The reason that we are not permitted to review the errors assigned is that no specifications of error are incorporated in and made a part of the statement by the order settling the same. The record shows that a paper purporting to contain specifications of error was presented to the district judge on December 28, 1908, being the

time when the record was presented to him for certification to the Supreme Court. The judge indorsed a statement upon such paper to the effect that the specifications were not incorporated in the statement of the case when the same was settled by him. In the certificate or order of the judge settling the statement of the case, it is expressly stated that it contains no specifications of error. From this statement, it is apparent that there is nothing properly before us for review except the judgment roll. The paper denominated, "Specification of Error" is not properly in the record, and cannot be considered. Section 7058, Rev. Codes 1905, provides for the settlement of a statement of the case, and that it shall contain a specification of the errors on which the party settling the same intends to rely. That section further provides: "If no such specification is made, the statement shall be disregarded on motion for a new trial and on appeal." The rules of practice also require specifications of error to be incorporated in the statement of the case. Rule 7 (91 N. W. vi) provides that statements shall contain a specification of the errors of law upon which the appellant intends to rely, and that such specifications "are vital parts of the statement of the case, and must be included in and settled and allowed by the district court as parts thereof."

As the statement contains no specifications of error, and no errors appearing on the judgment roll, the judgment is affirmed. All concur.

(120 N. W. 554.)

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JOHN L. SCHMIDT v. ARTHUR N. BEISEKER.

Opinion filed April 17, 1909.

**Appeal and Error — Points on Former Appeal.**

1. Questions fairly raised and decided on a former appeal in the same action are not open for consideration on a subsequent appeal, as such decision on the first appeal, whether right or wrong, became and is the law of the case.

**Evidence — Opinion Evidence — Value of Farm Lands.**

2. Upon the question of the value of farm lands, the opinions of farmers are admissible, where they live in the vicinity of the land, are acquainted with its situation and quality, and its adaptability for agricultural purposes, and state that they know its value, although they

may not have been engaged in buying and selling land and have no knowledge of an actual sale of the lands in question or of similar lands.

**Appeal and Error — Sufficiency of Evidence to Sustain Verdict — Statement of Case — Specification of Particulars.**

3. The question of the sufficiency of the evidence to sustain the verdict cannot be considered for the reasons: (a) The record does not affirmatively show that it embraces all the evidence; and (b) no proper specification of particulars is incorporated in the statement of case.

Appeal from District Court, Wells county; *Burke*, J.

Action by John L. Schmidt against Arthur N. Beiseker. Judgment for plaintiff, and, from an order denying a new trial, defendant appeals.

Affirmed.

*Bessessen & Berry* and *Burke & Middaugh*, for appellant.

*Hanchett & Wartner*, for respondent

FISK, J. This case was here on a previous appeal (Schmidt v. Beiseker, 14 N. D. 587, 105 N. W. 1102, 5 L. R. A. [N. S.] 123, 116 Am. St. Rep. 706), and it was there held that the contract relied upon by plaintiff, for a breach of which damages were sought, is not within the statute of frauds, as contended by defendant's counsel, and the ruling of the trial court in dismissing the action upon the ground that the complaint failed to state facts sufficient to constitute a cause of action was reversed, and the cause remanded for further proceedings. For a statement of the facts, see former opinion. The cause was again tried in the court below, which trial resulted in a verdict and judgment in plaintiff's favor. In due time a motion for a new trial was made and denied, and it is from the order denying such new trial that this appeal is prosecuted. No assignment of errors is contained in appellant's brief. Hence under rule 14 (91 N. W. viii) it is optional with this court whether it will notice any of the alleged errors. We have decided, however, to briefly consider appellant's several contentions.

The main portion of appelant's printed brief and argument is devoted to a discussion of the proposition that the contract forming the basis of plaintiff's cause of action is within the statute of frauds, and hence the recovery of damages for the breach thereof cannot be

sustained. A conclusive answer to such contention is the fact that this precise question was squarely raised and decided on the former appeal adversely to appellant's contention, and such decision, whether right or wrong, is now the law of the case. This is elementary.

It is contended that certain testimony relative to the value of the land, and hence having a bearing upon the extent of plaintiff's damages on account of the breach of the contract, was incompetent, and therefore the lower court erred to defendant's prejudice in receiving such testimony and in refusing to strike the same out on motion. There is no merit to this contention. The evidence thus objected to consists of the testimony of certain witnesses who were farmers residing in the vicinity of such land. These witnesses testified that they were acquainted with this land, knew the character of its soil, its adaptability for agricultural purposes, and also its value. Their testimony was clearly competent. Abb. Tr. Ev. (2d Ed.) p. 922; Kansas City Ry. Co. v. Allen, 24 Kan. 33; Robertson v. Knapp, 35 N. Y. 91; Keithsburg, etc., R. Co. v. Henry, 79 Ill. 290; Pa. etc. R. Co. v. Bunnell, 81 Pa. 414; Cent. R. Co. v. Pearson, 35 Cal. 247; Kans. City R. Co. v. Ehret, 41 Kan. 22, 20 Pac. 538; Railway Co. v. Hawk, 39 Kan. 638, 18 Pac. 943, 7 Am. St. Rep. 566; Ball v. Railway Co., 74 Iowa, 132, 37 N. W. 110.

The question of the sufficiency of the evidence to sustain the verdict requires but brief notice. In the first place, the record does not affirmatively show that it contains all the evidence. This is essential to a review of the sufficiency of the evidence by this court. Such is the universally established rule in this country, and the citation of authorities is unnecessary. In the second place, while the notice of intention to move for a new trial and the motion for a new trial both specify the statutory ground of insufficiency of the evidence to justify the verdict, the only specification of particulars in which the evidence is alleged to be insufficient, which is incorporated in the settled statement of the case, is that there was no evidence adduced showing that plaintiff was qualified, under the statutes of the United States, to purchase the land in question. The point covered by such specification is not argued or referred to in appellant's brief and hence is deemed abandoned. Obviously we cannot notice other grounds of insufficiency, as they were not brought to the attention of the trial court.

Respondent's counsel asks this court to impose the statutory penalty of 10 per cent. of the amount of the judgment for delay oc-

casioned by the appeal. This is denied, as it does not appear that as contended by respondent's counsel.

MORGAN, C. J., not participating on account of illness.

The order appealed from is affirmed. All concur.

such appeal was taken in bad faith and for the purpose of delay,

(120 N. W. 1096.)

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ARVID SATTERBERG, AS ADMINISTRATOR OF THE ESTATE OF JOHN SATTERBERG, v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, A CORPORATION.

Opinion filed April 23, 1909.

**Death by Wrongful Act — Who May Sue.**

1. Sections 7687, 7688, 7689, Rev. Codes 1905, portions of the statute providing for the recovery of damages for death by wrongful act, are as follows:

"Sec. 7687. In such action the jury shall give such damages as they think proportionate to the injury resulting from the death to the persons entitled to the recovery.

"Sec. 7688. The action shall be brought by the following persons in the order named:

"(1) The surviving husband or wife, if any.

"(2) The surviving children, if any.

"(3) The personal representative.

"If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, such person may bring the same.

"Sec. 7689. The amount recovered shall not be liable for the debts of the decedent, but shall inure to the exclusive benefit of his heirs at law in such shares as the judge before whom the case is tried shall fix in the order for judgment, and for the purpose of determining such shares the judge may after the trial make any investigation which he deems necessary."

*Held*, that brothers and sisters of one killed by wrongful act are included in the term "heirs at law," as used in section 7689, when no parent, wife or child survives the person killed.

**Same — Legal Obligation to Support.**

2. The provisions of the Code giving a right of action and recovery for damages occasioned by death by wrongful act do not contemplate or require a legal obligation on the part of the deceased toward surviving heirs at law to entitle them to maintain the action or recover for the injury sustained by them through the death of the person of whom they are heirs.

**Same — Expectation of Support.**

3. The provisions of the Code referred to, being sections 7686 to 7691, both inclusive, give the right to recover for the death of one killed by wrongful act to such heirs at law of the deceased as are prevented by his death from receiving pecuniary aid, support or benefit which he was either legally obligated to render, or which they were receiving, or had any reasonable expectation of receiving as a duty, or through a recognized sense of obligation.

**Actual Loss of Support.**

4. It is the fact of injury within the limits of the statute, rather than the legal obligation of the deceased which governs.

Appeal from District Court, McHenry county; *Goss*, J.

Action by Arvid Satterberg, as administrator of the estate of John Satterberg, deceased, against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From an order overruling a demurrer to the complaint, defendant appeals.

Affirmed.

*Alfred H. Bright, Christianson & Weber,* and *Ball, Watson, Young & Hardy,* for appellant.

*G. S. Wooledge* and *Murphy & Wooledge,* for respondent.

By permission a supplementary brief in support of respondent's contention was filed by Heffron & Baird, attorneys for Ely Gullickson, administrator, v. Henry Schaffner, in an action pending in Stark county.

SPALDING, J. This is an appeal from an order overruling appellant's demurrer to respondent's complaint in an action prosecuted by respondent, administrator, to recover damages for the death of John Satterberg, deceased. The complaint alleges that the deceased was killed while riding on one of defendant's passenger trains at Enderlin, N. D., on December 28, 1906, through defendant's negligence; that he was a single man, and left surviving no wife or children, or father or mother, but four sisters and two brothers, the plaintiff, administrator, being one of the brothers; that these six persons are the sole heirs at law of the deceased; that the four maiden sisters lived with the deceased during his lifetime, and were dependent upon him for support, and that one of them was an invalid and wholly dependent upon him. To this complaint, the terms of which we have briefly outlined, the appellant interposed a general demurrer. In the district court this demurrer was overruled, and defendant appeals. The action was brought under the pro-

visions of the statute of this state providing for the maintenance of an action for death by wrongful act. This statute embraces sections 7686-7691, both inclusive, Rev. Codes 1905, and is as follows:

"Sec. 7686. Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 7687. In such actions the jury shall give such damages as they think proportionate to the injury resulting from the death to the persons entitled to the recovery.

"Sec. 7688. The action shall be brought by the following persons in the order named:

"(1) The surviving husband or wife, if any.

"(2) The surviving children, if any.

"(3) The personal representative.

"If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, such person may bring the same.

"Sec. 7698. The amount recovered shall not be liable for the debts of the decedent, but shall inure to the exclusive benefit of his heirs at law in such shares as the judge before whom the case is tried shall fix in the order for judgment, and for the purpose of determining such shares the judge may after the trial make any investigation which he deems necessary.

"Section 7690. The action shall not abate by the death of either party to the record. If the plaintiff dies pending the action, the person next in order, entitled to bring the action, shall by order of the court be made plaintiff therein.

"Sec. 7691. The person entitled to bring the action may compromise the same, or the right thereto, and such compromise shall be binding upon all persons authorized to bring the action or to share in the recovery."

It is contended that the complaint fails to show a right to sue or recover. At common law no right of action for damages for death by wrongful act was given. Harshman v. Northern Pacific

Ry. Co., 14 N. D. 69, 103 N. W. 412, and cases cited. It follows that the right of action, if any exists, is purely statutory, and the facts pleaded in the complaint must be such as to show the right of action under the statute, and it must be prosecuted by one of the persons to whom the statute has given the right to prosecute. Harshman v. Northern Pacific Ry. Co., supra.

The first statute conferring the right to maintain an action of this nature was Lord Campbell's act passed by the British Parliament in 1846 (9 and 10 Vict. c. 93). Similar statutes have been enacted by all the American states. Scarcely any two of these statutes are alike in terms and verbiage. The construction placed upon them by the different courts of last resort are extremely diverse, many resting on the difference in verbiage of the statutes, and many others in apparent conflict. This court has not heretofore passed upon the questions presented in this appeal, and aside from a recent decision by the Supreme Court of Minnesota, to which reference will be made later, we discover no authorities specifically in point. It is conceded by appellant that this is not a survival statute intended to increase the estate of the deceased, but its purpose is to give a measure of protection to those persons within a fixed degree of relationship to and dependency on the deceased because of actual injury sustained by them by reason of the wrongful killing of the deceased, their protector. Stating it somewhat differently, we think the purpose of the statute is to provide compensation for the injury resulting to heirs at law of the deceased from the death. This is the measure of recovery fixed by section 7687, supra.

Appellant contends that the complaint shows upon its face that there are no living persons within the degree of relationship and dependency who can claim a right of recovery under this statute, and specifically for the reason that the statute does not authorize a recovery by sisters and brothers when the deceased leaves no surviving wife or children or parent. The substance of its argument is that the terms "heirs at law" limits the recovery to husband or wife or children. In other words, that the term "his heirs at law," used in section 7689, relates back to the persons qualified by section 7688 to bring the action. It relies largely upon the decisions of the courts of South Dakota, Colorado, Kentucky, and Washington as authority. We shall not take the time to discuss these authorities, or the statutes which they construe, for the reason that the statutes of those states are so dissimilar to the sections of our own Code

referred to that we feel little, if any, analogy exists. From considering our statute as a whole, we are satisfied that the meaning of section 7688 is that, if any husband or wife survives, such survivor may bring the action, but that if none survives, and there is a surviving child, such child, may bring it, but that if legal heirs survive, and no husband or wife or children, or if those named fail to bring the action, the personal representative may bring it. Prior to 1895 the Compiled Laws of 1887 on this subject were in force both in this state and in South Dakota. The decisions of the Supreme Court of South Dakota are constructions of the Compiled Laws referred to. Belding v. Black Hills Railway Co., 3 S. D. 369, 53 N. W. 750; Lintz v. Holy Terror Mining Co., 13 S. D. 489, 83 N. W. 570. That statute differs essentially from the one we are considering. The latter was enacted by the Legislature of this state in 1895, and apparently the Code Commission and the Legislature had in mind the Belding Case, and by the changes made were attempting to obviate the hardships which that statute, as construed by the Supreme Court of South Dakota, might work upon the heirs of one killed by wrongful act. To construe the right to recovery to be limited by the present statute in the same manner that the old one was held to limit it would be to hold that the change made in 1895 was practically meaningless and useless. Since the case at bar was argued the Supreme Court of Minnesota has passed upon our statute in Stangeland v. Minneapolis, St. Paul etc., Railway Co., 105 Minn. 224, 117 N. W. 386. In that case the same argument was made by the defendant that is made here. That court held that the South Dakota statute differed radically from that of our state, and that the reasons supporting the constructions of the South Dakota court were not applicable to the North Dakota statute, and held that the term "heirs at law" included the father of the decedent who left no widow nor children, and that the action might be maintained for the benefit of such a father by the personal representative of the deceased, who in such case brings it in a representative capacity for the exclusive benefit of the heirs at law in such shares as the trial court shall determine. In answer to some of the contentions of the appellant, we quote briefly from the Minnesota opinion: "The South Dakota statute gives absolutely the cause of action, the right to bring it, the amount recovered, to the parties in the order therein named, without any provision for the apportionment of the damages between beneficiaries. Not so the statute of North Dakota, which is built

upon broader and juster lines. Section 7686 thereof declares the liability of one who causes the death of another by his wrongful act or negligence, but it does not give the cause of action to any particular person. The next section defines the measure of recovery, and the next one, section 7688, provides who may bring the action and the order in which the right may be exercised, as other statutes provide who shall be entitled to administer the estate of a decedent, and the order in which they may apply; but it does not give the absolute right to the damages recovered to any of the persons who may and must bring the action. That this is a correct construction of the section is disclosed by section 7689, which declares the plan of the statute and the intention of the Legislature in enacting it; for that section provides that the amount recovered 'shall inure to the exclusive benefit of his (the decendent's) heirs at law, in such shares as the judge before whom the case is tried shall fix in the order for judgment.' It is also apparent that whoever brings the action does so in a representative capacity for the exclusive benefit of the heirs at law in such shares as the trial judge shall determine. See Powell v. Great Northern Railway Co., 102 Minn. 448, 113 N. W. 1017. The plan and the purpose of the statute is further emphasized by the provisions of section 7691, which are to the effect that the person entitled to bring the action may compromise the same, or the right thereto, which shall be binding upon all persons authorized to bring the action or to share in the recovery." The judge is authorized to investigate and ascertain the relative extent of the injuries of the parties entitled to recover, and to apportion the recovery in accordance with his findings. Applying this power of the judge to this case, it would seem that one's sister, an invalid unable to work, and wholly dependent upon the deceased for support, may be entitled to a larger share of the recovery than able bodied sisters less or only partially dependent upon the deceased. We are satisfied that brothers and sisters, in the absence of parents, wife or children, are heirs at law of the deceased within the meaning of the statute in question.

Appellant's next point is that the recovery is limited to such heirs as the deceased was legally obligated to maintain or support. Some authorities, under statutes somewhat similar to ours, tend to support this contention, but they are in the minority, and in our view of the statute it does not contemplate or require a legal obligation on the part of the deceased toward the survivors to entitle them to maintain the action, or recover. This construction is supported by a great

number of authorities, and, we think, by the better reasoning. In the present state of civilization a moral obligation is almost universally recognized as resting upon individuals to support, or to contribute to the support of, dependent near relatives, and a dependent person who is actually receiving maintenance from a relative, or who has reasonable grounds to expect maintenance or assistance, suffers injury by his death. Of course, the extent of the injury must be determined by the trial court, and the recovery and apportionment based upon such determination. The humane and reasonable construction seems to us to be that the statute applies to heirs at law who are prevented by the death from receiving pecuniary aid, support, or benefit which the deceased was either legally obligated to render, or which they were receiving, or had any reasonable expectation of receiving as a duty, or from a recognized sense of obligation. Louisville, etc. Railway Co. v. Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371. In the case at bar, so far as the pleadings show, the sisters of the deceased were justified in anticipating a continuance of the maintenance they were receiving at and prior to their brother's death. By reason of his death, and the consequent cutting off or lessening of such maintenance or contribution toward their support, they are pecuniarly injured. It is the fact of injury within the limits of the statute, rather than the legal obligation of the deceased, which governs. For authorities sustaining this point, see note to Louisville, etc., Ry. Co. v. Goodykoontz, supra; Grotenkemper et al. v. Harris, 25 Ohio St. 510; Ill. Cent. R. R. v. Barron, 5 Wall, 106, 18 L. Ed. 591; Sutherland on Damages § 373, note 5; Petrie v. C. & G. Railway Co., 29 S. C. 303, 7 S. E. 515; Hall v. Galveston, etc., R. R. (C. C.) 39 Fed. 18; 8 Am. & Eng. Ency. of Law 920, 923; 13 Cyc. 317, 320. That part of the Minnesota case included in the second paragraph of the opinion cited from the Supreme Court of that state is in no way involved in the present instance and we need not consider the suggestion of counsel for appellant relating thereto, except to say that, as we construe the Minnesota authority, the conclusion arrived at in the first paragraph of the opinion in no way depends upon the fact covered by the second paragraph, namely, that the son in that instance was indebted to the father. The court only held that to be an additional basis for recovery.

The order of the district court is affirmed.

MORGAN, C. J., not participating.

(121 N. W. 70.)

## STATE OF NORTH DAKOTA EX REL., T. F. MCCUE, ATTORNEY GENERAL v. NORTHERN PACIFIC RAILWAY COMPANY.

Opinion filed April 16, 1909.

**Constitutional Law — Regulation of Railroad Rates — Due Process of Law.**

1. Chapter 51, page 73, Laws 1907, amending and re-enacting section 4395, Rev. Codes 1905, prescribing maximum coal rates for the transportation by common carriers of coal in carload lots within the state, is not violative of section 8, article 1 of the constitution of the United States, known as the "commerce clause," which confers upon congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" nor does it violate the fourteenth amendment of the federal constitution, nor section 13 of the constitution of North Dakota, providing, in effect, that no person shall be deprived of life, liberty or property without due process of law.

**Same — Power of Legislature.**

2. The legislative assembly possesses the undoubted power, under section 142 of the constitution of North Dakota, to prescribe maximum rates for the transportation by common carriers of commodities between points within the state, provided the rates thus prescribed are reasonable.

**Same — Evidence — Statute Presumed Valid.**

3. The act in question is presumptively valid, and the burden is upon the carrier to prove that the rates therein prescribed are clearly unreasonable.

**Same — Statutory Construction.**

4. Where the constitutionality of a law is made to depend upon the existence or nonexistence of some fact or state of facts, the determination thereof is primarily for the legislature, and the court will acquiesce in its decision, unless it clearly appears that such decision was erroneous.

**Same — Transportation of Coal.**

5. Evidence examined, and *held* not sufficient to overcome the prima facie presumption that the rates prescribed by said act are reasonable.

**Same — Freight Rates — Determination of Reasonableness.**

6. The proper test as to whether the rates thus fixed are reasonable or unreasonable is not whether the rate fixed on the particular commodity is sufficiently high to enable the carrier to earn a fair compensation after allowing for the legitimate cost to the carrier of

transporting the same, but whether, under such rates, it will be enabled from its total freight receipts on all its intrastate traffic to earn a sum, above operating expenses reasonably necessary for such traffic, sufficient to yield a fair and reasonable profit upon its investment. It is within the power of the legislature to reduce the freight on a particular article, provided the carriers are enabled to earn a fair profit upon their entire intrastate business.

Application by the State, on the relation of T. F. McCue, Attorney General, against the Northern Pacific Railway Company for injunction. Writ granted.

*T. F. McCue, Atty. Gen.*, and *E. P. Kelly*, for plaintiff.

*Ball, Watson, Young & Lawrence* and *C. W. Bunn*, for defendant.

FISK, J. By chapter 51, p. 73, Laws 1907, which became effective July 1, 1907 the legislative assembly of this state amended and reenacted section 4395 Rev. Codes 1905, which establishes maximum coal rates for the transportation by common carriers of car load lots of coal within the state. It is conceded that this statute has at all times been wholly ignored by defendant and other carriers of freight in this state by their charging and exacting for such service higher rates than those prescribed therein; their contention being that said statute is unconstitutional, and hence void, for the reason, among others, that the rates thus prescribed are unreasonably low and confiscatory, and hence said act is violative of the fourteenth amendment to the federal Constitution, and section 13 of the state Constitution. On August 7, 1907, the Attorney General filed, by permission of this court, a petition, duly verified in which are set forth the essential facts, showing defendant's violation of said statute, and praying that this court issue its prerogative writ of injunction to restrain defendant, its agents and employes, from committing the acts complained of. Such petition is entitled in the name of "State of North Dakota ex rel. T. F. McCue, Attorney General, as Plaintiff, against Northern Pacific Railway Company, as Defendant." Similar proceedings in all respects were at said time also commenced against the Great Northern Railway Company and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Pursuant to plaintiff's motion in that behalf, an order to show cause returnable on September 16th was issued by the chief justice requiring defendant to appear and show cause, if any it had, why such writ should not issue permanently enjoining it from committing the acts complained of. In response to such order to show cause,

defendant made its return, setting forth, in substance, that chapter 51, Laws 1907, aforesaid is void for the reasons: (1) That it violates the commerce clause of the Constitution of the United States (article 1, § 8), which provides that: "Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes." (2) The maximum rate fixed by said act is "unremunerative, unreasonable, inadequate, and confiscatory, and violates the fourteenth amendment of the federal Constitution, also section 13 of the state Constitution." Such return also alleges that the maximum rates thus fixed by chapter 51 are greatly less than corresponding rates as fixed by law in Minnesota and by the railroad commissioners in the states of Iowa and Illinois, and a comparison of the rates in these various states is set out therein. By stipulation of counsel the clerk of this court was appointed referee for the purpose of taking and reporting to the court the testimony offered by the respective parties upon the issues thus framed. On November 20, 1907, such referee duly qualified by taking the oath required by law, and on the following 14th day of July, 1908, the taking of testimony was commenced at the general offices of defendant in the city of St. Paul, Minn., and was concluded on December 16, 1908, at Fargo, in this state and the same was thereupon reported to the court and on March 29, 1909, the cause was finally submitted for decision.

The Attorney General advances the following propositions: "(1) The Legislature has the right to regulate and fix rates for the transportation of coal in this state. (2) Presumptively, chapter 51, Laws 1907, is valid. (3) The burden of proving that the rates are unreasonable is upon the defendant. (4) The proposed rate is not unreasonable, even though it is not compensatory, provided the defendant is earning a fair profit upon its entire business in this state. (5) Chapter 51, Laws 1907, in no way amounts to a regulation of interstate commerce."

The correctness of the first proposition is not challenged by defendant's counsel, provided the same is qualified so as to restrict such right to the regulating and fixing of rates which are reasonable; and the Attorney General concedes that it should be thus qualified. The rule is, of course, too well settled to admit of dispute that the Legislature has the power to fix and regulate rates to be charged by common carriers upon intrastate traffic, provided such rates are not confiscatory, but are reasonably remunerative. Section 142 of

our Constitution expressly confers such power upon the Legislature. Upon the second and third propositions, which are that the statute in question is presumptively valid, and that the burden of proving that the rates therein fixed are unreasonable is upon defendant, counsel for the railway company, while stating that these questions are not of controlling importance in view of the state of the proof, argues that such presumption does not obtain in this case, and that the burden is upon the state to show that the rates fixed by said statute are reasonable. No authorities are cited in support of these contentions and we believe none exist. We know of no exception to the general rule that a statute is presumptively valid, and will be upheld unless it clearly contravenes the organic law of the state or of the United States, or a valid statute or treaty thereof. This is so elementary as to require the citation of no authorities, but see Sutherland on Statutory Construction, p. 417; 2 Lewis' Sutherland Statutory Construction (2d Ed..) § 497; In re Spencer, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Am. & Eng. Ann. Cas. 1105. From the opinion in the latter case, we quote: "The presumption always is that an act of the Legislature is constitutional and, when this depends on the existence or nonexistence of some fact or state of facts, the determination thereof is primarily for the Legislature, and the courts will acquiesce in its decision, unless the error clearly appears. Bourland v. Hildreth, 26 Cal. 184; State University v. Bernard, 57 Cal. 612; Matter of Madera Irrigation District, 92 Cal. 310, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Sinking Fund Cases 99, U. S. 718, 25 L. Ed. 496; 1 Tiedeman on Police Power, 10, note; Cooley on Constitutional Limitations (7th Ed.) 228. 'Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' Sinking Fund Cases, 99 U. S. 718, 25 L. Ed. 496. 'The delicate act of declaring an act of the Legislature unconstitutional and void should never be exercised unless there is a clear repugnancy between the statute and the organic law. * * * In a doubtful case the benefit of the doubt is to be given to the Legislature; but it is to be remembered that the doubt to which this rule of construction refers is a reasonable doubt,

as distinguished from vague conjecture or misgiving.' Bourland v. Hildreth, 26 Cal. 184."

This brings us to the main and controlling proposition in the case, which involves the question of the reasonableness of the rates thus established. Does the evidence clearly show that such new rates, if enforced, will necessarily prevent the carrier from earning and receiving a fairly reasonable income upon its legitimate investment, or, the present value of its property, after paying all necessary operating expenses? If so, the act cannot be sustained. The authorities to this effect are unanimous.

It is asserted by counsel for defendant that the rates fixed by chapter 51 would not even yield sufficient returns to defray the operating expenses alone, much less to pay a reasonable rate upon such investment. This assertion is predicated, however, upon two assumptions, neither of which are in our opinion warranted. Starting with the erroneous assumption that the act merely fixes rates for the transportation of lignite coal, counsel throughout the trial and in their argument further assumed that the test as to the reasonableness of these rates is whether the freight receipts derived from hauling lignite coal between points in this state are sufficient to pay, in addition to the operating expenses of this particular traffic, a reasonable compensation or profit. An examination of the act in question will serve to demonstrate the fallacy of the first assumption. Regarding the other assumption a more extended consideration is demanded.

For the purpose of showing the unreasonableness of the rates fixed, will defendant be permitted to single out the one commodity to which the rates apply, and prove, as it has attempted to do in this case, that the transportation thereof is a losing proposition to the carrier? Or must it not show that if such rates are enforced it will be unable from the total freight receipts to earn a sum above operating expenses sufficient to yield a fair and reasonable profit upon its investment, provided the road was economically and efficiently constructed and operated? It was conceded on oral argument by defendant's counsel, in effect, that under the latter test it has no defense. The proof shows that the lignite coal shipments form an infinitesimal portion of the entire freight shipments in the state, and hence that the difference between the freight receipts based upon the rates sought to be enforced would not materially affect the total receipts from all freight shipments within the state. This being true, has defendant any valid ground for complaint against the act in

question? In other words, does such act contravene either of the above-cited provisions of the federal and state Constitutions? As above stated, every presumption will be indulged in favor of the act, and hence it must be presumed that the Legislature carefully considered the foregoing facts before enacting such rates. If it is permissible for defendant to adopt the test which it has adopted for determining the reasonableness of such rates, then, upon the same reasoning, it would be proper, in order to show the inadequacy of rates generally, to prove that certain or all of its branch lines are unremunerative. This clearly could not be done. Interstate Commerce Commission v. Louisville & N. R. Co., (C. C.) 118 Fed. 613; St. Louis Railway Company v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, affirming same case in 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452. In the latter case the United States Supreme Court, among other things, said: "It therefore appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety, even in the state of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas & Texas Railway Company and extending from the northern boundary of Arkansas to Fayetteville in said state. In this state of facts, we agree with the views of the Supreme Court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect: That the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas."

Upon parity of reasoning it would seem that the carrier may not be permitted to single out one commodity and insist that the tariff of rates for the transportation of the same is unreasonable and confiscatory without being required to show that under the operation of

such rates it will be unable to derive from its entire freight business within the state a just and reasonable profit. In an able article on "State Regulation of Railroad Rates and Charges," by Dean Bruce, in 62 Central Law Journal, 458, it is, among other things, said: "Rates, however, are not necessarily unreasonable nor is their enforcement a taking of property without due process of law, merely because, if such rates were applied to all freight, the road would be operated at a loss. The tariff therefore for coal in car load lots and for similar products of general consumption may, when such products make up but a comparatively small proportion of the general freight carried, be fixed at a comparatively low rate, and one which, if generally applied to all products, would leave no profit to the company. So, too, it has been held that the mere fact that a railway line, operated as a part of a large system, does not by itself pay expenses, does not justify the charging of unreasonable rates in a shipment over such system"—citing State v. Minneapolis & St. Louis R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514; Minneapolis & St. Louis R. Co. v. State of Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; Interstate Commerce Commission v. Louisville & N. R. Co. (C. C.) 118 Fed. 613. The federal Supreme Court in affirming the Minnesota Court, held that it is not beyond the power of the commissioners of railroads to reduce the freight upon a particular article, provided the company is permitted to earn a fair profit upon the entire business and that the burden of proof is upon the carrier to impeach the action of the commission. Among other things, the court said: "Notwithstanding the evidence of the defendant that, if the rates upon all merchandise were fixed at the amount imposed by the commission upon coal in car load lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in car load lots. In Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, we expressed the opinion that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by the carrier, or the profits derived from it; but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often hap-

pens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. The right to permit this to be done is expressly reserved to the Interstate Commerce Commission by section 4 of that act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), notwithstanding the general provisions of the long and short haul clause, and has repeatedly been sanctioned by decisions of this court. While we have never decided that the commission may compel such reductions, we do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the commission in this particular. As we said in Smyth v. Ames: 'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.' * * * In exercising its power of supervising such rates, the commission is not bound to reduce the rates upon all classes of freight, which may perhaps be reasonable except as applied to a particular article; and if, upon examining the tariffs of a certain road, the commission is of opinion that the rate upon a particular article or class of freight is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be imposible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate."

Two cases very similar to the case at bar arose in the state of Florida as late as 1904. The railroad commission of that state fixed local rates for the transportation of phosphate, which rates were ignored by the carriers. The state, through its Attorney General, invoked the original jurisdiction of the Supreme Court for the issuance of a peremptory writ of mandamus to enforce the order of the commission fixing such rates. The respondents' return in those cases raised two issues for determination: (1) Whether the rates sought to be enforced are in and of themselves unreasonable; and (2) whether said rates, taken in connection with the other rates en-

forced by the state railroad commission on local business, would deprive the railway of its property without due process of law, or deny to it the equal protection of the law within the inhibition of the federal Constitution. It was held that the burden was upon the respondents to establish the affirmative of both of these propositions, and that they failed to establish either. These cases are both entitled State ex rel. Ellis v. Atlantic Coast Line R. Co., and are reported in 48 Fla. 146, 150, 37 South. 657. Both cases were taken by writ of error to the federal Supreme Court and affirmed by unanimous decisions. See 203 U. S. 256, 261, 27 Sup. Ct. 108, 51 L. Ed. 174.

In the light of the well-settled rules above announced, does the proof warrant this court in holding that these statutory rates are unreasonable and confiscatory, and hence that the act establishing the same is unconstitutional and void? We are clear that this question must be answered in the negative. Defendant attempted to show the invalidity of such rates: First, by a comparison of such rates with the rates in force in other states for the transportation of soft coal; and, second, by conclusions testified to by various witnesses to the effect that the cost of transporting lignite coal in this state is more than the freight receipts derived from such traffic. It would be a needless task to review this testimony at length. Suffice it to say that such proof comes far short of overcoming the prima facie presumption that such statutory rates are reasonable and valid. Regarding the comparison of the rates in other states with those fixed by the act in question, we call attention to the language of the Minnesota court in State v. Minneapolis & St. Louis R. Co., 80 Minn. 191, 83 N. W. 64, 65, 89 Am. St. Rep. 514, as follows: "Counsel for defendant claims something for testimony as to rates received by other roads for this class of service, and by comparison asserts that the tariff complained of is too low. This method of ascertaining the reasonableness of the tariff is valueless, because it may be that the other roads are exhorbitant in their charges. That another road is receiving, say, $1 per ton for carrying coal 100 miles, while defendant receives but 75 cents for the same distance, may prove that the other road charges too much, and should be looked after by the commission; but this kind of evidence does not demonstrate that defendant is receiving too little, and that the commission has fixed an unfair and unreasonable tariff of rates on its line." Also to the language of the Circuit Court of the United States in Smyth v. Ames, 64 Fed. 165, and approved by the federal Supreme Court in

169 U. S. 540, 18 Sup. Ct. 431, 42 L. Ed. 819, as follows: "Comparisons therefore between the rates of two states are of little value, unless all the elements that enter into the problem are presented." Even if this character of evidence would be admissible when a proper foundation has been laid for its introduction by showing a similarity of conditions in the other states to those existing in this state, no such proof was offered. Furthermore, the proof of the foreign rates consisted of certain copies of schedules of such rates, and from such copies, which are in no way authenticated, Defendant's Exhibit 4, which purports to be a comparison of coal rates in various states, including North Dakota, was compiled by rate clerks in defendant's general offices. Not a scintilla of proof is offered to show that such foreign rates are reasonable. For these reasons such proof can be given no effect by this court. Aside from the attempted proof of the unreasonableness of these rates by comparison with rates in other states, defendant's proof of such alleged unreasonableness consists merely of conclusions testified to by various witnesses relative to the cost of transporting lignite coal over its lines of road. As before stated, these conclusions are based upon the erroneous assumption that the new rates relate merely to lignite coal shipments; but, conceding that such assumption is, in practical effect, accurate, there is no contention made that, under the operation of such rates, the defendant will not be able upon its entire intrastate traffic to earn, in addition to its gross operating expenses, a sum amply sufficient to yield a reasonable income upon its investment. This being true, defendant, under the foregoing authorities, cannot successfully urge the unconstitutionality of said law.

Defendant's counsel contend, however, in effect, that each class of freight must be required to bear its share necessary to insure to the carrier a reasonable compensation for its service to the public. This argument, in a qualified sense, is sound. It should, of course, be required to bear its just and equitable burden; but it is everywhere held proper and just that freight commodities should be classified in fixing rates, and that a reasonable rate for one class may be entirely unreasonable as to another class, although both are identical as to bulk and weight, and the expense to the carrier is as great for the transportation of one as the other. What is a reasonable and equitable rate for one commodity may be wholly unreasonable and inequitable as to another. Coal, being a necessity and in general use by the public, is, and justly should be, favored in making

up rate classifications and schedules, and it is perfectly legitimate to permit the carrier, in order to earn a reasonable compensation upon its entire intrastate traffic, to charge and collect a high enough rate on general traffic to make up any deficiency caused by a lower rate on special commodities, such as coal. Whether a rate on any special commodity which is so low as to entail a positive loss to the carrier, in so far as the transportation of such particular commodity is concerned, is necessarily invalid, we are not here required to decide, as we consider the evidence insufficient, for reasons above stated, to disclose the existence of any such conditions. The federal Supreme Court, in Minneapolis & St. L. R. Co. v. Minn., supra, fully sustains us in these views. We again quote from the opinion: "* * * We do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the commission in this particular." In the nature of things it is impossible to say, with any degree of accuracy, what the effect of the enforcement of such statutory rates will be, and there can be no accurate test except the test of experience. The natural effect of cheaper rates will be to increase the demand for native coal all over the state, and this may result in enabling the carrier to transport such article in train load lots, and hence at greatly decreased expense.

It is finally urged by defendant's counsel that the act in question violates the interstate commerce clause of the federal Constitution. Their argument is necessarily predicated upon the assumption that state regulation of local rates on interstate lines amounts to an interference with interstate commerce, as the act assailed, upon its face, merely purports to establish maximum rates for transporting coal in car load lots between points within the state. This question is not open to debate, as the court of last resort in this country has repeatedly held adversely to counsel's contention. See Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298, and cases cited. In that case the court, speaking through Mr. Justice Shiras, said: "The final contention, that section 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long. It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short

distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state. It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a state. New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 15 Sup. Ct. 896, 39 L. Ed. 1043, 1045; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 17 Sup Ct. 532, 41 L. Ed. 953. A discussion of this subject will be found in the opinion of this court in Louisville & N. R. Co. v. Kentucky, 161 U. S. 701, 16 Sup. Ct. 714, 40 L. Ed. 849, where the same conclusion was reached."

It is but fair to counsel for defendant to state that they concede that up to this time the decisions of the United States Supreme Court on this point are uniformly opposed to their contention. Even if we were disposed to entertain the views expressed by Judge Lochren in Perkins v. N. P. Ry. Co. (C. C.) 155 Fed. 453, which we are not, we should feel it our duty, as did Judge Lochren, to yield to the judicial utterances of the final arbiter on this question.

The writ will issue as prayed for by plaintiff. All concur.

(120 N. W. 869.)

STATE OF NORTH DAKOTA, EX REL., T. F. McCUE, ATTORNEY GENERAL v. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY.

Opinion filed April 16, 1909.

Application by the State, on relation of T. F. McCue, Attorney General, for a writ of injunction against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Writ granted.

*T. F. McCue, Atty. Gen.*, and *E. P. Kelly*, for plaintiff.

*Alfred H. Bright* and *Ball, Watson, Young & Lawrence* for defendant.

PER CURIAM. Following the case of State ex rel. McCue v. N. P. Ry. Co. (this day decided) 18 N. D. 669, 120 N. W. 869, the writ herein prayed for by plaintiff will issue.

(120 N. W. 874. )

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STATE OF NORTH DAKOTA, EX REL., T. F. McCUE, ATTORNEY GENERAL v. GREAT NORTHERN RAILWAY COMPANY.

Opinion filed April 16, 1909.

Application by the State, on relation of T. F. McCue, Attorney General, for a writ of injunction against the Great Northern Railway Company. Writ granted.

*T. F. McCue, Atty Gen.*, and *E. P. Kelly*, for plaintiff.

*C. J. Murphy, W. R. Begg*, and *Ball, Watson, Young & Lawrence*, for defendant.

PER CURIAM. Following the case of State ex rel McCue v. N. P. Ry. Co. (this day decided) 18 N. D. 669, 120 N. W. 869, the writ herein prayed for by plaintiff will issue.

(120 N. W. 874.)

## THE COLUMBIAN LYCEUM BUREAU v. S. F. SHERMAN.

Opinion filed May 22, 1909.

**Contract — Substantial Performance.**

1. The plaintiff, a corporation, made a contract with defendant to furnish six entertainments for the sum of $325. The contract provided substantially that plaintiff should not be liable for damages if because of sickness or any other unavoidable cause any party engaged failed to keep engagements, and the plaintiff might at its own option furnish a substitute entertainment at the same booking price.

**Same.**

2. Where the plaintiff in one of the series of entertainments substituted one singer for another who was then ill and unable to appear, it was entitled under the evidence to recover the full contract price.

Appeal from District Court, Cass county; *Pollock*, J.

Action by the Columbian Lyceum Bureau against S. F. Sherman. Judgment for plaintiff, and defendant appeals.

Affirmed.

*Robert M. Pollock*, for appellant.

Where there are two or more modes of performing a contract, and one becomes impossible, the contracting party must perform one of the other. Board of Education v. Townsend, 52 L. R. A. 868; 9 Cyc. 633.

One party to a contract must perform it in good faith in order to enforce it as to the other. Glacius v. Black, 50 N. Y. 145; Davis v. Jeffries, 58 N. W. 815.

*V. R. Lovell*, for respondent.

Substantial performance of a contract by one party thereto coupled with the retention of benefits by the other, entitles the former to compensation. Omaha v. City, 156 Fed. 922; City v. Stookey, 154 Fed. 722; District v. Camden, 181 U. S. 453.

CARMODY, J. This action is brought and prosecuted by the plaintiff to recover from the defendant the balance claimed to be due on a certain contract made by the plaintiff and defendant, under and by the terms of which the plaintiff agreed to furnish and sup-

ply to the defendant six certain public entertainments to be given at Tower City, N. D., and, in consideration thereof, the defendant agreed to pay to the plaintiff the sum of $325. One of these entertainments was a company of musicians referred to in the contract as Arthur Middleton Company. The contract provided as follows: "It is understood and agreed that the bureau shall not be liable for damages, if, because of sickness, accidents, railroad detentions, or any unavoidable or legitimate cause, any party engaged fails to keep engagements, and any such failure shall not effect this contract as to unfilled dates, but in case of such failure a new date will be given the same season if possible, or the bureau will, at its own option, either deduct from the above consideration the price of the unfilled date or furnish a substitute entertainment of the same booking price." It is alleged on the part of the plaintiff that it furnished and supplied the entertainments as provided by said contract, and duly performed all the terms and conditions of said contract on its part to be performed, but that the defendant has failed and refused to comply with the conditions thereof on his part to be performed, and has refused to pay an unpaid balance of the consideration agreed upon. Defendant denied that plaintiff performed the said contract according to its promise, and alleges that the plaintiff only furnished five of the six entertainments provided for in said contract, and alleges that, among the entertainments provided for in said contract, plaintiff promised and agreed to furnish one entertainment by the Arthur Middleton Company, which company was, and is, made up of one Arthur Middleton, a renowned basso singer, and others; that the plaintiff advertised said company, and particularly the said Arthur Middleton, for February 22, 1906, at the city of Tower City for an entertainment to be given as the last of the series of the six entertainments under said contract; that plaintiff, without the knowledge of this defendant, substituted for said Arthur Middleton an inferior performer, and falsely and fraudulently represented to the defendant and to the public that said last mentioned person was Arthur Middleton, and by and with the use of such person the plaintiff gave an inferior entertainment and performance, and prior to such entertainment, and during the same, attempted to and did deceive this defendant and the public and those who attended such entertainment, and induced them to believe that the said last named person was, in fact

Arthur Middleton; that the defendant is the owner and manager of an opera house in said city of Tower City, and because of such misrepresentations and fraud practiced by the plaintiff the defendant was greatly damaged in his business and reputation, and asked judgment for $200. The evidence shows that the Arthur Middleton Company supplied at the time agreed upon for the performance of the Arthur Middleton Company with Mr. Madison in the cast in place of Middleton was of the same booking price as the same company with Mr. Middleton himself in the cast, and the said Arthur Middleton and George H. Madison were individually of the same booking price, and that said Arthur Middleton was ill at the time of said entertainment and unable to appear. At the close of the evidence, the court directed a verdict in favor of the plaintiff for the sum of $104 and interest. A motion for a new trial was made and denied, and judgment entered on the verdict, from which order and judgment this appeal was taken.

Appellant contends that the evidence on the part of the plaintiff failed to show that the plaintiff had complied with and performed the conditions of its contract with the defendant, and that it affirmatively appeared from such evidence that the plaintiff had attempted to and did practice a fraud and wrong upon and against the defendant, and had not honestly and in good faith or at all performed all the conditions of said contract on its part to be performed. Appellant proved no resultant damages arising from respondent's alleged default. The gate receipts from the entertainment were not diminished. He accepted the performance of the contract rendered by the respondent, and retained the benefits flowing out of it. These benefits were not reduced by reason of respondent's fault. It is well settled that substantial performance of the contract by one party, coupled with the reception of the benefits by another, will authorize an action by the former to recover the contract compensation. In the case at bar it may be that plaintiff practiced fraud upon the defendant by substituting George H. Madison for Arthur Middleton. If he did, it is not such a fraud as under the evidence in the case entitles the defendant to damages. There is no evidence to show that the plaintiff agreed that Arthur Middleton would be present, we do not think that a change of one member of a company, particularly when the same company was of the same booking price, was a violation of the plaintiff's contract, but was a substantial compliance with it. The defendant made

no complaint until after the entertainment, but represented to plaintiff that he was well satisfied with it. In fact he did not know of the change in singers until afterwards. He wholly failed to prove any damages, and must fail on this appeal.

The judgment and order appealed from are clearly right and are affirmed.

All concur.

MORGAN, C. J., not participating.

121 N. W. 765.

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MARY E. FINN AND MARY M. CARNEY, PETITIONERS, AND M. J. MORAN, AS ADMINISTRATOR OF THE ESTATE OF MARTIN A. WALSH, DECEASED, v. JOHN WALSH, GEO. W. WALSH, JOSEPHINE WALSH, MARY KEYES AND ELIZABETH PORTER.

Opinion filed May 21, 1909.

**Life Insurance — Executors and Administrators — Appeal and Error — Proceeds of Benefit Certificate—Right to Distribution—Jurisdiction.**

1. One W., who held two beneficiary certificates, one issued by the Loyal Americans and the other by the American Yeomen, fraternal benefit societies, both payable to his "legal heirs," died testate, and in his will he devised and bequeathed all his property, both real and personal, to appellants F. and C., and specially mentioned therein all life insurance of every name and description. Such will was duly probated, and said societies paid to one M., who was the duly appointed and acting testamentary administrator, the amount due under such benefit certificates. Upon the hearing of M.'s final account pursuant to his petition for an order of final distribution, respondents, who are the sole heirs of decedent, intervened and filed an answer to M.'s petition, setting forth their claims to the fund received under such certificates, whereupon the county court, assuming jurisdiction to adjudicate the rights of the respective claimants to such fund, entered a decree of final distribution awarding same to F. and C. On appeal the district court reversed such decree, and ordered the county court to enter a decree awarding the fund to respondents. *Held*, that the county court had no jurisdiction to try and determine the right and title to such fund as between the respective claimants, and consequently the district court on such appeal acquired no jurisdiction to adjudicate such question, and its judg-

ment directing the county court to distribute such fund to respondents, and awarding costs and disbursements to them, was erroneous.

**Question Not Decided.**

2. The estate of decedent has no interest in the proceeds of such certificates, but whether they belong to appellants F. and C., or to respondents is not decided.

**County Court — Jurisdiction — Power to Enlarge.**

3. The Constitution of North Dakota, section 111, defining the jurisdiction of county courts, confers authority upon such courts in probate, testamentary and guardianship matters merely, and it is beyond the power of the Legislature to enlarge such jurisdiction by statute.

**Same — Executors and Administrators — Proceeds of Benefit Certificates.**

4. Rev. Codes 1905, section 8083, was not designed to enlarge the constitutional grant of power to county courts, nor did the legislature, by its enactment, intend to make the proceeds of such life insurance policies and beneficiary certificates as are therein mentioned a portion of the estate of the insured, but the intent was merely to exempt from the payment of these debts of the decedent all such proceeds as might become assets of such estate.

Appeal from District Court, Grand Forks county; *Templeton,* Judge.

Final accounting of M. J. Moran, as testamentary administrator of Martin A. Walsh, deceased. From the decree of distribution entered, John Walsh and others appealed to the district court, where the decree of the county court was reversed; and Mary E. Finn and another and the administrator appeal.

Reversed.

*George A. Bangs,* for appellants.

The functions of probate courts are limited to administration and devolution of property; the right of decedent to property as against third parties, their rights as against his representatives, are to be tried by courts of general jurisdiction. 1 Woerner on Law of Admrs., 345; In re Walker Estate, 136 N. Y. 20, 32 N. E. 633; In re Haas estate, 97 Cal. 232, 31 Pac. 893; In re Thompson estate, 76 N. E. 870; In re Bolton estate, 53 N. E. 756; In re Hawes estate, 104 N. Y. at 262, 10 N. E. 352; Riggs v. Cragg, 89 N. Y. 479; In re Mousseau's estate, 40 Minn. 236, 41 N. W. 977.

Where the policy of mutual benefit insurance does not take away the power to change the beneficiary—the member has that right. and the beneficiary has a mere expectancy dependant on the will of the insured. Nieblack on Benefit Societies, 407; Masonic Mut. Ben. Soc. v. Burkhart, 10 N. E. 79; Splown v. Chew, 60 Tex. 532; Richmond v. Johnson, 28 Minn. 447, 10 N. W. 596; Delaney v. Delaney, 51 N. E. 961; Schoenau v. A. O. U. W., 88 N. W. 999; St. Louis Ass'n v. Strode, 77 S. W. 1091; Cooley's Briefs, on Insurance, Vol. 4, 3762 and cases cited.

A stipulation and rules of procedure as to change of beneficiary may be waived by the society. Splawn v. Chew, 60 Tex. 532; Manning v. A. O. U. W., 86 Ky. 136, 5 S. W. 385; Fischer v. Malchow (Minn.), 101 N. W. 602; St. Louis Co. v. Strode, 103 Mo. App. 693, 77 S. W. 1091; Schoenau v. Grand Lodge, 85 Minn. 349, 88 N. W. 999; Delaney v. Delaney, 51 N. E. 961.

*J. A. Sorley,* for respondent.

Mode of change of beneficiary must be strictly complied with. 3 Am. & Eng. Enc. Law, 993-5. Fink v. Fink, (N. Y.) 64 N. E. 506; Gladden v. Gladden, 8 N. Y. Sup. 880; Thomas v. Thomas, 30 N. E. 61; Jory v. Supreme Council, 38 Pac. 524; McLaughlin v. McLaughlin, 37 Pac. 865; Order of Mut. Companions v. Griest, 18 Pac. 652; A. O. U. W. v. Fisk, 85 N. W. 875; Knights of Honor v. Nairn, 26 N. W. 826; Shuman v. A. O. U. W., 82 N. W. 330; Stephenson v. Stephenson, 21 N. W. 19; Wendt v. Iowa Legion of Honor, 34 N. W. 470; Hainer v. Iowa Legion of Honor, 43 N. W. 185; Supreme Council v. Smith, (N. J.) 17 Atl. 770; A. O. U. W. v. Connoly, (N. J.) 43 Atl. 286; Holland v. Taylor, (Ind.) 12 N. E. 116; Bower v. Sampson, 102 Ind. 262, 1 N. E. 571; McCarthy v. N. E. Order, 10 N. E. 166; Am. Legion of Honor v. Perry, 5 N. E. 634; Clarke v. Supreme Council, 57 N. E. 787; Jinks v. Banner Lodge, 21 Atl. 4; Masonic Mut. v. Jones, 26 Atl. 255; Hamilton v. Royal Arcanum, 42 Atl. 186; Heasley v. Charch, 49 N. E. 408.

Upon the death of the assured beneficiaries acquire a vested right in the certificate, and it cannot be diverted without their consent. 3 Am. & Eng. Enc. Law, 998; McLaughlin v. McLaughlin, 37 Pac. 865; Shuman v. A. O. U. W., 82 N. W. 330; Daniels v. Pratt, 10 N. E. 166; Wendt v. Iowa Legion of Honor, 34 N. W. 470.

No one but a party to the consideration could sue upon the contract of insurance. 11 Enc. of Pl. & Pr., 389-390; Rindge v. N. E.

Material Aid Society, 15 N. E. 628; Flynn v. Mass. Benefit Association, 25 N. E. 716; Dean v. American Legion, 31 N. E. 1; McCarthy v. Metropolitan Life Insurance Company, 38 N. E. 435; Monroe v. Providence Permanent Fireman's Relief Association, 34 Atl. (R: I.) 149.

FISK, J. The facts necessary to a correct understanding of the questions involved on this appeal are not in dispute and are briefly as follows: On or about November 13, 1904, one Martin A. Walsh died testate, and in his will, dated March 25, 1903, he bequeathed all his property to appellants, Mary E. Finn, and Mary M. Carney, share and share alike, and he attempted thereby to bequeath to them the proceeds of two certain mutual benefit certificates hereinafter mentioned. The testator owned no real property and but a small amount of personalty at the time of his death. By his will he nominated and appointed the said Mary E. Finn and Mary M. Carney as executrices of his estate, but, they each having declined to serve, the appellant Michael J. Moran was duly appointed and qualified as testamentary administrator. Such will was duly admitted to probate. Thereafter the proceeds of such mutual benefit certificates, amounting in the aggregate to $3,031.14, were paid to the said Moran as such testamentary administrator. These mutual benefit certificates were as follows: Brotherhood of American Yeomen, $3,000, issued on May 5, 1899; Loyal Americans, $2,000, issued on February 10, 1902. The benefits under each of said certificates were made payable to the "legal heirs" of the said Martin A. Walsh as beneficiaries. After the testamentary administrator had fully administered said estate, he presented a final account praying for settlement thereof and a final discharge, whereupon the respondents, who are brothers and sisters of the deceased and and his sole heirs at law appeared before the county court and filed an answer to the petition of the administrator aforesaid, in which they set forth inter alia that the personal property of the estate of said deceased amounted to $100, and in addition thereto insurance policies and membership certificates as alleged and set out in the petition; that there came into the hands of said administrator, as the assets of said estate, the sum of $1,500 under the certificate issued by the American Yeomen, and the sum of $1,531.14 under the certificate issued by the Loyal Americans, which moneys they alleged were a part of the assets of the said estate, and which belong

and should be distributed to them as the legal heirs of said Martin A. Walsh. They also allege that the Brotherhood of American Yeomen and the Loyal Americans are benevolent organizations, the former being incorporated under the laws of the state of Iowa, and the latter under the laws of the state of Illinois, and that by the by-laws, rules and regulations of each of said organizations, beneficiaries of certificates issued to members were restricted to persons of blood relationship to the member, and under such by-laws, rules and regulations beneficiaries could be changed only in certain methods therein mentioned, and that the said Martin A. Walsh did not change the beneficiaries in either of said certificates; also, that the said Mary E. Finn and Mary M. Carney are not and were not related in any way to the said deceased nor dependent upon him, and are entitled to no part of such proceeds of said benefit certificates, and they prayed that such proceeds be distributed to them, as the heirs at law of such deceased, in equal shares, and that the said Mary E. Finn and Mary M. Carney receive no portion thereof. At the hearing in the county court on March 15, 1906, said petitioners and appellants on this appeal, Mary E. Finn, Mary M. Carney, and M. J. Moran, administrator aforesaid, filed an objection to the making of any order in said estate by the county court disposing of the proceeds of the certificates aforesaid in any manner or to any person or persons other than as mentioned and directed in such will, such objection being based upon the specific grounds, as stated, "that this court has no jurisdiction over any property other than such as actually, and, in fact, belongs to the estate of the said Martin A. Walsh, and that, if the proceeds of said membership certificate * * * belong to the estate of said Martin A. Walsh, then under and by the terms of said will * * * the same were devised to the said Mary E. Finn and Mary M. Carney; that this court has jurisdiction over the said M. J. Moran only for such acts as he can rightfully do as said administrator of said estate and that the said Moran, as administrator, has no power, authority or jurisdiction to act except in strict accord with the provisions of such will; that this court is absolutely bound as to the disposition of all the estate of said Martin A. Walsh by the terms of said will, and that, so long as said will is held to be a valid and subsisting will, this court has no jurisdiction to dispose of any of the estate of said Martin A. Walsh other than in accordance with

its terms." The county court thereafter made findings of fact and conclusions of law, in which it found inter alia that the Brotherhood of American Yeomen paid to the said M. J. Moran the sum of $1,500 and the Brotherhood of Loyal Americans paid to him the sum $1,531.14 in full settlement of such certificates and to be distributed according to the terms of such will, and that the said Moran, as such administrator, has such funds in his possession, and as conclusions of law that the said deceased intended to and did by the execution of such will, change the beneficiaries named in said benefit certificates from his legal heirs to the said petitioners, Mary Finn and Mary Carney, and that by the payments of the amounts due under such certificates to the said Moran, as such administrator, the said mutual benefit societies intended to and did waive any and all objections which they might have had to the method employed in the change of such beneficiaries, and that the said Mary Finn and Mary Carney are entitled to the proceeds of such benefit certificates according to the terms of the will. A decree of distribution was entered pursuant to such conclusions and findings, from which respondents perfected an appeal to the district court. Here the decree of the county court was reversed, in so far as the distribution of such funds is concerned, and the county court was ordered to make its final decree, distributing such proceeds to the respondents herein who are the heirs at law aforesaid of the decedent, and this appeal is prosecuted from the judgment of the district court aforesaid.

Appellants urge the following propositions in this court:

(1.) Assuming that theory of respondents to be correct, and that they, being the legal heirs, were the beneficiaries of the certificates and as such entitled to their proceeds, and that there was no change of beneficiaries, then the county court was without jurisdiction.

(2.) That the provisions of the will operated as a change of beneficiaries and that the societies had waived their by-law provisions.

(3.) That, under the statutes of this state, the proceeds of these certificates became a part of the decedent's estate, and must, therefore, be distributed according to the terms of the will.

The view we take of the first proposition renders it not only unnecessary, but improper, to dispose of the other very interesting

questions presented. It is entirely plain that the county court, in assuming to adjudicate the question as to the respective rights of these parties to this fund, exceeded its jurisdiction, and it is equally plain that the district court on such appeal committed error in so far as it assumed to adjudicate such question and to direct the county court to make and enter a final decree of distribution, decreeing, assigning, and vesting in respondents as such heirs the said sum of $3,031.14, being the proceeds of such beneficiary certificates. Such fund is and was no part of the decedent's estate; hence the county court had no jurisdiction over it, and could not, therefore, enter any valid judgment with reference to the distribution thereof. The insured had no interest in such fund. He merely had the right to designate to whom it should be paid after his death. Whether appellants or respondents are entitled to the same they take by contract and not by descent. This is manifestly so as to respondents, and conceding that the will operated to change the beneficiaries, it merely conferred upon appellants Finn and Carney a contract right to the fund. It served, at most, to divest the heirs of their contingent interests under the certificates, and vest the same in Finn and Carney. The fund being no portion of the estate of Walsh, he could not transfer the same by will, but by this we do not intend to intimate that the directions contained in such will might not be deemed as between these parties a sufficient exercise by the insured of his power of appointment of beneficiaries under such certificates. As to this we express no opinion, but on this very interesting question, however, we deem it not improper to here cite some of the numerous authorities, both pro and con. Splawn v. Chew, 60 Tex. 532; Dennett v. Kirk, 59 N. H. 10; Grand Lodge of the Ancient Order of United Workmen v. Bollman, 22 Tex. Civ. App. 106, 53 S. W. 829; Schmidt v. Iowa K. P. Ins. Ass'n, 82 Iowa 304, 47 N. W. 1032, 11 L. R. A. 205; Woodruff v. Tilman, 112 Mich. 188, 70 N. W. 420; Hall v. Allen, 75 Miss. 175, 22 South 4, 65 Am. St. Rep. 601; Titsworth v. Titsworth, 40 Kan. 571, 20 Pac. 213; Supreme Conclave Royal Adelphia v. Cappella (C. C.) 41 Fed. 1; Grand Lodge v. Noll, 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350, 30 Am. St. Rep. 419; Note to the case of Leavitt v. Dunn, 44 Am. St. Rep. 902; Grand Lodge Ancient Order of United Workmen v. Kohler, 106 Mich. 121, 63 N. W. 897; National Ass'n of the National Am. Ass'n v. Kirgin, 28 Mo. App. 80; Coleman v. Grand Lodge (Tex. Civ. App.) 104 S. W. 909; Silvers v. Benefit Ass'n 94 Mich. 39,

53 N. W. 935; Hainer v. Iowa Legion of Honor, 78 Iowa, 245, 43 N. W. 185; Phillips v. Carpenter, 79 Iowa, 600 44 N. W. 898; Catholic Order of Foresters v. Malloy, 169 Ill. 58, 48 N. E. 392; Burke v. Modern Woodmen of America, 2 Cal. App. 611, 84 Pac. 275; Brown v. Mansur, 64 N. H. 39, 5 Atl. 768; Bernheim v. Martin, 45 Wash. 120, 88 Pac. 106. See exhaustive note to the case of Estate of G. Bruce Harton, 4 L. R. A. (N. S.) 939; Fink v. Fink, 171 N. Y. 616, 64 N. E. 506; Knights of Maccabees v. Sackett, 34 Mont. 357, 86 Pac. 423, 115 Am. St. Rep. 532; Harton's Estate, 213 Pa. St. 499, 62 Atl. 1058, 4 L. R. A. (N. S.) 939; Schardt v. Schardt, 100 Tenn. 276, 45 S. W. 340; 29 Cyc. 134.

The respondents stand in the strange and inconsistent position of claiming, first, that the proceeds of these certificates are no part of the estate; and, second, that, notwithstanding such fact, the county court has jurisdiction to inventory and distribute such funds to them as the heirs of decedent. If the first contention be sound, the latter contention is manifestly untenable, as the two are irreconcilable. As before stated, the first contention is clearly correct. Were it otherwise, there could be no question about the validity of the county court's decree awarding such fund to appellants, in the absence of adverse claimants, as in such case the terms of the will would, of course, control. Respondents, however, as well as the trial court, seem to have taken the position, which position is here urged, that while such fund is no part of the estate, and the estate has no interest whatever therein, still under the provisions of section 8083, Rev. Codes 1905, authority is conferred upon the county court to inventory and distribute the same to the beneficiaries named in such certificates. This section is as follows: "The avails of a life insurance policy or of a contract payable by any mutual aid or benevolent society, when made payable to the personal representatives of a deceased, his heirs or estate upon the death of a member of such society or of such insured shall not be subject to the debts of the decendent except by special contract, but shall be inventoried and distributed to the heirs or the heirs at law of such decedent." We are unable to agree with respondents' contention as to the effect to be given to the above section, nor do we agree with appellant's contention that the legislative intent in its enactment was to make the proceeds of all such certificates a part of the assets of the estate of the decedent. The evident purpose was to exempt from the payment of the decedent's debts the proceeds of all life insurance which

might become assets of the estate, and hence subject to distribution by the county court. The section as originally enacted clearly disclosed that such was its only purpose, and we think the amendment made by chapter 111, p. 181, Laws 1897, was not designed to change such purpose, but merely to make the section more clear with reference to the insurance included therein. It is needless to say that the Legislature signally failed in its latter attempt. We are not here required to determine the constitutionality of this section as above construed, but it is very apparent that the construction contended for it by respondent's counsel would render the act clearly violative of section 111 of our state constitution which restricts the jurisdiction of county courts to probate, testamentary, and guardianship matters. An attempt to confer upon such courts the power to inventory and distribute funds which are confessedly no part of the decedent's estate is manifestly unwarranted by the provisions of section 111 aforesaid. Counsel's contentions that the above constitutional provision is not exclusive and that the term "probate," as used in the constitution, contemplates the exercise of jurisdiction in such transactions as are here involved and authorizes the statute in question, do not appeal to us as sound. But, conceding the correctness of such contentions, it is entirely clear that the county court had no jurisdiction to try and determine the right and title to such funds as between these respective claimants. This view finds ample support in the following, among numerous other authorities; Matter of Thompson, 184 N. Y. 36, 76 N. E. 870; Matter of Will of Walker, 136 N. Y. 20, 32 N. E. 633; In re Haas Estate, 97 Cal. 232, 31 Pac. 893, 32 Pac. 327; Mousseau v. Mousseau, 40 Minn. 236, 41 N. W. 977; Wise v. O'Malley, 60 Tex. 588; 1 Woerner, Law of Adm'n (2d Ed.) p. 345, and cases cited.

The county court having no jurisdiction to adjudicate such question, no such jurisdiction was conferred on the district court by the appeal. Wise v. O'Malley, supra. Counsel for appellants expressly urged in both courts such objection to the jurisdiction; but, even if instead of objecting to the jurisdiction of the county court counsel had expressly consented thereto, the result would be the same. There was a lack of authority to hear and determine the subject-matter of the controversy, and hence jurisdiction could not have been conferred even by consent. Such adjudication was a mere nullity, and must be treated as such. Matter of Will of Walker, 136 N. Y. 29, 32 N. E. 633.

It follows that the judgment appealed from in so far as it adjudges that the respondents are entitled to the fund in question, and requiring the county court to make its final decree distributing the same to them, and also adjudging the payment by appellants Finn and Carney of costs and disbursements to respondents, must be, and the same hereby is, reversed, appellants to recover their costs and disbursements, both in this and in the district court.

All concur, except MORGAN C. J., who did not participate in the decision.

(121 N. W. 766.)

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JOHN YEGEN v. NORTHERN PACIFIC RAILWAY CO., DEFENDANT. PHILIP GILBERT, AS TRUSTEE IN BANKRUPTCY OF HENRY KREBS, A BANKRUPT, INTERVENOR AND APPELLANT.

Opinion filed April 14, 1909.

Rehearing denied May 15, 1909.

**Sales — Acts Constituting — Consignment — When Title Passes.**

1. K., a wholesale liquor and wine merchant in St. Paul, called on Y., a merchant at Bismarck, and procured him to indorse a draft for $350. Y. had previously indorsed for K. notes aggregating $500. It is not clear whether the notes were then due, or whether Y. had paid them if due. The draft was presented for acceptance in St. Paul on the 29th day of April, 1905, and accepted by K. in the name of the American Wine & Liquor Company; that being the style under which he did business. On the 2d day of May, 1905, the draft was protested for nonpayment. On the day Y. indorsed the draft, the evidence tending to show that it was after the act of indorsement, K. told Y. that, if the draft was not paid, he would turn him over some "stuff." May 1, 1905, the day before the draft was protested, K. delivered to the railway company in St. Paul five barrels of whisky addressed to Y. at Bismarck, and took a bill of lading therefor. May 2, 1905, a petition of creditors of K. was filed in the bankruptcy court in St. Paul to have him adjudicated a bankrupt, and on the same day the appellant was appointed receiver of the effects of K. He qualified on the following day, and immediately notified the railway company of the fact and that he claimed the whiskey, and to not deliver it to the consignee, but hold it subject to the order of the court. The railway company notified him, in response to this notice, that it held the whisky subject to his disposition. No price

was agreed upon or mentioned between K. and Y. The character of the "stuff" was not indicated. Neither the bill of lading nor any notice, invoice, or communication of any kind was transmitted to the consignee, and he did not know that anything had been shipped to him until after its arrival in Bismarck, when, on his demand for the whisky being refused by the carrier, he brought this action in claim and delivery. The record does not disclose whether the whisky was sent in payment of, or as security for, a prospective indebtedness of K. to Y., or whether it was a sale.

*Held*, that the whisky at the time this action was commenced was in custodia legis.

**Bankruptcy — Claim in Delivery — Property in Custody of the Law.**

2. An action in claim and delivery in a state court will not lie to secure possession of property of which the receiver appointed by a bankruptcy court has taken either actual or constructive possession.

Appeal from District Court, Burleigh county; *Winchester*, J.

Replevin by John Yegen against the Northern Pacific Railway Company, in which action Philip Gilbert, as trustee in bankruptcy of Henry Krebs, intervened.

Judgment for plaintiff and intervenor appeals.

Reversed.

*Newton & Dullam*, for appellant.

Trustee in bankruptcy may replevy from third persons, avoid bankrupt's fraudulent transfer, and foreclose mortgages.

Bardis v. Bank, 2 N. B. N. R. 725, 3 A. B. R. 680, 178 U. S. 524; In re Gerded, 1; 2 Fed. R. 318, 4 A. B. R. 346; Hicks v. Nost, 2 N. B. N. R. 734, 178 U. S. 541, 4 A. B. R. 178; In re Cohn, 2 N. B. N. R. 299; 3 A. B. R. 421, 98 Fed. R. 75; In re Klein, 97 Fed. R. 31.

Need not secure order to sue. Chism v. Bank of Friars, 5 A. B. R. 56.

The filing of a petition in bankruptcy is a caveat to the world and in effect an attachment and injunction. Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405; Bank v. Sherman, 101 U. S. 4; 3, 25 L. Ed. 866; In re Rogers, 60 C. C. A. 567, 125 Fed. R. 169; State Bank of Chicago, v. Cox, 143 Fed. R. 91; In re Perkin Plow Co., 50 C. C. A. 257, 112 Fed. 308; Chesapeake Shoe Co. v. Seldner, 58 C. C.

A. 261, 122 Fed. 593; Loveland's Bankruptcy (2d Ed.) 563; In re Gracewich, 115 Fed. 87; In re Breslauer, 121 Fed. R. 910; In re Granite City of Dell Rapids, S. D. 137 Fed. R. 818.

Replevin of goods in the custody of the bankruptcy courts is a wrongful use of process and contempt. In re Russell, et al, 101 Fed. R. 248; Rouse v. Letcher, 156 U. S. 47, 39 L. Ed. 341, 15 Sup. Ct. Rep. 266; Taylor v. Carryl, 20 How. 594, 15 L. Ed. 1028; Freeman v. Howe, 24 How. 450, 65 U. S. 450, 16 L. Ed. 749; Clendenning v. Red River Valley Nat. Bank, 12 N. D. 51, 94 N. W. 901; In re Schloerb, 97 Fed. R. 326; Buck v. Colbath, 3 Wall. 334, 70 U. S. 377, 18 L. Ed. 257; Krippendorf v. Hyde, 110 U. S. 276, 28 L. Ed. 145; Covell v. Heyman, 111 U. S. 176, 28 L. Ed. 390; Appleton Waterworks Co. v. Trust Co., 35 C. C. A. 302, 93 Fed. R. 286; Peck v. Jenness, 7 How. 612, 12 L. Ed. 841; Buck v. Colbath, supra; Covell v. Heyman, supra; In re Smith, 92 Fed. R. 135; J. A. E. Furniture Co., 92 Fed. R. 329; In re Brown, 91 Fed. R. 358; In re Francis-Valentine Co., 93 Fed. 953; In re Richard, 94 Fed. R. 633; Norcross v. Nathan, 99 Fed. R. 414; In re Cobb, 96 Fed. R. 821; Withers v. Stinson, 79 N. C. 341; In re Guthwillig, 34 C. C. A. 377, 92 Fed. R. 337; Davis v. Bohle, 34 C. C. A. 372, 92 Fed. R. 325; Keegan v. King, 96 Fed. R. 758; In re Endl, 99 Fed. R. 915; Carter v. Hobbs, 92 Fed. R. 594.

Any suffering of the entry of a judgment or making transfer of property, within four months before filing petition in bankruptcy, is a preference. In re Piper, 2 N. B. N. R. 7; In re Conhaim, 2 N. B. N. R. 148, 3 A. B. R. 249, 97 F. R. 923; Swarts v. Fourth National Bank of St. Louis, 117 F. R. 1, 8 A. B. R. 673; In re McLam, 97 Fed. R. 922; In re Head, et al, 114 Fed. R. 489.

Where one creditor secures an advantage over another, it is a preference. In re Griffin Pants Factory v. Nelms Racket Store Co., 2 N. B. R. 630; In re Piper, supra; In re Conhaim, supra; In re Bashline, 109 Fed. R. 965, 6 A. B. R. 194; Stern v. Louisville Trust Co., 112 Fed. R. 501, 7 A. B. R. 305.

*Mockler & Johnson,* for respondent.

To warrant stoppage intransitu, there must be insolvency and goods unpaid for. 26 Enc. Law, 1084; Bayonne Knife Co. v. Unbenhauer, 18, So. 175; Wood v. Roach, 2d Dall. 180, 1 Am. Dec.

276; Schuster v. Carson, 44 N. W. 734; Clapp Bros. & Co. v. Sohmer & Co., 7 N. W. 639; Jeffries v. Fitchburg Ry. Co., 67 N. W. 424; Walsh v. Blakely, 9 Pac. 809; Gustine v. Phillips, 38 Mich. 674.

To constitute a preference, the party preferred must know of debtor's insolvency. Moore v. Robinson, 75 S. W. 890; Brandenburg on Bankruptcy, Sec. 963; Hackney v. Raymond Bros. et al., 94 N. W. 822; Urdangen & Greenberg Bros. v. Doner, etc., 98 N. W. 317; Doxsee v. Waddick, 98 N. W. 483; Hooks & Hines v. Pafford, 78 S. W. 991; Johnson v. Anderson, 97 N. W. 343; Boundinot v. Hamann, 90 N. W. 497; Deland v. Miller & Chaney Bank, et al., 93 N. W. 304; Rosenheim v. Flanders, 86 N. W. 293; Armstrong Co. v. Elbert, 36 S. W. 139; Texas Drug Co. v. Shields, 48 S. W. 882; Tillman v. Heller, 14 S. W. 700; Drummond v. Couse, 39 Iowa, 442; Carson et al., v. Byers, 25 N. W. 826; Crawford v. Nolan, 30 N. W. 32; Chase v. Walters, 28 Iowa, 460.

Delivery to a carrier at purchaser's direction, makes the goods the property of the vendee. Krulder v. Ellison, 47 N. Y. 36; The Mary v. Susan, 1 Wheat. 25; Stanton v. Eager, 16 Pick. 467; Bailey v. Hudson Riv. R. R. Co., 49 N. Y. 70; Stafford v. Walter, 67 Ill. 83; Whiting v. Farrand, 1 Conn. 60; Ranney v. Higby, 4 Wis. 154; Schmertz v. Dwyer, 53 Pa. St. 335; Putman v. Tillotson, 13 Met. 517; Waldron v. Romaine, 22 N. Y. 368; Hunter v. Wright, 12 All. 548; Claflin v. Boston R. R. Co., 7 Allen, 341; Odell v. Boston, Me., R. R. Co., 109 Mass. 50; Johnson v. Stoddard, 100 Mass. 306; Ober v. Smith, 78 N. C. 313; Van Dusen v. Piper, 43 N. W. 684; Litchfield Bank v. Elliott, 86 N. W. 454.

SPALDING, J. This is an appeal from a judgment in favor of plaintiff in an action of replevin brought by the respondent against the Northern Pacific Railway Company, in which Philip Gilbert, as trustee in bankruptcy of Henry Krebs, a bankrupt, intervened and defended. The facts are unique. The principal points relied upon for reversal are:

(1) That, by the act of the receiver appointed by the court in giving notice to the railway company to hold the property in question subject to the further order of the court, the property was within the possession of the court, and was so being held at the time respondent undertook to obtain possession by this action.

(2) That the property in question at the time this action was commenced was in custodia legis and in the custody of the bank-

ruptcy court, and the state court could not rightly interfere by any process or take the property from the possession of any person who held it under the authority of and for the federal court.

(3) For the reason disclosed, it is not proper for the state court to entertain this action and to decide the question as to who is entitled to the property in dispute upon the merits, as they belong exclusively to the bankruptcy court in whose possession the property was at the time it was taken by the claim and delivery process issued out of the state court.

(4) That it is clear that Krebs at the time he undertook to consign the property in question to Yegen was insolvent within the meaning of the bankruptcy law.

(5) That, without considering whether Yegen knew of Krebs' insolvency, the facts disclose a preference to Yegen within the meaning of the bankruptcy law, whereby he would obtain over 70 per cent. upon his claim, while other general creditors would obtain only about 17 per cent. on their claims.

(6) That, whether or not it was necessary for Yegen to know of Krebs' insolvency or design to give Yegen a preference in order to avoid it, the facts disclosed show that Krebs was insolvent, and that the action was so clearly irregular as a business matter as to put Yegen on inquiry, and that Yegen had reasonable cause to believe that Krebs was intending to make a preference, though no reasonable cause of belief of insolvency by Yegen was necessary to avoid it.

From our views of the case it is unnecessary to consider the questions above suggested, excepting so far as they relate to the title and right to possession of the property as between the bankruptcy court and the respondent, and the effect of the determination of this question upon the jurisdiction of the state courts. As far as necessary to a determination of these questions, the facts are as follows: On the 27th day of April 1905, Krebs was a wholesale liquor and and wine merchant in St. Paul, Minn., respondent a grocer in Bismarck, N. D., and an acquaintance of Krebs. Respondent had previously indorsed notes for Krebs amounting to about $500. The evidence is not clear as to whether respondent had paid them or not, or as to whether they were due prior or subsequent to the 2d day

of May, 1905, although for the purposes of this case it may be assumed that respondent had paid them at the time the acts herein related occurred. On the 27th day of April Krebs called on respondent in Bismarck, and procured him to indorse a draft on the American Wine & Liquor Company, which was the name under which he did business in St. Paul, for $350. Krebs told respondent on that date that he would either pay the draft and the note or would turn him over some "stuff" for it. The evidence tends to show that this promise to pay or turn over "stuff" was not made until after the transaction of indorsing the draft had been completed, as Yegen testifies that it was when he left that Krebs told him this. The draft reached St. Paul and was accepted on the 29th day of April, 1905. On the 1st day of May, 1905, Krebs caused to be delivered to the Northern Pacific Railway Company in St. Paul five barrels of whisky addressed to respondent at Bismarck. On the 2d day of May, 1905, the draft was protested for nonpayment, and on the same day the American National Bank of Valley City, the First National Bank of Lidgerwood, and other creditors filed a petition in the bankruptcy court to have Krebs adjudged a bankrupt, and at the same time applied for the appointment of a receiver under the provisions of the bankruptcy law, to take immediate charge of the assets of the bankrupt. Appellant was appointed such receiver, and it was adjudged that, on qualifying as such "he shall be entitled to all of the property and effects of said Henry Krebs, and all persons in possession thereof shall deliver the same to said receiver." On the 3d day of May, 1905, Gilbert qualified as receiver, and immediately notified the railway company of his appointment and qualification and that he claimed as such receiver to be the owner of the whisky in question, and certain other whisky shipped to another party at Bismarck, on the ground that the title thereto had not passed to the consignees, as it had been shipped for the purpose of defrauding the creditors of Krebs. He also notified the company to make no delivery of said merchandise to the consignees, or to any other person, until the further order of the court. On the 8th day of May, 1905, the railway company notified Gilbert that the whisky in question was being held at destination subject to his order, and requested him to send the company the original receipt or bill of lading with order of disposition. All of the whisky was returned to appellant except the five barrels in controversy, to obtain posses-

sion of which respondent brought this action upon the refusal of the railway company to deliver to him.

About 100 other packages shipped to different parties in North and South Dakota were recovered by appellant. It appears that in the conversation between appellant and Krebs no mention was made of the nature of the "stuff" that was to be turned over in case the draft was not paid. No price or quantity was mentioned or agreed upon, and no express assent was given by respondent to the proposition. It was not suggested at the time whether it should be sent him as security or in payment of the indebtedness which might accrue. No bill of lading was sent respondent. He was not written of the shipment or in any way notified. No invoice was sent him, and he testifies that he did not know that anything had been shipped him until after it had arrived in Bismarck, which appears to have been about the 8th of May. Appellant found the bill of lading among the bankrupt's effects when he took possession, but no entry or memo showing any charge to Yegen. In due time Krebs was adjudged a bankrupt, and appellant was elected trustee to succeed himself as receiver. Under these facts was the property when this action was commenced on the 18th day of May, 1905, in the custody of the bankruptcy court, or had the title and right to possession vested in respondent? If the whisky was in custodia legis, the state courts could not interfere by an action in claim and delivery, and take it from the possession of the federal bankruptcy court. We are agreed that the title and right to possession had not vested, and that the property was in custodia legis. Respondent bases his right to possession solely on the theory that he was the owner. The elements necessary to a sale are wanting. Had an agreement been made as to the nature of the "stuff," the quantity, the price, whether it was to be received in payment or as security, if there had been an express agreement to accept it for either purpose, and respondent had been sent the bill of lading or an invoice, or had been notified of the shipment, a more difficult question would be presented, but under the facts, had no bankruptcy proceedings been instituted, Krebs could have diverted the shipment to other parties. He (Yegen) could have refused to accept it on the ground that it was was not the kind of "stuff" he supposed was coming, or dealt in, or could use; that the law of North Dakota prohibited his reselling or disposing of it; that the price was excessive; that, instead of

whisky, he expected beer, or wine, or brandy. In other words, that he did not understand the word "stuff" to mean whisky.

This transaction cannot be regarded either as a sale or as a payment, as neither can result except from a mutual agreement of the parties that the transaction shall have that effect. The presumption is, when no price or quantity is mentioned, that a shipment like this is intended as security, but the respondent bases his whole claim upon ownership. He testifies that he is the owner of the whisky. From all that appears in the record he may have regarded the transaction as a sale or a payment, while Krebs may have considered it as a deposit of security. Aside from the naked statement of Yegen that he is the owner of the property, the record contains absolutely nothing to show whether it was intended as a sale, a payment or as a deposit for purposes of security. The record discloses nothing whatever to indicate that the minds of the parties ever met on this proposition. We find corroboration of this in the fact that, under the law of this state, the sale of whisky is prohibited and made a criminal offense. Krebs had no lawful right to sell it to respondent. Borland v. Nevada Bank, 99 Cal. 89, 33 Pac. 737, 37 Am. St. Rep. 32. In fact the elements necessary to a transfer of property or of possession in respondent are wholly wanting. This court decided in Farquar v. Higham, 16 N. D. 106, 112 N. W. 557, that "an indorsement of a promissory note creates no liability of itself, and the indorser is not liable on the indorsement until presentment to the maker and notice to the indorser of such presentment." If this principle applies to drafts, the liability of respondent had not attached at the time the "stuff" was shipped, and, as we before indicated the evidence leaves his liability on the promissory note or notes in doubt. The prior conditional agreement to ship the "stuff" conferred no title upon Yegen. As was said by the court in Cayuga County National Bank v. Daniels, et al., 47 N. Y. 631: "The owner may violate his agreement, and not ship the property at all; or, if he ships, may consign it to another person. In either event no title is acquired by virtue of the unexecuted agreement to ship. If such an agreement was as in the present case made upon a good consideration, an action may be maintained for its breach by the party injured, but no title is acquired. This shows that it is not the agreement to ship that confers the title, although such agreement is based upon good consideration; but the actual shipment accompanied an unconditional consign-

ment in pursuance of such agreement which proves that the delivery to the carrier was with intent to give the consignee a right of property free from any condition whatever. The owner of the property being free to ship the property or not, and if he consign the same to one with whom he has made a prior agreement to consign the same to him or to another, it follows that, if he consign to the former, he may impose any conditions upon the consignment he choose, and that such consignee can acquire title to the property only by observing such conditions." Krebs could have notified respondent that he required him to sell this whisky, and apply the proceeds at the rate of $10, or any other sum per gallon; or he might have notified him that he desired him to hold it as security, or he could have imposed any condition, however unreasonable, upon its receipt or acceptance. The freight was not prepaid. Respondent might have refused to pay it, and he might have refused to credit the property, or its value, upon the indebtedness, and he had no right to make a credit until an agreement was arrived at between him and the consignee as to the amount of credit to be given for it. There must be an acceptance as well as a delivery. No such appropriation of the property was made as is necessary to complete a bargain and sale, and the delivery of possession to the purchaser.

The question of stoppage in transitu does not enter into the determination of this case. Benjamin on Sales, p. 855. Our views of the law are supported by ample authority. First National Bank of Helena v. McAndrews, 5 Mont. 325, 5 Pac. 879, 51 Am. Rep. 51, is directly in point. In that case the Northwestern Company was a producer of bullion. It had an express contract with the First National Bank of Helena that, in consideration of advances to be made by the bank to the company in carrying on its mining operations, it would ship to the bank its products to be credited to its account. It made a shipment of bullion at a time when indebted on account of such advances to the bank in the sum of $6,000. The bullion was shipped, marked and consigned to the bank and placed in possession of a common carrier, the freight to be paid at Helena by the bank, upon receipt of the bullion, and charged to the account of the company. The bullion was to be credited upon a sale to such account. While in possession and custody of the carriers en route to its destination it was attached at the suit of one L. against the company. The bank brought an action in claim and

delivery against the officers who levied upon the bullion. Judgment was rendered in favor of the bank. On appeal the judgment was reversed, and in the course of its opinion the court says: "The bullion in question having been 'billed, shipped, marked and consigned' to the respondent under and by virtue of the contract mentioned in the findings of fact by the court, and placed in the possession of the common carrier, did the possession of and property in the bullion thereby become vested in the respondent, or did such possession and property remain with the Northwestern Company until the bullion had actually been received by the respondent and credited to the account of the company? There was no bill of lading transmitted to the bank, and no letter or notice informing it that the bullion had been shipped. The advances by the bank had been made prior to the shipment, and the situation was as if the shipment had been made under a contract in satisfaction of antecedent advances. We shall have to consider what effect the absence of a bill of lading and of notice of the shipment to the bank had upon the rights of these parties. A bill of lading is a commercial instrument, and is a written acknowledgment signed by the master of a vessel or by a common carrier that he has received the goods therein described by the shipper, to be transported on the terms therein expressed to the described place of destination, and there to be delivered to the consignee or parties therein designated. Abb. Ship. (7th Am. Ed.) 323; O'Brien v. Gilchrist, 34 Me. 558, 56 Am. Dec. 676; 1 Pars. Ship. 186; Maclachlan, Ship. 338; Emerigon, Ins. 521. A bill of lading is a symbol of the ownership of the goods covered by it; a representative of the goods. It is regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bill of lading which covers it. Shaw v. Railroad Co., 101 U. S. 564, 565, 25 L. Ed. 892. Hence it is held by the authorities that the transmission of a bill of lading by the consignor to the consignee is a delivery of the possession of the goods covered by it, and that thereby the title to the property passes from the consignor to the consignee. See Haille v. Smith, 1 B. & P. 563; Desha v. Pope, 6 Ala. 690, 41 Am. Dec. 76; Gibson v. Stevens, 8 How. 384, 12 L. Ed. 1123; Grove v. Gilmore, 8 How. 429, 12 L. Ed. 1142; Bryan v. Hix, 4 Mees. & Wels. 775; Anderson v. Clark, 2 Bing. 20; Holbrook v. Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607; Grosvenor v. Phillips, 2 Hill (N. Y.) 147; Sumner v. Hamlet, 12

Pick. (Mass.) 76; Nesmith v. Dyeing Co., 1 Curtis 130, Fed. Cas. No. 10,124; Valle v. Cerre's Adm'r, 36 Mo. 575, 88 Am. Dec. 161. The transmission of a bill of lading amounts to the actual delivery of the possession of the property described in it, and is a compliance with the statute of frauds as to the sale and delivery of property. The contract mentioned in the findings was an executory contract, to be completed by the delivery of the bullion therein described. Knight, the cashier of the bank, testifies that the bullion was to be delivered to the bank at Helena. In the absence of a bill of lading or a letter, or notice from consignor to consignee informing him of the shipment of bullion, is the fact that the bullion in question was 'billed, shipped, marked and consigned' to the respondent such an appropriation of the property to the contract as completes a bargain and sale, and delivers the possession thereof to the purchaser? If the consignor had done some conclusive unconditional act, by which the consignee was, or was to be, informed that the bullion shipped was to be applied on the consignor's account for money advanced, then undoubtedly the delivery of the property to the common carrier, properly marked and addressed, would have been a delivery to the consignee, and an appropriation of the property to the contract. But the mere shipment of the property without notice was not such conclusive act. The shipment did not bind the consignor. He did not thereby lose his control over the property. He might have stopped it while enroute to its destination, and sent it to some other place or person. By the terms of the contract the company, the consignor, was to pay the freight, and the bullion was not to be credited to the account of the company until it had been received and sold by respondents. There was something to be done besides a delivery to respondent. 'Said bullion was to be credited to the account of the company upon a sale thereof by plaintiff.' The respondent had no right to make this credit until a sale of the bullion. When the property was sold, the proceeds belonged to the respondent. If there was to be no credit until a sale, what property passes until a sale has been made? There must be an acceptance as well as a delivery. Suppose this bullion had been 'billed, shipped and marked' at double its value, would the consignee have been bound by the valuation of the consignor? The carrier had no right to accept of the property for the consignee. The value was to be ascertained by a sale, and then, and not until then, had the consignee any right to make the credit.

* * * * If there was a mere agreement to ship goods or produce to pay for advances, the property shipped would not belong to the consignee until actually received and possessed by him; but if the agreement appropriates specific property to the payment of such advances, and such appropriation is evidenced and authenticated by a bill of lading, then the title of the property passes to the consignee by a delivery thereof to the carrier." And the court proceeds: "The rule seems to be that, in order to change the title to the property shipped and vest it in the consignee, there must be a bill of lading, receipt, or letter of information forwarded to the consignee, or that the advancements were made upon the faith of the particular consignment. * * * A person cannot become a purchaser without his knowledge and consent. There must be an acceptance and delivery of possession. If this were a purchase there was no acceptance of the property by the purchaser. He had never seen the property. It had never been in his possession. He did not have any notice of the shipment. He could not accept the goods even by a carrier appointed by himself. * * * We do not know upon what principle a consignee or other person can be made the purchaser of property that he has never seen or accepted, and to which possession was never delivered either actually or constructively." The same doctrine is announced in Hodges & Co. v. Kimball & Farnsworth, 49 Iowa 577, 31 Am. Rep. 158. We refer to the Montana and Iowa cases for a review of the authorities on this subject. See also, Borland v. Bank, supra.

We conclude that the property from the time that the receiver gave notice to the common carrier was in the custody of the law, and that the courts of this state had no right to interfere by an action of claim and delivery. That property in the custody of the court cannot be taken by replevin process issued by another court is elementary. We find a large number of authorities holding, on somewhat similar facts, that the title had passed or the right to possession was in the consignee, but in all such cases which we have seen the decisions are based upon a delivery of a bill of lading, or its equivalent, or some other material fact, lacking in the case at bar. No question is made as to the regularity or validity of the proceedings in bankruptcy, and it is agreed that the value of the property is $600.

This conclusion makes it unnecessary to review the other questions discussed by the parties; in fact, renders it improper for us to

decide the case upon its merits as that is the province of the bankruptcy court.

The judgment is reversed.

All concur..

MORGAN, C. J., not particpating on account of illness.

121 N. W. 205.

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OLIVIA SJOLI v. E. K. HOGENSON, S. J. GRINDE, BEN TRONSLIN, JOHN SZARKOWSKI AND CYRUS RITCHEY.

Opinion filed July 1, 1909.

On petition for rehearing October 21, 1909.

**Probate Law — Decree of Distribution — Action on Administrator's Bond — Decrees of County Court Rank as Judgments.**

1. The suit is brought to recover a balance claimed to be due plaintiff as heir at law of said C. Gunderson, deceased, decreed to her by a final decree of distribution made by said county court. *Held,* that a final decree of distribution entered by county courts in this state distributing the estate of a deceased person to the heirs at law, is of equal rank with judgments entered by courts of record in this state, and that a distributee named in said final decree of distribution can maintain an action against the executor or administrator, or the bondsmen of the executor or administrator, or both, for the share assigned to said distributee by the said final decree of distribution.

**Probate Law — Decrees Conclusive Against Bondsmen.**

2. Such final decree of distribution is conclusive as against the bondsmen, as well as the administrator, and imports the same degree of verity as judgments entered by courts of record in this state.

**Payment of Residue — Receipts — Fraud.**

3. A receipt obtained from a distributee through fraud and misrepresentation is invalid, and open to explanation and impeachment.

**Words and Phrases —"Payment"—Promissory Note in Settlement—Effect of.**

4. A payment means a payment in money. If paid by promissory note, or anything else than cash, it must be accepted by the payee as payment. *Held,* under the evidence in this case, that the so-called promissory note given by the administrator to plaintiff's husband, did not constitute a payment.

**Words and Phrases—"Decree of Distribution"—Rights of Distributees.**

5. A "decree of distribution" is an instrument by virtue of which heirs receive the property of the deceased. It is the final determination of the rights of the parties to a proceeding, and, upon its entry, their rights are thereafter to be exercised by the terms of the decree.

Appeal from District Court, Walsh county; *W. J. Kneeshaw,* J.

Action by Olivia Sjoli against E. K. Hogenson and others.

Judgment for defendants and plaintiff appeals. Reversed.

*Townley & Frankberg* and *H. A. Libby,* for appellant.

Sureties on an administrator's bond may be jointly and severally sued in district court. Joy v. Elton, 83 N. W. 875; 9 N. D. 428; Berryhill's Administratrix's Appeal, 35 Pa. St. 245; Irwin, Administrator, etc., v. Backus et als., 25 Cal. 214; Mortenson v. Bergthold, 89 N. W. 742; Bryant v. McIntosh, 84 Pac. 440; State v. Bennett, 24, Ind. 383.

Judgment of county court may be attacked in district court for fraud. Joy v. Elton, supra; Berryhill's Administratrix's, App. supra; Irwin v. Backus et al., supra.

Final decree of distribution is conclusive on bondsmen. Mortenson v. Bergthold, 89 N. W. 742; Joy v. Elton, supra; 18 Cyc. 1272-5, and cases cited.

Discharge is no bar to action for default prior thereto. Bryant v. McIntosh, 84 Pac. 440; Mortenson v. Bergthold, 89 N. W. 742; Joy v. Elton, supra.

Discharge obtained by fraud is no bar. Pollock v. Cox, 34 S. E. 213; 18 Cyc. 609 (3).

*Jeff M. Meyers, E. R. Sinkler,* and *J. E. Gray,* for respondents.

A determination of the county court is res adjudicata not liable to collateral attack. 18 Cyc. 1192; Joy v. Elton, 9 N. D. 428; Smith v. Hanger, 51 S. W. 1052; State v. Carroll, 74 S. W. 468; Tobelman v. Hildebrandt, 14 P. 20; State v. Gray, 17 S. W. 500; Carven v. Lewis, 2. N. E. 705; Carven v. Lewis 2 N. E. 714.

Final settlement of an account precludes action on bond unless directly attacked in a proper proceeding. 18 Cyc. 1262; 2 Woener 570 (2d Ed.); Smith v. Eureka Bank, 24 Kan. 428; Diehl v. Miller, 9 N. W. 240; Proctor v. Dicklow, 45 P. 86; Debrells v. Ponton, 27 Tex. 623.

CARMODY, J. This action is brought against the defendants as bondsmen of Gilbert R. Gullickson, administrator of the estate of Christian Gunderson, by Olivia Sjoli, daughter and one of the heirs at law of Christian Gunderson, to recover the sum of $1,386, claimed to be the amount due her as heir at law of said Christian Gunderson.

The action was tried to a jury, and at the close of the testimony both parties moved for a directed verdict. The trial court granted the motion of defendants, and directed the jury to return a verdict in their favor. Such verdict was returned. In due time plaintiff made a motion for judgment in said action notwithstanding the verdict, or for a new trial, which motion was denied. Plaintiff appeals to this court from the order denying such motion.

A decision of this case will involve a consideration of the following facts: On March 13, 1901, one Christian Gunderson died intestate in Walsh county, N. D., leaving property therein and leaving this plaintiff as one of his heirs at law entitled to one-sixth of his estate. On June 22, 1901, one Gilbert R. Gullickson, of Grafton, N. D., was appointed administrator of said estate, and furnished a bond in the sum of $6,000 with defendants E. K. Hogenson and S. J. Grinde as sureties thereon, and letters of administration were issued in said estate. On January 27, 1902, an order was made for the sale of land in said estate, which order required an additional or sale bond in the sum of $14,000, which was furnished by said administrator with defendants, Ben Tronslin, John M. Szarkowski, and Cyrus Ritchey, as sureties thereon, and thereafter a sale of said real estate was made and duly confirmed. On March 8, 1902, the said adminstrator filed in the county court of Walsh County, in said estate, his final report and account and petition for distribution, which account showed a balance of $8,376 in his hands as such administrator for distribution among the heirs. It also stated the names of the heirs, and the amount each was entitled to. Said county court issued a notice of hearing on said final account and petition for distribution on April 26, 1902, and a notice of said hearing was published as provided by law. On said 26th

day of April, the hearing of said matter was postponed to May 19, 1902, at which time the following was added to said final account: "The attached vouchers show that $8,316 have been paid to above heirs since filing report, leaving a balance of $60 to be divided in like proportions, corrected 5-19-'02, or that such further order may be made as is meet in the premises."

On May 19, 1902, the county court made an order allowing said final account, which, so far as material here, is as follows: "Now, on this day aforesaid, being a day of the regular or May term, A. D. 1902, of this court, it duly appearing to the court, after having fully examined the said account and the vouchers produced in support thereof, that the said account contains a just and full account of all moneys received and disbursed by said Gilbert R. Gullickson, administrator of said estate, from the 22d day of June, A. D. 1901, to the 8th day of March, A. D. 1902; that all the necessary and proper vouchers were produced and filed herein. That the total amount received by said Gilbert R. Gullickson as such administrator is $9,788.50, and full amount expended, $9,728.50, leaving a balance of $60. Said amount of $60 in hands of administrator is due and owing to the heirs at law of said estate, and, upon administrator filing vouchers for said amount, he and his sureties on his several bonds shall be relieved from any subsequent liability to be incurred, and that said account is entitled to be allowed and approved; and the court having duly considered the matter aforesaid, it is ordered and decreed that the said final report and account be, and the same hereby is, in all respects as the same was rendered and presented for settlement, approved and settled."

On the same day a final decree of distribution in said estate was made, and, so far as material here, reads as follows: "Now, therefore, on the petition of Gilbert R. Gullickson, administrator of the estate of Christian Gunderson, deceased, and pursuant to due notice and the law in such case made and provided, it is ordered, adjudged and decreed, and this court, by virtue of the powers and authority vested in the same by law, doth hereby order, adjudge and decree that all and singular of the above described personal property be, and the same hereby is, assigned to and vested in the said Nels Burtness, Mrs. Olivia Sjoli, Mrs. Karen Kopperud, Mrs. Aneta Oas, Mrs. Gunda Freedland, Gust Embertson, Otilia K. Knudson, Gaatfred K. Knudson, forever, in the following proportions, towit:

| | | |
|---|---|---|
| Nels Burtness ..... | $1,396.00 | Same being 1-6 |
| Mrs Olivia Sjoli ..... | 1,396.00 | Same being 1-6 |
| Mrs. Karen Kopperud ..... | 1,396.00 | Same being 1-6 |
| Mrs. Anetta Oas ..... | 1,396.00 | Same being 1-6 |
| Mrs. Gunda Freedland ..... | 1,396.00 | Same being 1-6 |
| Gust Embertson ..... | 465.33 1-3 | |
| Otilia K. Knudson ..... | 465.33 1-3 | |
| Gaatfred K. Knudson ..... | 465.33 1-3 | |

"To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to the said above named persons, and their heirs and assigns, forever.

"And it is hereby directed and ordered, that Gilbert R. Gullickson, administrator of the estate of Christian Gunderson, deceased, shall immediately or as soon as conveniently can be, pay and deliver to the above named persons their respective parts or portions of the residue of the said estate as hereinbefore decreed and assigned, and take their receipt therefor, and that, upon the payment and delivery of the residue of said estate as aforesaid, and upon filing due and satisfactory vouchers and receipts therefor in this court, the said Gilbert R. Gullickson, administrator of the estate of Christian Gunderson, deceased, shall be fully and finally discharged from his trust as such administrator."

That afterwards and on the 26th day of July, 1902, a final discharge of the administrator was made in said estate, which, so far as material here reads as follows: "Gilbert R. Gullickson, administrator of the estate of Christian Gunderson, deceased, having this day duly presented to and filed in this court satisfactory vouchers, showing that he has paid all sums of money due from him and has delivered up, under the order of this court, all moneys and property of the said estate remaining in his hands, to the parties entitled thereto, in accordance with the directions of the decree of distribution made by this court on the 19th day of May, A. D. 1902. Now, on motion of Gilbert R. Gullickson, administrator aforesaid, it is ordered, adjudged and decreed that the said Gilbert R. Gullickson, administrator of the estate of said Christian Gunderson, deceased, having brought the administration of said estate to a close, his letters of administration of the estate of Christian Gunderson, deceased, are hereby vacated; and the said Gilbert R. Gullickson,

administrator aforesaid, and his sureties, are hereby released from any liability to be hereafter incurred." That previous to this discharge the administrator paid to plaintiff the sum of $10 and obtained her receipt therefor, which he filed in said county court.

Plaintiff and her husband lived on a farm in Ottertail county, Minn. Neither could read nor write the English language. In April, 1902, the administrator went to Fergus Falls, Minn., where plaintiff and her husband met him as per request by letter. He obtained a voucher or receipt for $1,386, which is in part as follows: "This being one-sixth part of said estate which is all I am entitled to as shown by the final report."

On the same day the administrator handed to the husband of plaintiff a paper which, so far as material here, reads as follows: "North Dakota. $1,386.00. Fergus Falls, Minn., April 1902, on or before October 1st, 1902, I promise to pay to the order of Peder O. Sjoli at Fergus Falls, Minn., for value received, thirteen hundred and eighty-six and no hundredths dollars out of the C. Gunderson estate, as soon as this amount is collected, on account due the estate with annual interest at the rate of 6 per cent from date until maturity, and 6 per cent after maturity, payable annually until fully paid. Interest not paid when due shall bear interest at the rate of 6 per cent per annum until paid. G. R. Gullickson, Administrator of Christian Gunderson Estate."

This paper, defendants contend, is a promissory note extending the time of payment of plaintiff's share of the said estate, and releases the defendants. Neither the plaintiff nor her husband knew the contents of it. In fact, the plaintiff did not see the paper until after she returned to her home. Afterwards, Gullickson, the administrator, went to Texas. On March 28, 1903, he wrote plaintiff's husband a letter in which he stated in substance that he would send the money just as soon as he could get it from other parties whom he claimed had the money. He afterwards returned to Grafton and on May 2, 1904, wrote plaintiff's husband another letter in which he stated that he would send the money as soon as he could get it from the man who had it. In July or August, 1904, one Gust Embertson, went to Grafton; plaintiff and her husband gave him the so-called promissory note, and instructed him to see about getting the money due plaintiff from Gullickson as administrator of her father's estate. On August 20, 1904, Gullickson wrote plaintiff's husband a letter in which he stated that he had met Embertson, and that he would fix

the matter up much sooner that it could be enforced by process of law. All these letters were written in the Norwegian language. About this time the so-called note was turned over to plaintiff's attorneys for collection, as well as the matter of collecting the money from defendants. The administrator, Gullickson, died in the winter or spring of 1905.

The following sections of the Revised Codes of 1905 are applicable to the facts in this case:

"Sec. 7898. The proceedings of a county court in the exercise of its jurisdiction are construed in the same manner and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders and decrees there is accorded like force, effect and legal presumptions as to the records, orders, judgments and decrees of courts of general jurisdiction."

"Sec. 8067. An executor, administrator or guardian may at any time present to the county court a petition praying that his account may be settled and that a decree may thereupon be made revoking his letters and discharging him accordingly. The petition must set forth the facts upon which the application is founded; but the application shall not be entertained while a proceeding is pending for the removal of the executor, administrator or guardian, or if in the opinion of the judge there is good cause for his removal or other sufficient cause for refusing to entertain the same."

"Sec. 8068. If the court entertains such application, a citation must issue to all parties interested in the estate. At the hearing any creditor or other person interested may allege cause for denying the application, or allege cause for his removal and pray relief accordingly. Upon a trial of the issue if the court determines that sufficient cause exists for granting the application the petitioner must be allowed to account; and after he has fully accounted and paid over all money which is found to be due from him to the estate and delivered over all books, papers and other property of the estate in his hands as the court directs a decree shall be made discharging him and revoking his letters, otherwise such decree shall be as justice requires."

"Sec. 8199. The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive evidence against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or to preceed by action

against the executor or administrator, either individually or upon his bond, at any time before final settlement; and in any action brought by any such person, the allowance and settlement of such account is prima facie evidence of its correctness."

"Sec. 8208. Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the petition of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator among the persons who by law are entitled thereto; and if the decedant has left a surviving child and the issue of other children, and any of them before the close of the administration have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate that such deceased child was entitled to by inheritance, must without administration be distributed to the other heirs at law. A statement of any receipts or disbursements of the executor or administrator since the rendition of his final accounts must be reported and filed at the time of making such distribution and a settlement thereof, together with an estimate of the expenses of closing the estate must be made by the court and included in the order or decree or the court or judge may order notice of the settlement of such supplementary account and refer the same as in other cases of the settlement of accounts."

"Sec. 8211. In the decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for and recover their respective shares from the executive or administrator or any persons having the same in possession. Or the court may order a partition and after such further proceedings as may be necessary under the following sections shall make a further decree assigning to each party his separate share and confirming the distribution accordingly."

"Sec. 8212. All questions as to advancement made or alleged to have been made by the decedant to his heirs may be heard and determined by the county court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the court or in case of any appeal of the district court or Supreme Court, is binding on all parties interested in the estate."

Upon all the evidence counsel for defendants made their motion for a directed verdict upon the following grounds:

"(1) The complaint fails to allege, and the evidence to show, that any demand was ever made upon the defendants' principal, G. R. Gullickson; in fact, the evidence affirmatively shows that no demand was ever made.

"(2) The complaint fails to allege, and the evidence to show, the recovery of a prior judgment against the defendants' principal in view of the fact that neither such principal nor his personal representative is a party to this action; in fact, the evidence affirmatively shows that no such judgment has been recovered.

"(3) The complaint fails to state, and the evidence to establish, that the entry of the order of the county court of this county was procured through any fraud practiced by the defendant's principal upon that court, or through collusion by said principal with said court, and the evidence showing affirmatively that all the conditions thereof have been complied with, the same constitutes an unsurmountable barrier to a recovery herein.

"(4) The complaint fails to allege, and the evidence to show, that the contract entered into between defendants' principal and plaintiff, whereby plaintiff, in consideration of such principal's promise to pay her as soon as he should collect out of the estate, acknowledged receipt of the amount sued for, has been rescinded by her; it affirmatively appearing from the evidence that such contract and the promissory note evidencing the same is a valid and enforceable personal obligation as against the estate of G. R. Gullickson, deceased, and, so long as the same stands unrepudiated, an insuperable obstacle to the prosecution of this action, * * * and on the further ground that the undisputed evidence shows that any cause of action which plaintiff may have had is barred by the judgment and decree of the county court of Walsh county, set out in defendants' answer."

The decisive question for determination in this court is whether the refusal of the trial court to direct a verdict in favor of the plaintiff was error. To this question, in our opinion, an affirmative answer must be given. Having reached this conclusion it is unnecessary to consider any of the other assignments of error. The undisputed evidence shows that the administrator obtained the receipt or voucher for $1,386 from plaintiff by deceit and fraud. Neither she nor her husband could read the English language. He represented to them that it was necessary for her to sign this paper before she could get her money, and that the other heirs had already

signed similar papers for the same reason. The so-called promissory note, made payable to and delivered to plaintiff's husband, was given to him through deceit and fraud. The administrator gave it to him when his wife was not present and stated to him that it was a paper that showed how much plaintiff had coming from her father's estate. Plaintiff knew nothing about it until after she and her husband returned to their home on April 7, 1902. The administrator, Gullickson, kept up the fraud and deceit by writing the letters hereinbefore mentioned. It is elementary that a receipt obtained from the distributee through fraud and misrepresentations is invalid, and open to explanation or impeachment. Ross v. Smith, 47 Ill. App. 197. See, also, 18 Cyc. 609, 610, and cases cited. The so-called promissory note given by the administrator, Gullickson, to plaintiff's husband was not a payment. A payment means a payment in money. If paid by promissory note, or in anything else than cash, it must be accepted by the payee as payment. In the case at bar the so-called promissory note was not given to the plaintiff, but to her husband. Neither she nor her husband knew its contents, and she never accepted it as payment. The distributee may demand, sue for, and recover, her share from the executor or administrator, or any person having the same in possession. See section 8211, supra. Section 8212, supra, provides, after stating what must be contained in the final decree of distribution, that the final judgment or decree of the court, or in case of an appeal to the district court or supreme court, is binding on all parties interested in the estate. Decree of distribution in estate of deceased is conclusive upon the rights of heirs, legatees and devisees. Dallie v. Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61; Wm. Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323; Crew v. Pratt, 119 Cal. 139, 51 Pac. 38; Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561; Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am St. Rep. 145; In re Trescony's Estate, 119 Cal. 568, 51 Pac. 951; Jewell v. Pierce, 120 Cal. 79, 52 Pac. 132; Toland v. Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100; Smith v. Vandepeer, 3 Cal. App. 300, 85 Pac. 136. See also, notes 48 Am. Dec. 744-747; 60 Am. St. Rep. 634; Kauffman v. Foster, 3 Cal. App. 741, 86 Pac. 1108.

In re Trescony's Estate, supra, the Court said: "The decree of distribution was a judicial construction of the will of the decedent, and the determination by the court, as well of the persons who were entitled to his estate, as of the proportions or parts to which

each of those persons were entitled, and was 'concluusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.'"

The decree of distribution is an instrument by virtue of which heirs receive the property of the deceased. It is the final determination of the rights of the parties to a proceeding, and, upon its entry, their rights are thereafer to be exercised by the terms of the decree. There is another reason why the final decree of distribution in the estates of deceased persons must be held conclusive. Under our probate system, all deraignment of title to the property of deceased persons is through the decree of distribution, entered as a final act in the administraion of an estate, whether testate or intestate. No one will contend that this decree can be made by any other court or in any other proceeding. It constitutes not only the law of the personalty, but also of the real estate. Toland v. Earl, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 100, supra. A decree of distribution has, in most respects, all the efficacy of a judgment at law or decree in equity. An action may be maintained upon it for noncompliance with its requirements, and there is no greater necessity for a demand before bringing action than exists in case of suit upon an ordinary judgment at law, or before issuing an execution upon a judgment. Melone v. Davis, 67 Cal. 279, 7 Pac. 703. When a decree of distribution has been made the probate court has no longer jurisdiction of the property distributed, and the distributee thenceforth has an action to recover his estate, or, in proper cases, its value. Wheeler v. Bolton, 54 Cal. 302; Mortenson v. Bergthold, 64 Neb. 208, 89 N. W. 742; Bryant, et al. v. McIntosh, 3 Cal. App. 95, 84 Pac. 440. If an executor or administrator had possession of property, his duty is not ended until he has delivered the property in accordance with the decree of distribution. Wheeler v. Bolton, supra; Mortenson v. Bergthold, supra; Bryant, et el. v. McIntosh et al., supra.

In an action against an executor or administrator for failure to obey the final decree, and turn over the property to the party entitled thereto, the judgment is sufficiently supported by proof of the decree of distribution, and the failure of the executor or administrator to pay to the plaintiffs the amount due thereunder. Bryant et al. v. McIntosh et al., supra; Irwin v. Backus, 25 Cal. 214, 85 Am. Dec. 125. Sureties of the deceased executor or administrator are not discharged at his death, with respect to his acts or defaults concerning the estate in his lifetime. 18 Cyc. 1262, and cases cited in

note thereto. The failure or refusal of an administrator to pay over or distribute the estate as required by the decree of distribution is a breach of the bond for which he and his sureties are responsible. 18 Cyc. 1270, and cases cited in note 73.

In an action against the sureties on an administrator's bond, for a breach of the bond by the principal, the proceedings taken in the probate court in passing on an account rendered by the administrator, and the decree rendered therein directing the administrator to pay over a sum found remaining in his hands, are admissible in evidence against the sureties, although the sureties were not parties to the same. Such decree is equally conclusive upon the administrator and his sureties, and, upon the refusal of the administrator to obey the same, the liability of the sureties attaches, and they cannot go behind the decree to inquire into the merits of the matter therein passed on. Joy v. Elton, 9 N. D. 428, 83 N. W. 875; Erwin v. Backus, 25 Cal. 214, 85 Am. Dec. 125; 18 Cyc. 1272, and cases cited. Holden v. Curry et al., 85 Wis. 504, 55 N. W. 965; Jenkins v. State, 76 Md. 255, 23 Atl. 608.

In an action on an administrator's bond, a judgment or decree against the executor or administrator is considered, by the preponderance of authority, as conclusive evidence against the sureties, though they were not parties to the proceeding in which the judgment or decree was rendered. 11 Am. & Eng. Ency. of Law (2d Ed.) 901, and cases cited in note 2. The final decree sued on not being invalid we shall hold that it is conclusive, and imports the same degree of verity as judgments entered by courts of record in this state. It is contended that the order of the county court, made on the 26th day of July, 1902, discharging the administrator, G. R. Gullickson, from his trust, and releasing him and his sureties from all liability thereafter incurred, is a complete defense to this action. A complete answer to this contention is that the said discharge was made ex parte and without notice to the parties interested in said estate. See, however, Pollock v. Cox, 108 Ga. 430, 34 S. E. 213; Bryant et al. v. McIntosh et al., 3 Cal. App. 95, 84 Pac. 440. Respondents strenuously contend that the order by the county court on May 26, 1902, settling the account adjudicated the matters of the payments claimed to have been made between March and May, 1902, and settled the account upon the basis of such payments haing been made, rendering the question of such payments

res judicata. It may be that an order allowing a final account, which final account contains only proper items, is final and conclusive.

In the case at bar the administrator filed a final account on March 8, 1902, which showed a balance of $8,376 in his hands to be distributed to the heirs at law. On May 19, he attached the following addenda to the said final account: "The attached vouchers show that $8,316 have been paid to above heirs since filing the report, leaving a balance of $60 to be divided in like proportions. Corrected 5-19-'02." This last had no place in the final account. The only proper items to be included in the supplementary final account are a statement of the receipts and disbursements since the rendition of the final account, together with an estimate of the expenses of closing the estate. Disbursements, in this connection, mean the payment of claims or expenses of administration. The administrator has no right to pay any money to any of the heirs at law until the final decree of distribution is made, except that, after the lapse of time limited for filing claims, any heir, devisee, or legatee, may present to the county court a petition for the legacy or share of the estate to which he is entitled. Notice must then be given to all parties interested in the estate, and the county court may, on hearing, order all or a portion of his share of the estate assigned to the petitioner. The petitioner must also give a bond conditioned for the payment of his proportion of the debts due from the estate.

The cases cited by the respondents in support their contention that the order allowing the final account is res judicata, do not apply to the facts in this case. Smith v. Hauger, 150 Mo. 437, 51 S. W. 1052, only decides that a judgment of the probate court, finally settling and distributing the estate, discharging the executor without objection from a specific legatee, is a final judgment. In that case the specific legatee stood by and consented to the final settlement and distribution of the estate without demanding his legacy, because of a verbal agreement between himself and the other legatees that they would pay his legacy. A year afterwards, the other legatees not having paid his legacy, he asked the probate court to disregard the final settlement. Held he was estopped.

In Tobelman v. Hildebrandt et al., 72 Cal. 313, 14 Pac. 20, the action was brought by plaintiff against the administrator and his bondsmen after an estate had been settled and closed, alleging that the administrator owed the deceased, in his lifetime, $10,000, on a promissory note which the administrator failed to inventory or ac-

count for in the settlement of the estate. Plaintiff knew of these facts long before the settlement and disribution was made. Held she could not maintain the action. Nearly all the cases cited by respondents are cases where the executor or administrator was sued after the estate was settled or distributed for not collecting all the property of the deceased, or omitting some of it from the inventory, and, in all, the facts differ from the facts in the case at bar.

The complaint alleges and the evidence shows that, before the commencement of this action, demand was made upon the defendants for the payment of the amount herein sued for.

The district court is directed to reverse its judgment, and render a judgment in favor of plaintiff for the amount sued for in this action.

All concur, except MORGAN, C. J., not participating.

ON PETITION FOR RE-HEARING.

CARMODY, J. In this case the defendants have filed a petition for rehearing, urging, among other points, that the decision of the court filed herein, by necessary implication, holds that an order settling an administrator's account can be collaterally impeached for other than jurisdictional reasons. In this they are mistaken. The final account of the administrator, as filed, and on which the notice of hearing was made, showed, as it should, that there was a balance of $8,376 in his hands for distribution to the heirs. On May 19, 1902, the day to which the hearing was adjourned, the administrator added to the said final account the following: "The attached vouchers show that $8,316 have been paid to above heirs since filing the report, leaving a balance of $60 to be divided in like proportions. Corrected 5-19-'02." For the reason stated in the opinion this last had no place in the final account. On the same day, and afterwards, the county court of Walsh county made its final decree of distribution in this estate, in which it decreed and gave to the heirs $8,376 or $1,396 each, only $10 of which was ever paid to this plaintiff.

Section 8208 of the Revised Codes of 1905, as far as material here provides:

"Upon the final settlement of the accounts of the executor or administrator or at any subsequent time, upon the petition of the executor or administrator, or of any heir, legatee or devisee, the

court must proceed to distribute the residue of the estate in the hands of the executor or administrator among the persons who are by law entitled thereto."

Section 8211 of the same Code, as far as material here, provides: "In the decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for and recover their respective shares from the executor or administrator or any person having the same in possession."

It is undisputed that the administrator did not obey the final decree, in that he failed to pay to the plaintiff $1,386 of her distributive share, which failure to pay is a violation of the final decree, and a breach of his bond; hence plaintiff can maintain this action, and the court should have directed a verdict in her favor for the said sum of $1,386. The order of the county court settling the final account relieved the administrator and his bondsmen from any subsequent liability to be incurred. The liability to pay the $1,396 was previously incurred, hence by that order the administrator and his bondsmen were not relieved from that liability, and, he having paid plaintiff but $10, the defendants, his bondsmen, are liable to her for the balance of $1,386.

In their answer the defendants set up, as a defense, an order made by the said county court on the 26th day of July, 1902, discharging the administrator, G. R. Gullickson, from his trust, and releasing him and his sureties from all liability thereafter incurred. In the opinion filed in this case, the court says: "A complete answer to this contention is that the said discharge was made ex parte and without notice to the parties interested in said estate." Defendants contend in their petition for rehearing that it was not an ex parte order; that the citation upon which the order allowing the final account was made and the final decree of distribution entered, cited the appellant to show cause why the administration of the said estate should not be closed and the administrator discharged. Section 8196 of the Revised Codes of 1905, as far as material here, provides: "If from any cause the hearing of the account or the petition and distribution be postponed, the order postponing the same to a day certain is notice to all persons interested therein." The citation was returnable on the 26th day of April, 1902, on which day an order was made postponing the hearing to May 19, 1902, on which day the order allowing the final account and the decree of the distribution were made. No further post-

ponement was had; hence the order discharging the administrator and releasing his sureties from liability thereafter incurred made on the 26th day of July, 1902, not being on a day certain to which the hearing was postponed, was made ex parte. The defendants contended that, even if the order was made ex parte, it was valid until it was vacated in a direct proceeding. Admitting this to be true, it does not help the defendants in this action, as the discharge at best only released the administrator and his sureties from any liability to be thereafter incurred, and, as hereinbefore stated, the liability to this plaintiff was incurred prior to that time.

In the original opinion this court says: "The so-called promissory note given by the administrator, Gullickson, to plaintiff's husband, was not a payment. A payment means a payment in money. If paid by promissory note, or anything else than cash, it must be accepted by the payee as payment. In the case at bar the so-called promissory note was not given to the plaintiff, but to her husband; neither she nor her husband knew its contents, and she never accepted it as payment." Defendants, in their petition for rehearing, contended that no claim was made by them that the note referred to was given or received as payment, but that plaintiff could not retain the note and at the same time maintain this action. True, defendants did not claim that the so-called promissory note was given or received as payment, but did and do claim that plaintiff could not retain Gullickson's note and at the same time maintain this action. Plaintiff, the appellant herein, contended in her brief that the note was neither accepted nor received in payment, and this court sustained her contention. Defendants are not in a position to claim that plaintiff cannot retain Gullickson's note, and at the same time maintain this action; plaintiff could neither read nor write the English language, and did not know the contents of the so-called promissory note. Gullickson told her husband, when he handed it to him, that it was a paper to show how much was to come out of the estate; she never at any time waived any of the conditions of the final decree of distribution. The defendants have not in any way been prejudiced by her retaining the so-called note, and do not come within the provisions of section 5380 of the Revised Codes of 1905.

The petition is denied. All concur, except MORGAN, C. J., not participating.

122 N. W. 1008.

## The City of Mayville v. C. A. Rosing.

Opinion filed November 6, 1909.

**Municipal Corporations — Fire Limit Ordinances.**

1. A city ordinance, enacting that it shall be unlawful to construct any wooden building within the fire limits of the city, is not violated by a repairing or remodeling of a wooden building, unless it is done to the extent of substantially erecting a "new building," as that word is commonly understood.

**Same — Ordinances — Construction of Terms.**

2. Before an ordinance declaring it unlawful to construct any wooden building within the established fire limits of the city is violated, the act must be brought within the terms of the ordinance, or synonymous terms, or terms included within the terms of the ordinance.

3. If the terms of such an ordinance be liberally construed, there can be no conviction thereunder based solely on the fact that the acts are within the spirit or purpose of the ordinance.

4. Facts stated in the opinion *held* not to show a violation of an ordinance declaring it unlawful to construct a wooden building within the fire limits of the city.

Appeal from District Court, Traill County; *Pollock*, Judge.

Action by the City of Mayville against C. A. Rosing. Judgment for plaintiff, and defendant appeals. Reversed and action dismissed.

*Engerud, Holt & Frame*, for Appellant.

To constitute a new building there must be a substantial addition of material parts. Miller v. Hershey, 59 Pa. St. 64; Driesbach v. Kellar, 2 Barr. 79; Landis' Appeal, 10 Barr. 379; Armstrong v. Ware, 20 Pa. St. 519, 8 Harris, 519; Combs v. Lippincott, 35 N. J. L. 481; City Council v. L. & N. R. Co. (Ala.), 4 So. 626; Booth v. State, 4 Conn. 65; Tuttle v. State, 4 Conn. 68; Kaufmann v. Stein, 37 N. E. 333; 13 Am. & Eng. Encycl. of Law (2d Ed.) at page 398.

Penal Statute and ordinance cannot be extended by construction beyond the letter of the act. 13 Am. & Eng. Encycl of Law, page 398; 2 Abb. Mun. Corp., Sec. 566; Daggett v. State, 4 Conn. 60; U. S. v. Booker, 98 Fed. 291; Folson v. Kilbourne et al., 5 N. D. 402, 67 N. W. 291.

*F. W. Ames*, for Respondent.

A new building need not be distinct from, nor independent of an old one, to be deemed a building erected. 3 Words & Phrases,

2452; Nelson v. Campbell, 28 Pa. 156; Harmon v. Cummings, 43 Pa. (7 Wright) 332; Deleone v. Long Branch, etc., 25 Atl. 274, 55 N. J. L. 108; 3 Words & Phrases, 2452; Dreerbach v. Keller, 2 Pa. 77, 79; 3 Words & Phrases, 2452.

Material alteration and enlargement is building within the meaning of the ordinance. People v. Marley, 2 Wheeler's Crim. Cases 74; Douglass v. Commonwealth, 2 Rawl's Rep. 262; Carroll v. Lynchburg, 6 S. E. 133; People v. Sweetser, 1 Dak. 308, 46 N. W. 452.

The intention of the legislature must govern in penal as in other statutes, and the obvious legislative will is not to be defeated by construction. U. S. v. Williams, 119 Fed. 310; In Re Coy, 31 Fed. 794; Case, Bell Crown Cas. 45; Daniels v. State, 50 N. E. 74.

If a case comes within the spirit and reasonable interpretation of the letter it is sufficient. State v. Goodwin, 82 N. E. 459; State v. Kiley, 76 N. E. 184; Johnson v. So. Pac. Co., 25 Sup. Ct. Rep. 158, 49 L. Ed. 363; State v. Roby, 142 Ind. 168, 41 N. E. 145; 33 L. R. A. 213, 51 Am. St. Rep. 174; Conrad v. State, 75 Ohio St, 52, 78 N. E. 957, 6 L. R. A. 1154.

MORGAN, C. J. The defendant was convicted of violating a city ordinance declaring it unlawful for any person "to construct any wooden building within such limits" (fire limits), and further declaring that "all buildings hereafter erected therein shall be built of brick, stone or other fireproof material," and has appealed from a judgment against him imposing a fine of $100 for a violation of such ordinance and costs, and said judgment further provided that the defendant should be imprisoned until such fine was paid, as provided by statute in cases of nonpayment of fines. Before the enactment of this ordinance, the defendant built a one-story wooden building with a sky-light raised at one end thereof higher than the other parts of the roof. The building, as thus erected, was about 42 feet in length, and 24 feet 8 inches in width, and about ten feet in height at the highest part outside of the skylight part, which was about 17 feet high at its highest point. The sides of this building were not of equal height, and the roof was, in consequence of this fact, slanting. After the ordinance was passed, defendant made changes in the building as follows: The roof, with the skylight, was removed, and the building raised in height, except at the front. On the rear 16 feet of the upper part of the building was an addition

with a peaked roof. This addition is 16 feet long, and the height is about 17 feet to the peak of the roof from the ground and about 12 feet to the base of the roof. By this change one side of the building was made about 3½ feet higher than before, and the other was made about 7½ feet higher. As stated before, the height of the original building was irregular, and it was made of the same height by the change. The peaked roof part at the rear of the roof of the building was divided into four rooms for sleeping room purposes. The front was not changed as to height or appearance. The only change in the appearance of the sides was that made by reason of the increased height.

The sole question presented on the appeal is whether the acts of the defendant in thus changing the character of the building were within the prohibition of the ordinance against the construction of wooden buildings, as it is conceded that the material used in the building was not fireproof. The ordinance is penal in its character, and a violation of its terms is followed by a fine of $100 and costs, and, if the fine is not paid, the offender may be imprisoned under the provisions of section 10104, Revised Codes 1905. The city contends for a liberal construction of the provisions of the ordinance. Defendant contends for a strict construction thereof, in view of its penal character. We do not think it material whether sections 10313 and 8538, Revised Codes 1905, calling for a liberal construction of the provisions of the Penal Code and Code of Criminal Procedure, or whether the rule of common law, calling for a strict construction of penal statutes and actions for a penalty, shall govern. The result must be the same in this case.

Conceding that the provisions of the ordinance are to be liberally construed, we do not think that the judgment of the district court should stand, in view of other provisions of the code. This rule of liberal construction does not do away with the fact that the defendant must be shown to have violated the ordinance. The Code authorizes the city to enact ordinances of this kind and to provide penalties for violation thereof; but such acts are not subject to such penalty until ordinances are enacted pursuant to such statutory authority and the terms thereof have been violated. It is elementary that the terms of the ordinance must be such as to include the defendant's acts before the penalty can be rightfully imposed upon him. This is so whether the proceeding under which it is imposed be deemed civil or criminal in its char-

acter. The ordinance forbids the construction of wooden buildings. Is repairing or remodeling or enlarging a building always to be regarded, under this ordinance, the same as building it in the first instance? Clearly not, or the most insignficant change in a structure would subject one to a penalty. On the other hand, if four or five stories be added to a one-story building, will that always be deemed simply repairing, or enlarging within the ordinance? Clearly not. It is difficult, however, to state what facts, so far as changes in buildings are concerned, will constitute a violation of this ordinance. No fixed rule can be laid down stating what is to be deemed a "new building" or a "repairing." There are no definite rules laid down in the precedents or cases on this point. The nearest that has been found is in State v. Long Branch Commissioners, 55 N. J. Law 108, 25 Atl. 274, a case based on a city ordinance similar to the one under consideration. In that case the court approved the rule laid down in Armstrong v. Ware, 20 Pa. 519, a mechanic's lien case. In the New Jersey case this language was approved, from Combs v. Lippincott, 35 N. J. Law 483: "While it must be admitted that a building may be greatly changed in structure, in the materials which enter into it, and in its internal arrangements, without at all losing its identity or ceasing to be the same building, it can hardly be denied, I think, that it may be so entirely changed in plan, in structure, in dimensions, and in general appearance as to become, in a fair sense and according to the common understanding of men, another building, a new building." In addition to this, the court said, in State v. Long Branch Commissioners, supra: "Applying this rule to the circumstances of the present case, I think the judgment of the police justice may be justified with reference to the main building. Considering the change in the position, the new front, the increased width, the greater elevation, the different internal arrangements necessitated thereby, and the great alteration in outward appearance resulting therefrom, the structure might, according to common understanding, in common parlance, be called 'a new building.'" Under the facts of that case, the changes in the building were much greater than in this case, and were as follows: The building was originally one story and an attic in height, 14 feet in width on the street and 24 feet deep. This was changed by moving the building back a little, by taking out the front and putting in a new one, by extending the lower story seven feet laterally along the street and

putting on a full second story, in place of the attic, making the roof three or four feet higher than before and extending the second story about ten feet laterally along the street and projecting about three feet beyond the lower story.

In Landis' Appeal, 10 Pa. 379, the court said that: "In the common understanding and language of the people, when we speak of the erection or construction of a house or building, we mean the erection of a new house or building, and not the repairing of an old one." In Armstrong v. Ware, supra, the court said: "When the structure of a building is so completely changed that in common parlance it may be properly called a new building, or a rebuilding, it comes within the law." In Douglass v. Commonwealth, 2 Rawle (Pa) 262, the court laid down this test, and said: "It is idle to answer on the blacksmith's shop, for that is no longer existing, but has been enlarged and altered and converted, in the words of the special verdict, into a cabinet warehouse and shop, and forms within the purview of the ordinance a new wooden building, erected on a lot or piece of ground within the limits of this city." In City Council v. L. & N. R. Co., 84 Ala. 127, 4 South. 626, the court said, in reference to a violation of an ordinance like the one in suit, where an addition at the end of the railway company's depot, 30 by 42 feet and 24 feet high was erected: "Without undertaking therefore to determine whether the structure in question is a wooden structure, we are satisfied that the extension or enlargement of the complainant's brick depot building in the manner described does not fall within the prohibition of the ordinance. * * * What we decide is that the ordinance of the city which has been enacted on this subject does not meet the case in hand." In Tuttle v. State, 4 Conn. 68, the court said: "Where a building was removed and extensively repaired, to which an addition was made of the same width, height and slope of roof, it was held that these acts did not constitute the erection of a building within the ordinance to secure the city of New Haven from damage by fire." In Booth v. State, 4 Conn. 65, the court said: "That the former building was extensively repaired and converted to a new use is not disputed; but whether regard be had to etymology, or the popular meaning of language, no dwelling house was built or erected, and of consequence, no law has been contravened." In A. & E. Enc. of Law, (2d Ed.) p. 398, the rule is laid down as follows: "If a building be so changed in plan, structure, dimensions and general appearance

that it might, according to the common understanding of men, be called, in common parlance, a new building, then it may be deemed a violation of an ordinance forbidding the erection of wooden buildings within the fire limits."

We do not think that this ordinance should be deemed to have been violated if the facts show only a violation of its spirit, intent or the purpose of its enactment—to lessen loss by fire. It is true that, by the changes in this building, more combustible materials were added to it than there were in it originally; but that fact should not be the sole test. Its provisions or terms must be violated also, and, before the penalty can rightfully be imposed, the facts must be brought within the terms of the ordinance, or within terms included within the terms of the ordinance or of synonymous meaning. If the facts constitute a rebuilding of the old structure, then the ordinance is violated; but a repairing or remodeling, without clearly or substantially changing the character or appearance of the structure, is not a violation of the ordinance. The words "repairing" and "remodeling" are not synonymous or included within the meaning of the word "building." This construction is in harmony with our statutes, which declare that words in statutes are to be understood in their ordinary sense, and words in informations are to be construed according to their usual acceptation in common language. Sections 6691 and 9854, Rev. Codes of 1905. It is not enough that, through a strained construction of the words of the ordinance, a violation of its terms can be predicated. If a liberal construction be the rule, the intendments alone are not sufficient to warrant a conviction. The language must sustain a conviction, and, if it does not, no conviction can follow, however glaringly the spirit of the enactment may be violated. The terms of the statute cannot be extended unreasonably, even under liberal construction. Sutherland, Stat. Con. (2d Ed.) § 590. On this point the following rule seems to state the rule correctly: "A distinction must be drawn between the rules applied when considering whether an ordinance as enacted falls within the terms of the power or not, and those applied in determining whether a certain act complained of falls within the prohibition of an ordinance; the rules in the former case being much more lenient than in the latter. * * * The act complained of does not constitute an offense unless it falls plainly within the meaning of the words used by the legislative body in framing the ordinance. Unless some peculiarity of the subject-matter indicates

otherwise, the words used must be taken in their ordinary accepted meaning; but the rule of strict interpretation is not violated by permitting the words of the ordinance to have their full meaning, or the more extended of two meanings, nor by giving a reasonable meaning to the words according to the intent of the lawmaking body, disregarding captious objections and even the demands of an exact grammatical propriety." Orr & Bemis, on Municipal Police Ordinances, § 193.

It seems clear to us that what was done in changing this structure cannot be said to be the building of a new building or structure as commonly accepted, although raised in height, as stated, and changed by substituting a peaked roof for the skylight. See, also, Miller v. Hershey, 59 Pa. 64, and Driesbach v. Keller, 2 Pa. 79. There are decisions that are contrary to our conclusions in this case; but these cases are in the minority, and, what is more important, are not sustained by the better reason, in our judgment. They place too much reliance on the spirit of such ordinance, without limiting liability thereunder to a reasonable construction of the language of the ordinance as it should be and is commonly understood.

The judgment is reversed, and the action dismissed. All concur. 123 N. W. 393.

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PETER BOSCHKER v. HENRY VAN BEEK.

Opinion filed June 22, 1909.

**Mortgage Foreclosure — Mortgagees in Possession — Invalid Foreclosure.**

1. The holder of a sheriff's certificate of sale, or of a sheriff's deed under an invalid foreclosure of a real estate mortgage by advertisement, in possession of the mortgaged premises, with at least the implied consent of the mortgagor, is a mortgagee in possession.

**Statute of Limitations — Mortgagee in Possession — Equity.**

2. A grantee of the mortgagor cannot maintain an action to cancel the sheriff's certificate and deed, as against the mortgagee in possession, without paying the mortgage debt, even though the statute of limitations has run against the mortgage.

**Mortgage Foreclosure — Sheriff's Certificate — Personal Property — Assignment by Administrator.**

3. A sheriff's certificate of sale, under foreclosure by advertisement, is personal property and transferable by the executor of the

deceased mortgagee in whose name the certificate was issued by assignment under the laws of Massachusetts.

**Executors and Administrators — Assignment of Foreclosure Certificate.**

4. It not appearing in this case, definitely, whether the sheriff's certificate of sale referred to in the preceding paragraph was held in Massachusetts or in this state, but the will of the deceased certificate holder having also been probated in this state, and the assignment of such certificate for a valuable consideration paid the executor having been approved by the probate court and acquiesced in by the devisees, it transferred the interests of the deceased holder and the devisees to the assignee of the executor, in case it was held by such executor in this state.

Appeal from District Court, Emmons County; *Winchester,* Judge.

Action by Peter Boschker against Henry Van Beek.

Judgment for plaintiff and defendant appeals. Reversed.

*H. A. Armstrong* and *John H. Perry,* for Appellant.

*Geo. W. Lynn* and *G. N. Williamson,* for Respondent.

SPALDING, J. Action to cancel a sheriff's certificate of sale on foreclosure of real estate by advertisement and the sheriff's deed issued thereunder, and to enjoin the defendant from asserting any interest in the premises described, plaintiff had judgment and defendant appeals. It is unnecessary to quote the pleadings.

It appears by uncontradicted evidence that one Hannah K. Loring, a resident of Massachusetts, made a loan of $425 to one Homme Boschker, and took as security therefor a mortgage upon the N. E. ¼ of section 22 in township 129 N. of range 76 W., in Emmons county, N. D. This mortgage was executed and delivered by Boschker to Loring about the 15th day of June, 1889, and recorded in the office of the register of deeds of Emmons county, on the 2d day of August, 1889. The mortgagor is dead, and the plaintiff and respondent is his son. The appellant signed the mortgage note and two others given by other parties to Hannah K. Loring, as guarantor. Little or nothing was ever paid on the interest or taxes by the mortgagor, and no part of the principal has been paid. On the 9th day of September, 1898, the firm of Herreid & Williamson, of South Dakota, having been employed by the mortgagee for that purpose, issued a notice of foreclosure sale by advertisement to foreclose such mortgage, claiming that there was then due thereon the

sum of $1,092.08. Due publication was made, and the premises were sold on the 5th day of November, 1898, and struck off to Hannah K. Loring, the mortgagee, for the sum of $550, and a sheriff's certificate issued in her name and delivered to her attorneys. This certificate was duly recorded in the office of the register of deeds of Emmons county, N. D., on the 14th day of November, 1898. While the notice of sale was running in the newspaper, Hannah K. Loring died. It does not appear from the record whether her attorneys were ignorant of her death at the time of the sale; but we presume they were. She left a will appointing one Batchelder executor, and in due time he qualified as such in the state of Massachusetts, and Herried & Williamson thereafter acted as his attorneys in relation to the mortgage in question and the notes on which appellant was guarantor. They sued appellant in South Dakota to recover the balance due on such notes after foreclosure, and he paid such balance and among other things, took an assignment of the sheriff's certificate of the Boschker mortgage at figures amounting to something over $700; the land then being worth from $700 to $800. This assignment bore date March 29, 1900, and was duly recorded in Emmons county. At the time of the assignment of the certificate to appellant, Williamson represented to him that it was perfectly good. The money received by Williamson from appellant was transmitted to the executor of Loring's will and by him paid to her devisees and heirs, and his account showing such payment was approved by the probate court in Massachusetts. The Loring will was subsequently probated in Emmons county and the sale of the certificate approved by the court.

May 6. 1905, the land not having been redeemed, the sheriff of Emmons county executed his deed therefor to appellant as assignee of the certificate of sale, and this deed was duly recorded. February 8, 1904, George W. Lynn, an attorney residing at Linton, N. D., wrote a letter to Batchelder, the executor, as follows: Linton, N. D., Feb. 8, 1904. John M. Batchelder, Holliston, Mass.—Kind Sir: Your favor of the 2d inst. received and contents noted, and your promptness in answering my former letter is appreciated. A client of mine has requested that I pass upon the title of certain tracts of land in this county in which the late Hannah K. Loring had an estate prior to her death. I wish to state at this time that the purpose of my correspondence with you is not adverse in any manner to the interests of yourself or of the heirs and devisees of

the said Hannah K. Loring; but is for the purpose of perfecting a good and unquestionable title to the said tracts. To this end I have advised that, in order to obtain such title, he should secure a certified copy of the will which has been probated in your state, together with quit-claims from the heirs and devisees of the late Hannah K. Loring, all of which should be placed of record in this state. Will you undertake to secure the quitclaims and in your opinion what will be the costs of securing them, including your services, providing I prepare all papers according to the laws of our state, and you attend to having the same executed? I have this day written the register of probate to ascertain the cost of securing the certified copy of the will, and when I have heard from you, and if everything is satisfactory to my client, I will send you the papers together with a draft for the amount. An early reply will be appreciated, and in any event I will compensate you for your trouble. Yours, Geo. W. Lynn. (Dic.)" And in response thereto, and for the sum of $2.50 each, the cost of executing deeds, he received quitclaim deeds from the devisees under the will of Hannah K. Loring to the premises in question, which were recorded in Emmons county on the 25th day of June, 1904. The executor testifies: That he paid the money received for the certificate to the devisees under the will; that no objection was made by them to the sale and assignment of the sheriff's certificate or the amount realized therefrom; that in response to Lynn's letter he procured the deeds mentioned, after having referred the matter to Herreid & Williamson and receiving their approval; that such deeds ran to L. A. Wetherby; that none of the devises claimed any right, title, or interest or estate in the land described at the time they executed such deeds; that he forwarded them to Lynn at Linton, N. D.; and that none of such devisees, since the distribution of the estate of Hannah K. Loring, have made any claim to any estate, right, title, or interest in the land in controversy. Shortly after appellant purchased the sheriff's certificate of sale, he made a contract with respondent agreeing to sell him the certificate of sale on his making payment therefor of something over $700, and under such contract respondent went into and retained possession of the premises until April 16, 1905, when he called on appellant and represented to him that, as the land was quite a distance from his home, he would rather sell it back to appellant. After some discussion respondent executed an instrument relinquishing his claim to the land under the contract

with appellant in consideration of $948.50, being about $200 more than he had agreed to pay appellant for it. At the same time appellant leased him the land for the season of 1905. It appears from the evidence: That a few days prior to the last transaction described, respondent had learned of the quitclaim deeds procured by Lynn in the name of Wetherby; that the land had increased very materially in value; that he called upon Lynn and had a talk with him and Wetherby with reference to the title; that Lynn told him to go and make a settlement with Van Beek, the appellant, and offered him a warranty deed of the land at the same price he was to pay Van Beek; that he took such deed later; that Lynn advised him that he could probably get a deed from Homme Boschker, and drew up such a deed ready for execution; and that he went home and took his father before a notary and had him execute the deed. It appears that these negotiations with Lynn and Wetherby occurred a few days before respondent saw appellant and surrendered his contract to the land, and that he surrendered it with a view to consummating this deal with Lynn, or with Lynn and Wetherby, but disclosed to Van Beek nothing regarding it, but, as we have shown, gave entirely different reasons for surrendering his contract. The deed from Homme Boschker to respondent was executed on the 19th day of April, 1905, without consideration, and on the same day Wetherby quitclaimed to Lynn an undivided one-half of the premises, and on the next day, April 20, 1905, Wetherby and Lynn gave a warranty deed thereof to respondent, and on the 26th day of May, 1905, Lynn, evidently in conjunction with Williamson, brought this action. Respondents contend that the foreclosure is invalid, and that the sheriff's deed executed thereunder conveyed no title to appellant.

The power of sale in the mortgage foreclosure is a peculiar one, quite unlike the usual power contained in mortgages. It runs to Hannah K. Loring, or agent. On the death of Mrs. Loring no one was left qualified under the terms of the power to continue or complete the foreclosure, and for the purposes of this case we may assume that the attempted foreclosure was invalid. We have held, in Winterberg v. Van De Vorste, 122 N. W. 866, that a sheriff's certificate is personal property, and assignable by Mrs. Loring's executor. It does not definitely appear whether the sheriff's certificate of sale was held by the executor in Massachusetts or in this state, or whether it was assigned by him as executor under

the will, in Massachusetts or in this state; but, in either event, his assignment transferred the interests of the deceased holder and the devisees. The purchaser of the certificate and those holding under him became equitable assignees of the mortgage, and, having taken possession with at least the implied consent of the mortgagor, the appellant is, at least, a mortgagee in possession, and the only remedy against him is by a suit in equity and an offer to redeem. Nash v. Land Company, 15 N. D. 566, 108 N. W. 792. The plaintiff and respondent has neither offered to redeem, nor does he tender into court the amount necessary to redeem from the mortgage given to Mrs. Loring.

The respondent is not in position to invoke the aid of a court of equity to cancel the mortgage, or the sheriff's certificate of sale and the deed issued thereunder, or to enjoin the mortgagee in possession from asserting his rights in the premises, without paying, or offering to pay, the amount due him. He not only does not come into this court with clean hands; but his hands are reeking with filth. He is attempting to avail himself of the good offices of a court of equity while showing no disposition on his own part to follow the plain paths of equitable procedure long marked out. He appears to be wholly destitute of the most ordinary principles of fair play in his and his attorney's dealings with appellant. This case is squarely within the rule announced in Tracy et al. v. Wheeler et al., 15 N. D. 248, 107 N. W. 68, 6 L. R. A. (N. S.) 516, and needs no further consideration. The appellant has not succeeded in establishing a clear title in himself. Hence we cannot quiet title as prayed for in his counterclaim. See Winterberg v. Van De Vorste, supra.

The judgment is reversed and the district court directed to dismiss the action. All concur.

MORGAN, C. J., not participating.

122 N. W. 338.

NOTE—Time to bring suit limited in a fire insurance policy begins from the time of the fire. Travelers Insurance Co. v. Cal. Insurance Co., 1 N. D. 151. Bar of a statute in one state is available in another where it bars the debt. Rathbone v. Coe, 6 Dak. 93. Tax deed, void on its face, does not set the statute of limitation in motion. Heger v. DeGroat, 3 N. D. 354, 56 N. W. 150. Legislature may shorten the period of limitation, provided a reasonable time to sue is afforded after the law is passed. Merchants Nat. Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244; Adams & Freese Co. v. Kermayer, 17 N. D. 302, 116 N. W. 98. Such time is reckoned from the passage, not

the taking effect of the law. Mer. Bank v. Braithwaite, supra. Statute need not fix time as to pending cases. Id. A tax deed, valid on its face, recorded for more than the full time limited to bring action to set it aside, cuts off all interest under a prior tax deed. Meldahl v. Dobbins 8 N. D. 155, 77 N. W. 280. A tax deed based upon proceedings jurisdictionally defective, will not set statute running. Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049; Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; Osborne v. Lindstrom, 9 N. D. 1; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188. A suit on a claim rejected by an administrator, must be brought within three months after such rejection. Boyd v. Von Neida, 9 N. D. 337, 83 N. W. 329. Statute applies to judgments rendered before, as after, its enactment; and time is computed from period prior as well as after its passage. Osborne v. Lindstrom, supra. Time runs from date of judgment, not from time leave to sue was obtained. Id. Nor is time stayed by period required to get leave to sue thereon. Id. Fixing the time within which suit may be brought is a legislative function. Id. What constitutes a reasonable time upon change of statute of limitation. See Osborne v. Lindstrom, Id. The statute of limitations embraced in section 1640, Comp. Laws (three years limit on tax deed) does not control against adverse possession under color of title and payment of taxes for ten years. Power v. Kitching, 10 N. D. 254, 86 N. W. 737. There is no vested right in a statute of limitations in force at time of tax sale. Id. Ten years adverse possession and payment of taxes, entitled occupant under color of title to have it quieted. Id. Payment by one joint debtor does not interrupt running of statute as to others. Grosvenor v. Signor, 10 N. D. 503, 88 N. W. 278. Plea of the statute of limitations is of equal merit with any other plea. Wheeler v. Castor, 11 N. D. 347, 92 N. W. 381. Bar of the debt does not bar the mortgage securing it. Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518. Statute of limitations must be pleaded. Id. In pleading the statute of limitations, facts, not conclusions, must be set out. Id. Where one purchases land under a contract and loses it for lack of agents' authority to execute, statute runs from time of his ejectment. Kennedy v. Stonehouse, 13 N. D. 232, 100 N. W. 258. One who enjoins foreclosure of mortgage by advertisement, may plead statute of limitations to action to foreclose it. Teigen v. Drake, 13 N. D. 502, 101 N. W. 893. Foreclosure action is *in personam* and within the statute that excepts time of defendant's absence from state from the limitation period. Mortgage Co. v. Thresher Co., 14 N. D. 147, 103 N. W. 915; Mortgage Co. v. Flemington, 14 N. D. 181, 103 N. W. 929. Foreign corporation represented in the state by an agent, and doing business therein, may plead the statute of limitations. Id. Absence of mortgagor from state after he has parted with mortgaged property does not prevent running of the statute in favor of his grantee. Id. A foreclosure may be barred although the debt is not. Id. Mortgage Co. v. Flemington, 12 N. D. 181, 103 N. W. 929; Paine v. Dodds, 14 N. W. 189, 103 N. W. 931. Failure to appoint an administrator does not bar the heirs from pleading the statute of limitations. Mortgage Co. v. Flemington, 14 N. D. 181, 103 N. W. 929. Mortgagor's grantee may plead the statute, although the mortgaged debt is neither barred nor discharged.

Id. Where four heirs of deceased mortgagee inherited the mortgaged land, and no administrator was appointed, and three of them lived out of the state, action is barred as to one-fourth of the land. Id. The statute ceases to run in favor of one who establishes his residence out of the state from date of his departure. Paine v. Dodds, 14 N. D. 189, 103 N. W. 931. A grantee of mortgaged premises may add the time the statute has run in favor of his grantors to what it has run in his own favor. Id. Where the party's own pleadings show running of statute against defendant's plea of the statute, he must show facts suspending the running. Id. Statute limiting ten years as the time to foreclose by action does not apply to foreclosure by advertising. Clark v. Beck, 14 N. D. 287, 103 N. W. 755. Equity will not cancel a mortgage securing a just debt, solely because it is outlawed. Tracy v. Wheeler, 15 N. D. 248, 107 N. W. 68. The statute of limitations is a defense warranting the enjoining of a foreclosure by advertisement. Scott v. Barnes Co., 15 N. D. 259, 107 N. W. 61. Tax certificate is conclusive evidence of a valid sale if not attacked within three years from the sale, unless judgment was paid before sale, or redemption affected after. Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357. Tax sale on a void judgment is valid after three years, unless jurisdictional defect in antecedent proceedings appears. Finance Co. v. Beck, 374. Objection to tax sale under law of 1897 is barred by section 1263, Rev. Codes, 1899. Id. Sale upon an apparently valid judgment under the "Woods Law" is barred in three years after the sale. Nind v. Myers, 15 N. D. 400, 109 N. W. 335. A tax deed in form not in substantial compliance with law does not set statute in motion. Beggs v. Paine, 15 N. D. 436, 109 N. W. 322. Section 1263, Rev. Codes 1899, construed, Id. Adverse possession puts the statute in motion against remedies of mortgagor. Nash v. N. W. Land Co., 15 N. D. 566, 108 N. W. 792. Last adverse possessor may compute from time when cause of action accrued against the first. Id. Twenty years' limitation fixed by sections 6774, 6775, Rev. Codes 1905, does not apply to such suits. Id. Right to maintain action by mortgagor against mortgagee in possession is barred in ten years from accrual of the cause of action. Id. A title acquired by the statute of limitations is a legal, not an equitable one, and may be proven under an allegation of a legal title. Id. Payment that interrupts the running of the statute on debt, interrupts its running on the security. Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677. Without his wife's consent, mortgagor can interrupt the running of statute against a mortgage on their homestead. Id. Fourteen years delay of foreclosure of a mortgage does not render a claim stale, if that period is short of that of the statute, and abandonment of mortgage is not shown. State Finance Co. v. Halstenson, 17 N. D. 145, 114 N. W. 724. A statute excepting absence from the period fixed for computing time under the statute, does not apply to existing causes for foreclosure of mortgages accruing prior to the act. Adams & Freese Co. v. Kenoyer, 17 N. D. 302, 116 N. W. 98; Clarke & Co. v. Doyle, 17 N. D. 340, 116 N. W. 348.

WESTERN MANUFACTURING COMPANY v. GEORGE F. PEABODY.

Opinion filed June 22, 1909

**Appeal and Error — Sufficiency of Findings.**

1. The sufficiency of findings of fact to support the conclusions and judgment may be challenged by assignments of error upon the record proper, without exceptions having been taken to such findings.

**Same.**

2. A recovery under defendant's counterclaim, based upon an alleged cause of action arising under a contract, whereby plaintiff, who sold certain jewelry to defendant, agreed that if defendant failed to sell enough of such jewelry within one year to equal one and one-half times the purchase price, he (plaintiff) would redeem or purchase back from defendant the unsold portion at the invoice price, cannot be sustained, where the findings totally fail to find that any such contingency has arisen. So far as the findings disclose, defendant may have sold, at retail prices, enough of such jewelry to equal one and one-half times the wholesale price of the entire consignment. Hence, the findings are insufficient to support the judgment on any theory of law.

Appeal from District Court, Foster county; *Edward T. Burke*, J.

Action by the Western Manfacturing Company against George F. Peabody.

Judgment for defendant and plaintiff appeals. Reversed.

*W. E. Hoopes* (Engerud, Holt & Frame, of Counsel), for appellant.

To support a judgment, findings must be based upon matter properly pleaded. Cawley et al. v. Day et al., 56 N. W. 749; Haynes on New Trial and Appeal, Sec. 242; Lewis v. Meyers, 3 Cal. 475; Mondran v. Goux, 51 Cal. 151; Devoe v. Devoe, 51 Cal. 543; Harkins v. Cooley, 55 S. D. 227; Anderson v. Alseth, 62 N. W. 435; R. L. Co. v. S. & P. P. Co., 135 N. Y. 209.

*C. B. Craven*, for respondent.

Objection to findings cannot first be raised on appeal. Naddy v. Deitze, 86 N. W. 753; De Lendrecie v. Peck, 48 N. W. 342.

FISK, J. This action originated in justice court, and was brought to recover upon a promissory note for $32, executed and delivered

by defendant to the plaintiff as a part of the purchase price of a certain consignment of jewelry sold and delivered by plaintiff to defendant on or about February 10, 1905. The answer admits the execution of the note sued upon, but alleges, by way of counterclaim, that at the time the same was executed and delivered, defendant purchased a consignment of jewelry from plaintiff at the wholesale invoice price of $192, under an express agreement that, if the defendant should fail to sell, within one year from the date thereof, at retail price an amount of such jewelry equal to 1½ times the total amount of such contract, towit, $192, the plaintiff would redeem or purchase back from defendant the unsold portion of such jewelry remaining in defendant's possession at the expiration of said year, paying therefor the wholesale invoice price thereof. The answer further alleges that defendant had on hand, at the expiration of said year, according to the wholesale invoice price thereof, jewelry thus purchased from plaintiff aggregating in value $153.51, which he had failed to sell, and that defendant requested plaintiff to redeem or purchase back from him said jewelry pursuant to the terms of such contract, but that plaintiff has refused so to do, and defendant prays for judgment in his favor for the sum of $131.51. The answer also prays the plaintiff be adjudged to be the owner of such jewelry, but that defendant be awarded the possession thereof until such time as the plaintiff shall have complied with its agreement to redeem said property, and that if the plaintiff shall not redeem the same within thirty days from the date of the entry of judgment, such property to be sold by the sheriff or any constable under execution.

Defendant recovered an affirmative judgment in the justice court for the sum of $152.90, and costs, from which an appeal was taken to the district court, where a new trial was had, a jury being waived. At the conclusion of the trial the court made findings of fact and conclusions of law, in substance as follows: (1) That defendant, on or about the 11th day of February, 1905, purchased of the plaintiff a consignment of jewelry at the wholesale invoice price of $192; (2) that such purchase was made upon a written contract, which provided that if the defendant should fail to sell an amount of such jewelry equal to 1½ of the total amount of such jewelry, plaintiff would remit to defendant the balance of the price of the jewelry remaining at the expiration of said contract, at the wholesale price thereof; (3) that the total amount of such jewelry sold by defendant

at the wholesale price thereof amounted only to the sum of $38.49; (4) that the total amount of such jewelry remaining unsold at the expiration of one year, according to the wholesale invoice price, is $153.51, and that defendant has demanded of the plaintiff that it redeem or repurchase such property, and the plaintiff refuses so to do. From such facts the court made conclusions of law, in substance, as follows: That defendant is entitled to recover of the plaintiff the sum of $131.51, and interest thereon from February 11, 1905, at the rate of 7 per cent per annum; that plaintiff is the owner of all of the jewelry remaining in the possession of defendant on February 11, 1906. Pursuant to such findings and conclusions the trial court ordered that defendant have and recover from the plaintiff the sum $131.51, with interest as aforesaid, together with his costs and disbursements, and that plaintiff within ten days after the service of said order upon it, shall deposit such jewelry with the clerk of the district court. Judgment was entered pursuant to such order, from which plaintiff has appealed to this court. No statement of case was settled, and the sole errors assigned relate to the face of the judgment roll proper.

Appellant assigns error as follows: (1) The findings and conclusions do not conform to the issues presented by the pleadings. (2) The findings and conclusions are too obscure to sustain the judgment. (3) The conclusions and judgment are not supported by the findings of fact, because (a) the recovery awarded is greater in amount than is warranted by the facts pleaded and found; (b) the findings do not show that plaintiff's obligations to redeem ever became operative; (c) the facts pleaded and found do not warrant a recovery of the invoice value of the goods remaining unsold, neither do they warrant a recovery for damages for the breach of plaintiff's agreement to redeem or a judgment for the foreclosure of a vendor's lien and a recovery of a deficiency arising on sale of the goods as a pledge. (4) The judgment is too indefinite and ambiguous to constitute a final determination of the rights of the parties, and is not warranted by the facts pleaded and found. It is entirely clear that the conclusions of law and judgment are not supported by the findings of fact, and hence the judgment is erroneous, and must be reversed. This conclusion renders it unnecessary to notice any of the assignments other than the third, and, in view of the admission of respondent's counsel that the amount of the recovery is in excess of

that warranted by the facts as pleaded and found, we shall merely notice the second and third grounds for reasons relied on in support of such assignment, and these will be considered together, and but briefly.

The stipulation of facts set out in respondent's brief, even if it contained a sufficient statement of facts to support respondent's counterclaim, cannot be considered, as it has not been incorporated in, and made a part of the record by the settlement of a statement of the case. This was, of course, essential, to bring the same properly to our attention. Nor does the fact that appellant saved no exceptions to the findings of the trial court in any manner deprive him of the right to attack their sufficiency to support the conclusions and judgment. It is well settled that error may be assigned upon the record, without exceptions, when the only question is whether the facts found support the judgment. The findings are treated as a special verdict in such cases. Morgan v. Botsford, 82 Mich. 153, 46 N. W. 230; Saukville v. Grafton, 68 Wis. 192, 31 N. W. 719; Seeberger v. Schlesinger, 152 U. S. 581, 14 Sup. Ct. 729, 38 L. Ed. 560, 8 Encyc. of Pl. & Pr. pp. 273, 274, and cases cited. Our reasons for saying that the conclusions of law and judgment are without support in the findings are briefly the following: Such conclusions and judgment award a recovery to respondent upon his alleged counterclaim, but the findings fail absolutely to show, or to find as a fact, that a cause of action on such counterclaim ever accrued to respondent under the terms of the contract. By its terms appellant obligated itself to purchase or redeem from respondent at the end of one year such portion of the goods as should remain unsold in respondent's possession "if the defendant should fail to sell an amount of such jewelry equal to one and one-half of the total amount of such jewelry." In other words, if defendant failed within a year to sell enough of such goods to equal, at retail prices, 1½ times the total invoice price thereof, appellant agreed to redeem or purchase back from respondent the unsold portion at the wholesale invoice price thereof. The findings totally fail to disclose that any such contingency ever arose. The third finding is to the effect that defendant sold enough of such jewelry to equal, at the wholesale price thereof, the sum of only $38.49. What he received for it at retail prices is nowhere disclosed. It was incumbent upon him, in order to substantiate a cause of action under the counterclaim, to allege and prove that he failed to receive for the portion sold by him

a sum equal to 1½ times the total invoice price of all such jewelry. Hence the findings are insufficient to support a recovery on the counterclaim under any theory or rule of law.

It follows that the judgment must be, and the same is hereby, reversed, and a new trial ordered. All concur, except MORGAN, C. J., not participating.

122 N. W. 332.

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FRANK N. FORMAN v. SIMON P. HEALEY.

Opinion filed June 5, 1909.

**Public Lands — Receiver's Receipt — Vested Right.**

1. Issuing a filing receipt does not constitute a contract between the applicant and the United States, and he obtains no vested right to the land filed upon.

**Public Lands — Contest — Jurisdiction — Notice.**

2. The Land Department had power to order a hearing as to the rights of the parties to the land in controversy, and it was not error for the local land officers to refuse to dismiss the hearing on the grounds of the insufficiency of the affidavit and notice of hearing when both parties appeared and took part in the proceedings.

**Public Lands — Cancellation of Entries.**

3. The Commission of the General Land Office has power to cancel an entry.

**Public Lands — Decision of Land Commissioner Conclusive.**

4. The decision of the Land Department upon controverted questions of fact involved in the cancellation of an entry, and in awarding the land to the party entitled thereto, is final and conclusive and binding on the courts, provided the parties interested have been heard, or have had an opportunity to be heard.

**Public Lands — Cancellation — Disregard of Rules.**

5. Disregard of rules, if any, which does not result in the denial of the right or in the loss of an opportunity to be heard, will not affect the decision.

Appeal from District Court, Richland County, *Frank P. Allen*, J.

Action by Frank N. Forman against Simon P. Healey. Judgment for defendant and Plaintiff appeals. Affirmed.

*Ink & Wallace*, for appellant.

Jurisdiction is not cured by a general appearance after special appearance to object to jurisdiction. Harkness v. Hyde, 25 L. Ed. (U. S.) 237; Milne v. Dowling, 4 L. D. 379; Chesley v. Rice, 16 L. D. 120; Ellsworth Trust Company v. Parramore, 48 C. C. A. 132; Central Grain et., Exchange v. Board of Trade, 60 C. C. A. 302.

Notice of final proof must cite adverse claimant. Reno v. Cole, 15 L. D. 174; cited with approval in Andrew Davis, 18 L. D. 525; Findley v. Ford, 11 L. D. 172; Tuttle v. Parkins, 9 L. D. 495.

Permission to cross-examine final proof claimant and his witnesses should be allowed. 3 L. D. 112; Langford v. Butler, 20 L. D. 76; 5 L. D. 178; Manderfield v. McKinsey, 2 L. D. 580; A. & P. R. R. Co. v. Forrester, 1 L. D. 481; Vasquez v. Richardson, 10 C. L. O. 391; Sorenson v. Robinson, 3 L. D. 276; Brady v. Southern Pac. R. R. Co., 5 L. D. 407; United States v. Fernandez, 6 L. D. 379.

It is error for the Interior Department to disregard rules of practice. Peters v. U. S., 2 Okl. 116; U. S. v. Symonds, 30 L. Ed. 557; U. S. v. Bailey, 9 Pet. 238; U. S. v. Eliason, 16 Pet. 291; Aldrige v. Williams, 3 How. 9; Gratiot v. U. S., 4 How. 80; Ex Parte Reed, 25 L. Ed. 538; Smith v. Whitney, 29 L. Ed. 601; U. S. v. Boggs, 31 Fed. 337; U. S. v. Eaton, 12 L. Ed. 764.

*Chas. E. Wolfe,* for respondent.

A general, after a special appearance, confers jurisdiction. Miner v. Francis, 3 N. D. 549, 58 N. W. 343; Converse v. Warren, 4 Iowa 158; Ferris v. Ferris, 89 Ill. 452; Sargent v. Flaid, 90 Ind. 501; Bankers Life Assn. v. Shelton, 84 Mo. App. 634; Dyas v. Keaton, 3 Mont. 495; Boon v. Roberts, 1 Tex. 147; Tallman v. McCarty, 11 Wis. 401; Eddy v. LaFayette, 1 C. C. A. 441.

Findings of Interior Department as facts are conclusive upon the courts. U. S. v. N. P. Ry. Co., 37 C. C. A. 290; Unita Tunnel Co. v. Creede Mining Co., 57 C. C. A. 200; Bertwell v. Haines 63 Pac. 702; Hartwell v. Havighorst, 66 Pac. 337.

CARMODY, J. This action is brought by Frank N. Forman, appellant, against Simon P. Healey, respondent, to declare Healey to hold title for Forman to certain lands, described as follows, towit: the E. ½ of the S. E. ¼ of section 35 in township 133 of range 48 W., Fargo Land District, N. D., and that he be decreed and required to transfer the same to Forman. The title to the land in question is patented from the United States government to defend-

ant and respondent. At the commencement of the trial defendant and respondent objected to the introduction of any evidence as follows: "The defendant objects to the introduction of any evidence under the complaint in this action upon the following grounds: First, that the complaint shows upon its face that all the material matters therein alleged to have been fully and finally tried, determined and adjudicated between the same parties, with reference to the same subject matter in another and different tribunal having full jurisdiction of subject matter and parties, to-wit, the Department of the Interior of the United States Government. Second, that the complaint fails to state facts sufficient to constitute a cause of action against the defendant particularly in this, construing these portions of the complaint which, on their face, show conclusively the former adjudication mentioned in the first ground, there are no allegations of any facts constituting or tending to show any right of action in the plaintiff as against the defendant." The trial court made findings of fact and conclusions of law, and ordered judgment in favor of defendant, Simon P. Healey, dismissing the action and adjudging him to be the absolute owner of the land in question. Judgment was entered accordingly, from which judgment plaintiff appealed. A review of the entire case is demanded in this court.

The facts in the case are as follows: That on the first day of May, 1896, the respondent herein tendered his homestead application to the United States Land Office at Fargo, N. D., within the jurisdiction of which land office the land in controversy then was, to enter said land as a homestead, alleging settlement thereon prior to May 1, 1896. On the 4th day of May, 1896, the appellant herein tendered his homestead application to enter said land at said land office, under the homestead laws, alleging in said application settlement thereon prior to April 1, 1896. That both parties were qualified homestead entrymen. That on October 1, 1896, pursuant to notice issued by the officers of said land office at Fargo, a hearing was had between appellant and respondent upon the question of priority of settlement upon said land. That upon said hearing the register of the local land office at Fargo decided in favor of the appellant. That thereafter an appeal was taken from said decision by the respondent herein to the Commissioner of the General Land Office at Washington, D. C., which appeal was decided in favor of respondent and against appellant. That thereafter an appeal was taken to the Secretary of the Interior from the decision of the said com-

missioner, and his decision was reversed, and he was directed to allow appellant, Forman, to enter the land in controversy subject to further compliance with the law. That said decision was dated February 7,, 1899. On March 17, 1899, respondent Healey, filed a motion for rehearing in said case, alleging that Forman had wholly abandoned the land since the original hearing. On April 11, 1899, the motion of said Healey for a rehearing was denied by the Secretary of the Interior, for the reason that the matter of the abandonment was not before the department when the former decision was rendered, in which decision the Secretary of the Interior used the following language: "The latter's claim (meaning Forman's) depends solely upon his prior settlement, and the department awarded him preference right of entry upon that ground. It was therefore incumbent on him to comply in good faith with the settlement laws pending the final determination of this controversy." He also used the following language: "That this action does not preclude your office (meaning the Commissioner of the General Land Office) from directing an inquiry for the purpose of determining this charge."

On the 20th day of April, 1899, the Commissioner of the General Land Office notified the register and receiver at Fargo, N. D., of the decision of the Secretary of the Interior denying the motion of respondent, Healey, for a review of the decision of February 7. 1899, and the said case was accordingly closed, to notify the parties in interest and Forman that he would be allowed thirty days within which to perfect his application to said land. That on the 27th day of April, 1899, appellant, Forman, made his homestead filing on said land at the land office at Fargo, N. D., and received from the register and receiver thereof a filing receipt and paid the fees for said filing. On the 29th day of April, 1899, the Commissioner of the General Land Office, in a letter to the register and receiver of the local land office at Fargo, N. D., in reference to the decision of the Secretary of the Interior denying the motion for review made by respondent, Healey, used the following language: "Said decision was promulgated on a blank form and your office directed to notify Forman that he would be allowed thirty days within which to perfect his application for the land therewith returned. Said action of this office is hereby recalled to the extent of allowing Forman to perfect his application for the land. In event you have not carried out the instructions of this office you will now notify said Forman that he will

be allowed to apply to perfect his application, and in the event that he so does, you will order a hearing on the charge made by Healey and his affidavit is herewith returned as a basis of the same. In the event Forman has perfected his application, you will order a hearing on the charge of Healey, if you are convinced the same should be had to further the ends of justice."

That on May 8, 1899, the register and receiver of the said land office at Fargo cited both appellant and respondent to appear before them on June 20, 1899, to offer testimony touching the allegations contained in the said notice of hearing, which is in substance as follows: "On March 17, 1899, Simon P. Healey having filed affidavit, fully corroberated, alleging: That he is well acquainted with the land in question and has known the same for the last 12 years; that he knows the present condition of the same; that he made a bona fide settlement upon said land on May 1, 1896, and has followed the same by residence and cultivation; that he has a house upon said land 12x16 and a barn 10x16 and nine acres of said tract under cultivation; that, since the date of said settlement, he has never abandoned said land, and has resided upon, cultivated and improved said tract ever since the said settlement; that Frank N. Forman never made settlement upon said tract since July, 1897, but resided with his family at Moselle, N. D., a distance of twenty-five miles from said tract for more than eighteen months before the filing of said affidavit, where he purchased a farm; that he has wholly abandoned whatever residence and settlement he had upon said land and has so abandoned for the period above mentioned; that he has made no improvements upon said land, except the shanty built during the spring of 1896; that said shanty has no doors, no windows, and contains no furniture, and has been in said condition and wholly uninhabitable for more than 18 months previous to the filing of said affidavit; and that said Forman has wholly abandoned and left said land, and such abandonment has existed for a period of 18 months before the filing of said affidavit, and still exists." That said Forman never made a good-faith settlement and never resided upon said land at any time. That the notice was issued and served by registered mail on both of said parties. That on the 20th day of June, 1899, both parties appeared before the register and receiver of said land office. Forman appeared specially, and moved to dismiss for insufficient notice, which was denied, and the taking of the evidence proceeded, in which Forman participated and in-

troduced evidence. After the close of the testimony in rebuttal for Healey, Forman moved for a continuance to take the deposition of Stephen B. Brown, which was granted and hearing continued until August 3, 1899. On that day a motion was made by Forman to take the testimony of R. N. Ink, which was denied because the adjournment was made to that date solely to secure Brown's deposition.

On September 23, 1899, the officers made diverse decisions. The register found the charges of abandonment by Forman to be proven and recommended cancellation of his entry, and that Healey's application be received. The receiver dissented, finding that Forman's residence on the land had been continuous. Healey appealed from the receiver's decision, which appeal was dismissed because it was not taken in time. Forman appealed from the register's decision to the Commissioner of the General Land Office, and upon such appeal the said Commissioner of the General Land Office affirmed the decision of the register. That thereafter an appeal was taken by Forman to the Secretary of the Interior, who affirmed the decision of the Commissioner of the General Land Office. That thereafter Forman made a motion for review of said decision, which motion was denied on the 5th day of December, 1900. On the 8th day of December, 1900, Forman's entry was canceled, and Healey made his homestead entry on said land, which was allowed on the 19th day of December, 1900. That on the 21st day of January, 1901, pursuant to due notice given, commutation proof was made by Forman before the register and receiver of the United States Land Office at Fargo, and the amount to pay for said land and the necessary fees were deposited by him in said land office. That said final proof was refused by said land office at Fargo and appeal taken therefrom to the Commissioner of the General Land Office, who affirmed the decision of said land office, refusing said proof. An appeal was then taken to the Secretary of the Interior, who affirmed the decision of the commissioner refusing said final proof. A motion was made for review before said Secretary of the Interior, which was denied. That thereafter the defendant, Healey, on the 24th day of May, 1902, made final proof upon his entry of said land, and based upon said final proof the patent for said land was issued to him. That on said 24th day of May, 1902, said appellant, Frank N. Forman, appeared by counsel and filed a protest against said proof and asked permission to cross-examine Healey and his wit-

nesses, which was refused and protest dismissed. On May 25, 1902, all the papers in said proof with fees and protest were received by the Commissioner of the General Land Office, who dismissed the protest of Forman and approved the final proof of Healey. In dismissing said protest the commissioner used the following language: "Every allegation set out in this protest has been adjudicated by this office and this department several times, and to further consider the same matter would be unjust to the entryman, and would subserve no good purpose." Afterwards, appellant, Forman, petitioned for exercise of the supervisory authority of the Secretary of the Interior by an allowance of a writ of certiorari, that the proceedings be transmitted to the department. In passing upon the said petition, the Secretary of the Interior used the following language: "Forman asserts no right in himself not heretofore fully and repeatedly adjudicated." Nor does that applicant show that Healey has not fully complied with the law, and is therefore without merit and is denied.

Appellant asks a reversal for errors of law, as follows: In deciding that defendant is entitled to a judgment herein against the plaintiff adjudging and decreeing that he is the owner of the land described in the complaint, and that appellant has no right, title to, interest in, or lien or incumbrance upon, said land, and that the judgment is not supported by the findings. He also discusses the following propositions of law, which he claims were decided incorrectly by the Land Department, and which, if decided correctly, would give him the land in controversy: "(A) By issuing a filing receipt upon payment by plaintiff a contract was entered into between the plaintiff and the United States. (B) It was error of law for the officers of the local land office to refuse to dismiss the contest because the affidavit upon which the same was based was insufficient. (C) It was error of law for the officers of the local land office to refuse to dismiss the contest because of insufficient notice. (D) It was error of law for the officers of the local land office to refuse the introduction of testimony, tending to show residence or cultivation of said tract subsequent to the date of the defendant's affidavit alleging abandonment. (E) A contest should be dismissed when default charged had been cured prior to the notice of same. (F) Jurisdiction is not conferred by a general appearance after a special appearance was made for the purpose of objecting to jurisdiction. (G) The officers of the local land office had no authority

to call the contest, and it is nil. (H) Plaintiff's final commutation proof based on his entry No. 23,518, should have been allowed. (I) Defendant's notice of final proof was insufficient. (J) It was error to allow plaintiff to cross-examine defendant and his witnesses at the hearing of final proof. (K) It was error for the Interior Department to disregard its rules of practice. (L) A secretary of the Interior has no power to annul a decision of his predecessor which determines the rights of the parties to contest for entry of public lands. Such determination is a judicial action which can only be done by the courts."

There is no merit in appellant's point A, in which he contends that by issuing a filing receipt a contract was entered into between him and the United States. In Parsons v. Venzke (decided by this court) 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669, the following language is used: "The entryman has no vested right which the commissioner takes away by canceling the enrty. His claim is not vested, but contingent. Its validity depends upon its approval by the commissioner." It is too well settled to need any citation of authorities that a Commissioner of the General Land Office has authority to cancel an entry on public lands. The case of Cornelius v. Kessel, 58 Wis. 237, 16 N. W. 550, and Carroll v. Safford, 3 How. 441, 11 L. Ed. 671, relate to lands purchased by the government under the old law and paid for in full, and have no application to this case. Railway Co. v. Sture, 32 Minn. 95, 20 N. W. 229, was an action by the railway company against Sture, a homesteader, to acquire a right of way through his homestead. Held, that as the railroad company had not complied with the conditions of the act of March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting railroad companies the right of way through public lands, Sture was entitled to recover the difference between the value of his rights in the homestead as they would have been without the construction of the railroad, and their value diminished by such construction.

Appellant's points B, C, F, and G all relate to the dismissal of the so-called contest, and are considered together. It was not error of law for the officials of the local land office to refuse to dismiss the contest because the affidavit upon which the same was based was insufficient and because of insufficient notice. This was not in reality a contest. Both appellant and respondent had attempted to file on the land in controversy. The land department held that

appellant, on account of the priority of his settlement, was entitled to preference. Afterwards, based on an affidavit by respondent that appellant had abandoned the land since his attempted filing in May, 1896, the Land Department ordered a hearing before the local land officers in Fargo, who caused notice thereof to be served on both parties by mail. On the return day, June 20, 1899, both parties appeared and offered evidence. True, appellant appeared specially and moved to dismiss the proceedings on the ground of the insufficiency of the affidavit and insufficient notice, but afterwards took part in the proceedings, offered evidence, asked for a continuance, which was granted and by his conduct appeared generally. Parsons v. Venzke, supra; Creighton v. Kerr, 20 Wall. 9, 22 L. Ed. 309. It is well settled that the Land Department of the United States, including in that term the Secretary of the Interior, Commissioner of the General Land Office, and subordinate officers, constitutes a special tribunal vested with judicial power to hear and determine all claims of all parties to the public lands which it is authorized to dispose of, and hence had authority to order the hearing in the matter in controversy and cancel the entry. King v. McAndrews, 111 Fed. 860, 50 C. C. A. 29; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Acers v. Snyder, 8 Okl. 659, 58 Pac. 780; Parsons v. Venzke, supra, and cases therein cited.

As shown by appellant's point D at the hearing before the local land officers on the 20th day of June, 1899, and on the adjourned day of said hearing, he offered evidence tending to show residence and cultivation subsequent to the date of respondent's affidavit on which the hearing was ordered. This offer the local officers refused. He now urges this refusal as an error of law which the courts have power to correct. We do not think this testimony could have effected the result. Courts will not review a decision of the United States Land Department on the ground that the evidence was insufficient or that only incompetent evidence was before it, or that it refused to admit evidence, as the power of the department to try questions of fact embraces the power to pass on the weight and competency of evidence. Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398.

Error in the admission or rejection of evidence can never be presumed with reference to proceedings in the Land Department, and such errors, if relied upon, must be pleaded, and it must be made to appear that the decision finally arrived at in the department was

brought about either by the admission or rejection of that particular evidence. Durando Land & Coal Co. v. Evans, 80 Fed 425, 25 C. C. A. 523; James v. Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Thorton v. Peery, 7 Okl. 441, 54 Pac. 649. There is no merit in appellant's point E, that a contest should be dismissed when a default charged had been cured prior to notice of the same. This was not a contest but a hearing between two parties who claimed to have made settlement on the land. None of the evidence which was before the Land Department on that matter is in the record. In the absence of the evidence upon which findings of fact in the Land Department are based, courts will presume that there was legal, competent and relevant evidence to support such findings. Acers v. Snyder, 8 Okl. 659, 58 Pac. 780.

Appellant contends in point H that his final commutation proof based on his entry No. 23,518, should have been allowed. There is no merit in this contention. His entry had been canceled more than one year before his attempt to make said proof. We are cited to no case, and we believe none can be found, where an entryman was allowed to make final proof when his entry had been canceled and it had not been reinstated.

Appellant's points I, J, and K will be considered together. Respondent's notice of final proof was sufficient. The only fault appellant finds with it is that it did not specially cite him to appear at the hearing; he claiming to be an adverse claimant in possession. It is sufficient answer to this that he appeared at the time and place of the hearing of said final proof and protested against its allowance, it was not error to refuse to allow appellant to cross-examine respondent and his witnesses at the said hearing. The cross-examination was denied on the ground that the Department of the Interior had previously passed upon every objection made by appellant in his protest against the allowance of said final proof adversely to him. The Interior Department held that respondent's evidence on the hearing of his final proof was sufficient to entitle him to patent to the land. Appellant says that it was error for the Interior Department to disregard its rules of practice, but has not pointed out what rules were disregarded; but he undoubtedly means the failure of the notice of final proof to cite him to appear at the hearing and the refusal to permit him to cross-examine respondent and his witnesses at said hearing. In Parsons v. Venzke, supra, this court said: "Disregard of rules of practice which does not result in the denial

of a right or loss of an opportunity to be heard will not effect the binding force of the decision." Certainly the appellant was not injured by the alleged failure to observe these rules, as he appeared at the hearing and filed his protest against the proof. True, appellant was not permitted to cross-examine the respondent and his witnesses as to the latter's residence on the land; but that question was passed upon by the land department, his residence found to be sufficient and the patent issued to him.

Appellant's last point, L, is that the Secretary of the Interior has no power to annul a decision of his predecessor which determines the rights of the parties to contest for entry of public lands. Such a determination is a judicial action which can only be done by the courts, and cites Noble v. Railroad Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123; Emblem v. Lincoln Land Co., 102 Fed. 559, 42 C. C. A. 499; United States v. Stone, 2 Wall. 525, 17 L. Ed. 765. None of them are applicable to the facts in this case. In Noble v. Railroad Co., the railroad company, plaintiff below, desiring to avail itself of the act of March 3, 1875, granting to railroads the right of way through public lands of the United States filed with the register of the land o ce at Seattle, Wash., a copy of its articles of incorporation, a copy of the law under which it was organized, and other documents required by the act, together with a map showing the termini of the road, its length and its route through the public lands according to the public survey. These papers were transmitted to the Commissioner of the General Land Office, and by him to the Secretary of the Interior, by whom they were approved in writing and ordered to be filed. They were accordingly filed, and the plaintiff notified thereof. It then constructed its lines of road through the public lands according to the map so filed. Afterwards defendant and appellant, who was the successor in office to the Secretary of the Interior by whom the maps were approved, served upon plaintiff an order requiring it to show cause why the approval should not be revoked and annulled. This was followed by an order of the acting Secretary of the Interior annulling and cancelling said maps and directing the Commissioner of the General Land Office to carry out the order. The railroad company then brought an action in equity to enjoin the Secretary of the Interior, and the Commissioner of the General Land Office from executing this order. Held that, under the facts in this case, the right of way vested in the railroad company, and the revocation of

the approval of the Secretary by his successor in office, was an attempt to deprive the company of its property without due process of law, and was therefore void. The same ruling would undoubtedly apply had the Secretary who approved the maps attempted to revoke them.

In Emblem v. Land Co. the complainant brought an action in equity to set aside a patent and declare the defendant trustee of the land for him. From reading the syllabus it would appear that the case sustained the contention of appellant that the Secretary of the Interior has no power to annul a decision of his predecessor. This point was not passed on in the action and was not necessary to its decision. The facts are that, while a contest was pending between the plaintiff and defendant, Congress passed an act awarding the land to defendant which the Circuit Court of Appeals of the Eighth Circuit held it had no power to do.

In United States v. Stone: In 1829 a grant of land was made to the Delaware Indians with Camp Leavenworth as a boundary. In 1830 the President was authorized to employ a surveyor to survey the land, which he did. In 1854 another survey was made by the Secretary of War, which fixed the boundary the same as the 1830 survey. In 1861 the Secretary of the Interior ordered a new survey, which included the lands in controversy as having been granted to the Indians, and which were not included in the other surveys. In setting aside the patent issued to Stone, the court said: "The Secretary of the Interior in 1861 transcended his authority when he attempted to overrule the acts of his predecessor." It will be seen that none of these cases have any bearing on the case at bar. There is another reason, however, why this last contention cannot be sustained. The Secretary of the Interior, C. N. Bliss, passed upon the rights of the parties here up to May 1, 1896. The Secretary of the Interior, E. H. Hitchcock, passed upon the rights of the parties to the land after that date, so that one secretary did not annul or overrule the decision of his predecessor. The entry of appellant was cancelled because he abandoned the land. The patent was issued to the respondent, Healey, on the ground that he had under the homestead laws of the United States earned title to the land. These are matters of fact. The Land Department having power to pass upon them and to reach a conclusion, its decision is final. It is one of the elements of law that the decision of the Land Department on a question of fact is ordinarily binding on the courts. Vanton-

geren v. Heffernan, 5 Dak. 180, 38 N. W. 52, and cases cited; Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. Rep. 1030, 38 L. Ed. 992; Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063; Steele v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570. The reasons for this rule are obvious.

It appears from the various decisions of the Land Department that there was conflicting evidence on each of the material questions determined in the contest between appellant and respondent, and it is a well-settled rule that the decision of the Land Department upon controverted questions of fact are final and conclusive, and courts will not inquire into nor review them.

The Land Department is the only tribunal intrusted by Congress with the power to decide these questions or with authority to dispose of this land, and it had jurisdiction to hear and decide which of these parties was entitled to the land, and, it having decided adversely to appellant, he can obtain no relief in the courts.

The judgment is affirmed.

FISK and SPALDING, JJ., concur. MORGAN, C. J., not participating.

ELLSWORTH, J. (concurring specially). While I concur in the result announced by the opinion of my associates, I am unable to agree with their holding that the proceeding initiated by respondent, Healey, against appellant, Forman, in the United States Land Office at Fargo on May 8, 1899, "was not in reality a contest."

A "contest," according to the definition of the rules of practice of the Land Department (rule 1), is a special proceeding "initiated by an adverse party or other person against a party to any entry, filing or other claim, under the laws of Congress relating to the public lands for any sufficient cause affecting the legality or validity of the claim." The proceeding referred to presents every feature of a contest. It was initiated by an affidavit presented by the respondent, Healey, as contestant, in which were alleged facts constituting a ground of contest. It was directed against appellant, Forman, who on April 27, 1899, had made an entry under the homestead laws and invoked an adversary proceeding, the result of which would eventually determine the rights of one party or the other to the land. The notice issued was in

the exact form required of a notice of contest, and the parties were directed to appear before the local land office and offer testimony in accordance with the rules of practice governing contests. Such a proceeding arising out of a hearing to determine conflicting claims of two parties to priority in entry on a tract of public land is a new contest, or at least "an inquiry in the nature of a new contest," that under specific holdings of the Land Department should be regulated by the rules of practice governing service of notice. Parrish v. Jay, 19 Land Dec. Dep. Int. 405; Lark v. Livingston, 26 Land Dec. Dep. Int. 163. Rule 9 provides (4 Land Dec. Dep. Int. p. 38): "Personal service shall be made in all cases where possible if the party to be served is a resident in the state or territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served." Forman, was, unquestionably, at the time this notice was issued, a resident of the state and entitled to personal service. He was, however, served only by registered letter, which reached him on June 9, 1889, 11 days before the date of hearing. He appeared before the United States District Land Office on the day of hearing named in the notice and objected to the jurisdiction of the Land Department on the grounds of insufficiency of service. His objection was overruled, and he then took part in the proceedings of the trial, cross-examined the witnesses offered by contestant, introduced witnesses of his own, and applied for and obtained a continuance until August 3, 1899, for the purpose of taking further testimony. On the adjourned date he again appeared, introduced the testimony taken, and joined in a submission of the cause to the register and receiver of the local land office upon oral and written argument of counsel.

Under the rulings of the Land Department an appearance for the purpose of objecting to the sufficiency of the notice does not confer jurisdiction upon the local office; nor is such objection waived by subsequent participation in the trial. Chesley v Rice, 16 Land Dec. Dep. Int. 120; Davison v. Beatie, 14 Land Dec. Dep. Int. 689; Farrier v. Falk, 13 Land Dec. Dep. Int. 546. In denying Forman's motion to dismiss on the ground of insufficient notice, and in asserting and maintaining jurisdiction of the contest, the Land Department may be said to have ignored its rules and disregarded its announced principles of practice. If therefore, in a proceeding in the courts, a failure of the Land Department to

observe its own rules with reference to service of notice may be regarded as depriving it of jurisdiction over the person of a party to a contest, it may be urged with great force that its action, as shown by the facts of the case, in cancelling Forman's entry, was wholly unauthorized.

It has, however, been decided by this court that the Land Department may in particular cases suspend the operation of its rules or entirely disregard them, providing, however, it does not in so doing act in an arbitrary manner and deny the entryman a right to be heard. In case it shall appear that the action of the Land Department in failing to observe its own regulations results in the denial of a fair hearing to an entryman, the courts will restore to him the rights he has lost by such unfair procedure. Under the principle of this ruling, while the action of the local land office in asserting jurisdiction over the person of appellant in this case was a clear disregard of its rules of practice, and might have and should have been reversed either by the Commissioner of the General Land Office or the Secretary of the Interior, it will not be fatal to the action of the department in cancelling the entry, unless it can be said that it resulted in an ex parte proceeding in which the entryman had no chance to be heard, culminating in a cancellation of a bona fide entry. Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669.

I think it may be assumed upon the facts shown that appellant was accorded a reasonably fair hearing before the local land office. It does not appear that by reason of the defective notice of hearing he was prevented from introducing any evidence important to his case, or was deprived of any right that he would have enjoyed if service had been made in accordance with the rules of practice of the Land Department. It certainly does not appear that the Land Department, under all the circumstances, acted arbitrarily.

The rule that, in the view of courts of this state, a partial or even total disregard by the Land Department of some of its rules will not affect its jurisdiction to cancel an entry upon the public lands, provided it shall appear that the entryman has been accorded a fair hearing, was announced by the court almost fifteen years ago, and since that time has been applied and reiterated so often that it may be said to be a principle firmly embedded in the jurisprudence of our state. While I believe it should be applied

in the determination of this case, I place my concurrence on this point upon the ground of stare decisis.

(121 N. W. 1122.)

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STATE OF NORTH DAKOTA v. ROLAND MAGILL.

Opinion filed June 12, 1909.

**Criminal Law — Evidence — Impeachment — Reputation**

1. In cases where evidence of the good character or reputation of a person is admissible, the evidence must be as to his general reputation in the community in which he resides, and before a witness is competent to testify thereto, he must disclose a knowledge of the person's general reputation, and should not be permitted to give his own opinion as to it.

**Same — Assault and Battery.**

2. Under the evidence in this case, evidence of the good character or reputation of the complaining witness is inadmissible.

**Same — Instruction — Words and Phrases — "Battery."**

3. An instruction that a battery is any unlawful or willful use or force or violence upon the person of another is incorrect, as the force or violence used must be both willful and unlawful.

Appeal from District Court, Ransom county; *Allen*, J.

Roland Magill was convicted of assault and battery and appeals. Reversed.

*W. D. Lynch* (*C. W. Davis*, of counsel), for appellant.

*T. A. Curtis* and *Andrew Miller*, Attorney General (*Rourke & Kvello*, of counsel), for the State.

CARMODY, J. On the 3d day of December, 1907, the defendant was informed against by Alfred M. Kvello, state's attorney of Ransom county, for the crime of assault and battery with a dangerous weapon, upon the person of one Claude Bearfield. The jury returned a verdict finding the defendant guilty of assault and battery. Judgment was entered on the verdict, and this appeal taken therefrom.

The defendant claimed whatever he did was in self-defense, and that Bearfield was the aggressor. Error is assigned upon the admission of testimony offered by the state as to the reputation of

Claude Bearfield. J. F. Martin testified as follows: "I live north of town here about six miles. I am acquainted with Mr. Bearfield. I have known him since about 1898 or '99, I guess. I am a farmer, and have been farming all that time. Bearfield worked for me about three years, several times, you know, since I got acquainted with him. He stayed at my house. I am a married man, and have a family. He was a member of my family during that time. From my knowledge of Mr. Bearfield, I know what his reputation for being a peaceful man is; he is a peaceful man. I never had any trouble with him on the farm; never knew of him having trouble or a fight with anybody. I think he is kind and peaceful as I say. I never heard him say a word out of the way, only be kind. I don't know anything at all about his badness of any kind; never saw him use intoxicants of any kind." On cross-examination by defendant's attorney he testified as follows: "I have heard nothing about his quarrelling with others. My folks made remarks lots of times how good he was. What I know about him and what I am testifying is from my own personal knowledge and observation. I am not pretending to testify about his general reputation in the community." A motion was then made to strike out the testimony of this witness as to reputation, both as a peaceful citizen and for truth and veracity, upon the ground that the testimony now given is not from his knowledge of the general reputation of the witness, but from his individual experience and opinion of the witness Bearfield, therefore not admissible. No ruling was made, and an exception was taken by defendant. In our opinion the testimony should have been stricken out. Even if in this case the state might properly introduce proof as to the general reputation or character of the complaining witness, nevertheless, the proof offered was not competent for the reason that it was not as to the general reputation. The witness did not pretend to know or testify to his general reputation. The rule of the cases is stated in 5 Am. & Eng. Enc. Law (2d Ed.) 879, 880, as follows: "Character must be proved by witnesses who know the general reputation of the person in question; and before evidence as to character is admissible, this knowledge must appear. * * * A witness as to character should not be allowed to speak as to his own knowledge of the acts and transactions from which the character or reputation of the person whose character is being investigated has been derived, but he must speak from his

own knowledge of what is generally said of such person by those among whom he resides, and with whom he is chiefly conversant. The mere individual opinion of the witness as to character which is the subject of inquiry is not admissible." State v. Thoemke, 11 N. D. 387, 92 N. W. 480. In the case at bar, however, evidence of the reputation of the prosecuting witness for truth and veracity and peacefulness was inadmissible. Before such evidence is admissible, the defendant must first attack the character of the prosecuting witness. It is never competent for the prosecution to show, in the first instance, against the defendant, that the person assaulted was of good or peaceable character. 2 Bishop on Criminal Law (3d Ed.) section 612, and cases there cited; Bowlus v. State, 130 Ind. 227, 28 N. E. 1115; Pound v. State, 43 Ga. 88; State v. Potter 13 Kan. 414; Ben v. State, 37 Ala. 103.

Several errors are assigned to the charge of the court, only one of which we shall notice, which is as follows: "A battery is any unlawful or willful use of force or violence upon the person of another." Battery is defined by our Code to be any willful and unlawful use of force or violence upon the person of another. The error urged in this instruction is the use of the disjunctive "or" instead of the conjunctive "and" between the words "unlawful" and "willful." This instruction was, we think, erroneous. The assault and battery, to constitute the crime, must be both willful and unlawful, not either willful or unlawful. Alston v. State, 109 Ala. 51, 20 South. 81. In that case the court said: "An instruction that 'the least touching of another person, willfully or in anger, is a battery' is vitiated by the disjunctive 'or,' since touching one willfully is not sufficient to constitute a battery." The charge to the jury must include every element of the offense. If not defined in the language of the statute, the other language used must set forth the essential constituents of the offense to which the charge relates. 12 Cyc. 612; State v. Goldsberry, 66 Neb. 312, 92 N. W. 906; State v. Lindley, 8 Tex. App. 445.

On account of the errors hereinbefore stated, the judgment is reversed, the verdict of the jury set aside, and a new trial awarded the defendant. All concur, except MORGAN, C. J., not participating.

(122 N. W. 330.)

THE ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY CO., A CORPORATION, v. ROBERT B. BLAKEMORE, ET AL., AND THE COUNTY OF CASS, IN THE STATE OF NORTH DAKOTA, A MUNICIPAL CORPORATION, INTERVENER.

Opinion filed May 1, 1909.

Rehearing denied June 29, 1909.

**Parties — Bringing in Additional Parties — Time.**

1. Section 6824, Rev. Codes 1905, does not authorize the bringing in, by order of court, of additional parties after entry of judgment in a pending action. The judgment being in itself a complete determination of the controversy and of the rights of all parties thereto, there is neither warrant nor necessity, after its entry, for the presence of additional parties.

**Parties — Intervention — After Entry of Judgment.**

2. Section 6825, Rev. Codes 1905, authorizes the intervention and interpleader in a pending action only before the trial of parties whose rights are undetermined. The provisions of this section will not sustain an order permitting the intervention, after judgment, of a party whose petition to intervene does not show a clear, unmistakable, or adjudicated interest in the judgment rendered.

Appeal from District Court, Cass county; *Pollock*, J.

Action by the St. Paul, Minneapolis & Manitoba Railroad Company against Robert B. Blakemore and others, to condemn certain real estate, and an award was made to defendants in judgment after entry. Cass county was permitted to intervene, and interplead as defendant, and from such order defendants appealed.

Reversed.

*Engerud, Holt & Frame*, for appellants.

If the court can determine the matter before it without prejudice to parties not before it, they need not be summoned. Northwestern Tel. Co. v. N. P. Ry. Co., 9 N. D. 339, 83 N. W. 215; Bolton v. Donovan, 9 N. D. 575, 84 N. W. 357; McMahon v. Allen, 12 How. Pr. 45; Sawyer v. Chambers, 11 Abb. Pr. 110.

Intervention cannot be had after judgment. Feorny v. Ball, 6 La. Ann. 685; Carey v. Brown, 58 Cal. 180; Owens v. Colgan, 97 Cal. 454, 32 Pac. 519; Langenour v. Shanklin, 57 Cal. 70; Hocker v. Kelley, 14 Cal. 165.

*Murphy & Duggan* and *Lee & Fowler,* for respondent.

ELLSWORTH, J. The appeal in this cases arises out of an action commenced by the respondent railroad company against the defendants and appellants for the condemnation of two lots in the city of Fargo as station grounds for the use of respondent. The defendants made answer in the action, claiming title in fee to the lots which respondent sought to have condemned. The action was tried in the district court of Cass county to a jury, which rendered a verdict in favor of the defendants and against the plaintiff for the sum of $900 as the actual value of the lots in question. A judgment in accordance with this verdict was entered in the district court on January 18, 1906. On the same day respondent deposited with the clerk of the district court the sum of $959.70, the amount of the award of the jury with taxable costs. On the same day the district court made its final order, whereby it vested title to the lots in plaintiff for the uses and purposes for which the same were condemned, "free and clear of all right, title, claim and interest of the defendants in or to the same." On the same day the state's attorney of Cass county presented to the district court a petition of Cass county to intervene in the condemnation suit, in which was alleged, as ground for such intervention, the fact that in prior years, beginning with the year 1893 and ending with the year 1905, taxes had been assessed and levied upon the lots condemned, which had become delinquent and were unpaid, and which at that date, with accrued penalty and interest, amounted to the total sum of $439.13; that pursuant to the state laws the taxes for the years 1893 to and including the year 1901 had been duly certified to the clerk of the district court for judgment and sale of the premises involved in satisfaction of these taxes. The petition further recited the condemnation proceedings and the award of the jury of $900 as compensation for the taking by respondent, the entry of judgment on the award in the sum of $959.70, and "that the said judgment is for the full value of said premises, and stands in lieu of said premises, and these petitioners and interveners are entitled to resort to said judgment for the satisfaction of the liens aforesaid, and are entitled to have said judgment paid to them to the extent of their said lien claims. Wherefore, petitioners and interveners ask that an order be entered by this court distributing the moneys aforesaid as in this petition prayed for." The respondent railroad company joined with the intervener in its petition that

the moneys paid into court by it as plaintiff in the action be distributed as the petition requested. The district court issued an order to show cause on this petition to intervene, and upon a formal hearing had pursuant thereto made an order as follows: "At this time the above-entitled matter, coming before the court, having been under advisement, and the question arises whether the money now in the hands of the clerk of this court to the extent of the taxes due on the property in question shall be retained by the court awaiting the final determination of the action of Cass county, North Dakota, against said property, and the court, being fully advised in the premises, directs that the same be retained to the extent of $439.13, and the remainder thereof be forthwith paid over to the defendants Blakemore and Kedney, executors. The court at this time also makes an order interpleading the county of Cass as a party defendant in the condemnation proceedings, and this order is made nunc pro tunc as of December 16, 1905." This order is now the subject of an appeal by the defendants to the condemnation suit.

Appellant contends that the district court committed error by the entry of the order above quoted in the following particulars: First. The trial court ought not to have made the order interpleading Cass county after the case had been tried, judgment entered on the verdict, and that judgment had been paid. Second. The trial court ought not to have made an order the effect of which was to modify a final judgment. The proper procedure was to open up or set aside the final judgment entered, determine the rights of the intervener, and enter a new judgment, giving therein to the intervener such relief as it might be entitled to. Third. The order was void because it was an attempt to enforce delinquent taxes in a manner not authorized by statute. From a comparison of the prayer of the petition of Cass county with the order made by the district court, it is apparent that the order obtained is much broader than the request of the county. It prayed for a distribution of the fund created by the award in the condemnation suit. It obtained an order interpleading it as a party defendant in the condemnation proceedings, and directing that a portion of the award be retained by the court until the final determination of the tax proceeding brought by Cass county against the property in question. As the scope of the order is not made the subject of exception by appellant, it will be presumed that all matters included in

its provisions were either within the purview of the order to show cause, or were suggested and duly considered on the hearing.

This brings us to a consideration of the first point made by appellant that the district court, on the procedure instituted by the county, was not authorized to make, after judgment in the action, an order interpleading Cass county and making it a defendant in the condemnation suit. Respondent contends that authority for such an order is contained in sections 6824, 6825, Rev. Codes 1905. The section first mentioned reads as follows: "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in." This section is simply the codification of a familiar rule of equity, provided for the purpose of bringing before the court any person whose interest is so interwoven with the matter in controversy that a full and complete determination cannot be had in his absence. In all cases where full adjudication can be had without the presence of additional parties the express mandate of the statute forbids that they be brought in. Northwestern Telephone Exch. Co. v. N. P. Ry. Co., 9 N. D. 339, 83 N. W. 215.

The judgment in a case is a final determination of all controversies presented, as well as of the rights of all parties to the action. If the presence of Cass county as a party was necessary to a full determination of the controversy, then judgment could not have been entered without its being brought in. The fact that the condemnation suit was fully determined in its absence is the best evidence of the fact that its presence was not necessary. It is true that Cass county claimed a lien upon the property involved in the condemnation suit. This, of itself, however, does not require its presence as a defendant. Neither mortgagees nor lienors are necessary parties to a condemnation suit. Chicago, etc., R. R. Co. v. Sheldon, 53 Kan. 169, 35 Pac. 1105; 2 Lewis, Eminent Domain, section 325.

Section 6825, Rev. Codes 1905, is as follows: "Any person may before the trial intervene in an action or proceeding, who has an interest in the matter in litigation in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or pro-

ceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it was an original complaint." It will be noted that the right to intervene in a pending action, as provided for in this section, exists, if at all, only before the trial. The reason for this is readily apparent. The rights of a party who intervenes after trial cannot be determined by the judgment. His presence at such a time would be prejudicial to both parties to the suit. As the existence and extent of his right is wholly undetermined, he cannot then ask to be permitted to have the same relief as the other plaintiffs against the defendants; neither is he entitled to share with the parties who have taken part in the trial the fruits of the litigation. If the petition in intervention clearly established the fact that the intervener has an adjudicated or unquestioned interest in the judgment which had been recovered, a different case would be presented. In the case at bar, however, a convincing and undisputed claim to such an interest does not appear in the procedure in intervention. Whether or not in a proper action Cass county may be able to establish its right to transfer its lien for taxes from the property taxed to the award in the condemnation suit, and to have a portion of the award held by the court to await the determination of its proceeding to perfect its tax lien, is not necessary for this court, upon this appeal, to decide. It is only necessary to say that, in the procedure adopted, such right does not clearly and unmistakably appear. In its application to intervene Cass county must be regarded simply as a party who asks, after judgment in an action, for leave to have its rights litigated. It is clear that no authority exists for permitting a party under such conditions to intervene or interplead. It is equally clear that Cass county is not a party whose presence was necessary to a full determination of the controversy. Nothing stated herein in any manner affects, or is intended to affect, the order made in the tax case; that order not being before us for consideration.

The order appealed from is therefore reversed, and the district

court directed to vacate the same. All concur.

MORGAN, C. J., did not participate.

(122 N. W. 333.)

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MARY S. HODGSON v. STATE FINANCE COMPANY ET AL.

Opinion filed June 12, 1909.

**Taxation — Description of Land.**

1. A sufficient description of the property intended to be assessed and taxed is essential to a valid tax.

**Taxation — Redemption — Service on Holder of Void Tax Deed.**

2. Service of the notice of the time when the period for redemption from a tax sale will expire on the holder of a void tax deed as owner, is not effectual for any purpose.

**Same — Notice of Redemption.**

3. Service of the notice of the time when the period for redemption from a tax sale will expire must be made upon the owner of the land personally, if known to be a resident of the state; but if the owner be a nonresident, service shall be made by registered letter, addressed to the owner's last known post office address, and must also be served personally on the person in possession.

**Same — Tax Sale Certificate.**

4. Tax sale certificates, barred by the provisions of chapter 165, page 220, Laws 1901, are not liens on the land.

**Taxation — Mortgage Foreclosure — Injunction by Owner under Tax Deed.**

5. The purchaser of land at a tax sale cannot avail himself of the ex parte remedy provided by section 7454 of the Revised Codes of 1905 to enjoin the foreclosure of a mortgage.

**Laches.**

6. Under the evidence in this case, the plaintiff cannot complain of the laches of the defendant and its predecessors in interest prior to the mortgage foreclosure.

**Taxation — Mortgage Foreclosure — Rents and Profits During Period of Redemption.**

7. The purchaser at a mortgage foreclosure is, under the facts in this case, entitled to the rents and profits during the period of redemption.

Appeal from District Court, Sargent county; *Allen*, J.

Action by Mary S. Hodgson against the State Finance Company and others. Judgment for the Finance company, and plaintiff appeals.

Modified and affirmed.

*E. C. Wolfe, J. E. Bishop* and *C. D. Austin,* for appellant.

*Wicks, Paige & Lamb,* for respondents.

CARMODY, J. This case is here for trial de novo of all the issues pursuant to an appeal by plaintiff, who, claiming to be the owner in fee of the southeast quarter of section 22 in township 131 N., of range 56 in Sargent county, N. D., brought this action in statutory form to determine adverse claims. Defendant State Finance Company answered, claiming to be the owner and holder of a certificate of mortgage foreclosure sale, which certificate was based upon the foreclosure of a first mortgage of the premises, and denying that the plaintiff had any title, right, estate, lien or interest in, or upon said land, or any part thereof. The plaintiff claims title to said land by virtue of three tax deeds; one running to J. H. Devenney, based on the 1895 tax sale for the taxes of 1894; a special warranty deed from said Devenney to E. J. Hodgson, husband of the said plaintiff; a warranty deed from E. J. Hodgson and Mary S. Hodgson, his wife, to Lucille Hodgson, and a deed from said Lucille Hodgson to the plaintiff, and also by virtue of two certain other tax deeds, running to plaintiff, dated September 16, 1904, one for the taxes of 1897, and one for the taxes of 1898. Plaintiff is the owner of tax sale certificates based on sales for the taxes of 1887, 1892, 1893, 1895, 1896 and 1900, and holds receipts for the taxes of 1888, 1889, 1890, 1891, 1899 and 1901 paid as subsequent taxes under said sales. The defendant having obtained a sheriff's deed before the trial of this action on account of the mortgage foreclosure sale mentioned in its answer, claims to be the owner of the patent title to said land under said mortgage foreclosure. On July 24, 1885, one Sarah E. Bowen, who was the owner of said land, made and delivered to one A. P. Blunt her certain mortgage deed of said land to secure her note to said Blunt, of even date, for the sum of $300. That some time during the year 1896 she abandoned said land, and removed from this state. That in the year 1900 she died, leaving four minor children. The said A. P. Blunt died intestate, at Manchester, in the state of New Hampshire, which was the place of his residence. On the 1st day of November, 1889,

Mary A. Blunt was appointed administratrix of his estate, and was on the 16th day of February, 1904, the duly appointed and acting administratrix of the said estate, and on that date, as such administratrix, assigned by an instrument in writing the mortgage hereinbefore mentioned, and the indebtedness evidenced thereby, to this defendant. Said mortgage and assignment are both recorded in the office of the register of deeds in and for the said county of Sargent. On May 2, 1904, the defendant duly foreclosed said mortgage, and became the purchaser of the mortgaged premises at the foreclosure sale, and obtained a sheriff's certificate of sale thereof, which said certificate of sale is recorded in the office of the register of deeds. That no redemption was made from said foreclosure sale, and on May 3, 1905, a sheriff's deed was duly issued to said defendant. The plaintiff and her predecessor under said tax deeds and certificates of sale were in possession of said premises by tenant for a period of about six years, and collected about $100 as rental for said premises. On the 23d day of April, 1904, the district court of Sargent county made an order enjoining the foreclosure of the mortgage herein mentioned, which order was, without notice to plaintiff, vacated on the 2d day of May, 1904. The trial court made findings of fact and conclusions of law, on which judgment was entered adjudging and decreeing that the defendant State Finance Company is the owner in fee simple of said land, and that plaintiff has no estate or interest in, or lien or incumbrance upon, said premises, except that she holds tax sale certificates for the taxes of 1896, 1897, 1898 and 1900, with 1899 and 1901 taxes paid as subsequent thereto, which are liens on said land. From which taxes and tax sales the said defendant is authorized to redeem, and to be allowed, as credit on the legal amount required to redeem, the sum of $100 collected by plaintiff and her grantor as rent for said land, from which judgment this appeal is taken.

Appellant asks a reversal or modification of the judgment, on the grounds that the tax deeds mentioned are valid, but, if invalid, that she is at all events entitled to an equitable lien upon the land for the total amount paid on the tax sales, and other taxes paid against the land; that the defendant is not in any event entitled to the rents of said land, or to have the amount thereof credited to it on account of redemptions from the tax sales of said land; that the statute of limitations had run against the Blunt mortgage, and

foreclosure of said mortgage had become barred in law and equity by the laches of defendant and its predecessors in interest prior to the alleged foreclosure; and the foreclosure sale of the Blunt mortgage was enjoined by an order of the judge of the district court, which was in force at the time of the alleged foreclosure sale, because of which order said alleged sale is void. The tax deed to John H. Devenney based on the taxes of 1894, runs in the name of the county of Sargent as grantor, instead of the state of North Dakota, and was absolutely void for that reason. State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322. The tax deeds issued for the taxes of 1897 and 1898 are void. There was no proper service of the notice of the expiration of redemption. Section 1289 of the Revised Codes of 1899 requires notice to be addressed to the person in whose name the land was assessed, and it requires that this notice be served upon the owner of the land personally, if known to be a resident of the state; but, if the owner be a nonresident, service shall be made by registered letter, addressed to the owner's last known post office address. This service by registered mail is required in all cases where the owner is a nonresident, in addition to service by publication, and in addition to service upon the person in possession. The notice was not mailed to the then record owner, nor to Sarah E. Bowen, nor her heirs; it appearing on the trial of this action that she was not living at the time the notice was given, but was survived by four minor children. There was no service made upon Frank Anderson, the person in possession of the land. The only service made, or attempted to be made by registered mail, was upon John H. Devenney. The auditor, in serving, or attempting to serve, the notice on John H. Devenney by registered mail, undoubtedly proceeded on the theory that he having the tax deed was the owner of the land, and the only person entitled to notice. His tax deed was void on its face, and notice to him was insufficient. State Finance Co. v. Beck et al., supra; State Finance Co. v. Mulberger, 16 N. D. 214, 112 N. W. 986.

Frank Anderson was the person in possession within the meaning of the law, and notice should have been served upon him. Bradley v. Brown, 75 Iowa, 180, 39 N. W. 258; Hintrager v. McElhinney, 112 Iowa, 325, 82 N. W. 1008, 83 N. W. 1063. The taxes for the years 1887, 1888, 1889, 1890 and 1891 were void on their

face. They described no land. The only attempted description is the "S. E. 4." This court has held several times that such description makes the taxes jurisdictionally void. Power v. Larabee, 2 N. D. 141, 49 N. W. 724; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Roberts v. Bank, 8 N. D. 504, 79 N. W. 1049; Sheets v. Paine, 10 N. D. 103, 86 N. W. 117; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; State Finance Co. v. Beck et al., 15 N. D. 375, 109 N. W. 357; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350; State Finance Co. v. Mulberger, 16 N. D. 214, 112 N. W. 986; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984. Plaintiff holds three other certificates, one issued in 1893 for the taxes of 1892, one issued in 1894 for the taxes of 1893, and one issued in 1896 for the taxes of 1895, which were disallowed by the district court, and we think correctly. These certificates are barred by the provisions of chapter 165, page 220, Laws 1901. State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350. The injunction, issued at the request of appellant, restraining the foreclosure of the mortgage by advertisement, was improvidently issued. The plaintiff was not the mortgagor, and was not claiming title to the mortgaged premises under and in privity with the original mortgagor. Her only title to the premises was by tax deed, and she was not entitled to avail herself of the ex parte remedy provided by section 7454, Rev. Codes 1905, to enjoin the foreclosure of a mortgage, and cannot complain of its dissolution. Scott & Wheeler v. District Court, 15 N. D. 259, 107 N. W. 61. The appellant admits that there was no statutory limitation applicable to this mortgage, limiting the time within which it might be foreclosed by advertisement. We do not think that the plaintiff can complain of the laches of the defendant and its predecessors in interest prior to the mortgage foreclosure. State Finance Co. v. Halstenson, 17 N. D. 145, 114 N. W. 724.

But one other question remains. The trial court allowed defendant, as an offset to plaintiff's tax liens, $100, being the rent collected by the plaintiff and her predecessor in interest, E. J. Hodgson. This was error, as the most it was entitled to was the rent for the years of 1904, 1905 and 1906, being seventy-five dollars in all, which was collected after the foreclosure of the mortgage. The district court is directed to modify judgment in this particular. No costs will be allowed either party in this court.

Modified and affirmed. All concur.

MORGAN, C. J., not participating.

(122 N. W. 336.)

FRANK W. CHANLDER v. H. L. STARLING, C. F. SWEET, GEORGE T. MCDONALD AND W. J. BROWNLEE, AS MEMBERS OF THE STATE BOARD OF DENTAL EXAMINERS OF THE STATE OF NORTH DAKOTA, AND H. L. STARLING, AS SECRETARY OF SAID STATE BOARD OF DENTAL EXAMINERS.

Opinion filed April 23, 1909.

**Mandamus — Parties — Trial of Title to Office — Prosecution in Name of State.**

1. In a mandamus proceeding for the purpose of compelling recognition of his rights brought by one having a prima facie title to an office by virtue of a certificate in due form issued by the appointive power, it is not necessary that the action should be prosecuted in the name of the state, as plaintiff has a special interest therein within the meaning of section 7808, Rev. Codes 1905.

**Same — Parties Defendant — Prior Official Incumbent.**

2. In such a proceeding the prior incumbent of the office is not a necessary party defendant.

**Same — Mandamus to Compel Recognition by Members of Board — Title to Office.**

3. Mandamus is a proper remedy, under the facts set forth in the alternative writ, to compel defendants, who are members of the State Board of Dental Examiners, to recognize plaintiff's prima facie right, as an appointee, to fill an alleged vacancy on such board, to sit thereon, and to participate in the transactions of its business.

**Same.**

4. In such a proceeding the ultimate right and title to the office cannot be litigated, but plaintiff's prima facie right and title thereto is conclusive, except as to a de facto officer.

**Same — Officers — Color of Title.**

5. The allegations in the alternative writ, which are not challenged by proper denials in the answer, show that a vacancy existed in the office at and prior to plaintiff's appointment, and hence that one R., who was a former incumbent of the office, was not a de facto officer, as he did not have even color of title thereto.

**Same — Pleading.**

6. The answer admits the facts, showing plaintiff's prima facie title to the office, and fails to properly deny any issuable fact alleged in the alternative writ, or to alleged facts sufficient to constitute a defense.

Appeal from District Court, Cass county; *Pollock*, J.

Mandamus by Frank W. Chandler against H. L. Starling and others, as members of the State Board of Dental Examiners and H. L. Starling, as secretary of the board. From an order sustaining a demurrer to defendant's answer and granting a peremptory writ, defendants appeal.

Affirmed.

*H. F. Miller,* for appellants.

The action should have been begun in the name of the State of North Dakota, ex rel. Frank W. Chandler.

State, ex rel. Dakota Hail Ins. Co. v. Cary, 2 N. D. 36, 49 N. W. 164; 13 Enc. Pl & Pr. 656; 2 Am. & Eng. Ann. Cases, 551.

The governor had no authority to appoint the relator.

Rev. Codes 1905, section 86, paragraphs 2 and 3; State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025.

Mandamus will not issue against an incumbent in the exercise of the official function, de facto, under color of title. 26 Cyc. 255, section 7; McCrary on Elections (3d Ed.) section 218; State ex rel. Jones v. Oates, 57 N. W. 297, 19 Am. & Eng. Enc. Law, 769, and note.

*Bangs, Cooley & Hamilton,* for respondent.

Action should not be entitled in the name of the state on relation of relator.

Smith v. Lawrence, 2 S. D. 185, 49 N. W. 7; Howard v. City of Huron, 5 S. D. 539, 59 N. W. 833.

The appointment by the governor adjudicated that a vacancy existed. Conklin v. Cunningham, 38 Pac. 170, 173; Werner v. Smith, 9 Pac. 293, 297; Eldolt v. Territory, 61 Pac. 105, 107; Thompson v. Holt, 52 Ala. 491; Ewing v. Turner, 35 Pac. 951; Cameron v. Parker, 38 Pac. 14; Chambers v. Stringer, 62 Ala. 596; State v. Kipp, 74 N. W. 440; Driscoll v. Jones, 44 N. W. 726; Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025.

A resignation tendered to a wrong authority and accepted by a right one cannot be withdrawn.

State v. Augustine, 20 S. W. 651; Pariseau v. Board, 55 N. W. 799.

FISK, J. This is a special proceeding by mandamus brought in the district court of Cass county to compel defendants, who are the members of the State Board of Dental Examiners, to recog-

nize plaintiff as a member of such board, and to permit him to act in such capacity. Plaintiff presented to the trial court an affidavit subscribed and sworn to by him, setting forth, in substance, that he possessed the necessary qualifications for holding such office, and the fact of his appointment thereto by the governor on December 22, 1906, to fill the vacancy caused by the removal from the state, as well as the resignation of one Ramsey, who was theretofore and on January 1, 1906, duly appointed as a member thereof, and also setting forth the issuance to plaintiff in due form of a certificate of his appointment aforesaid, and the fact that on January 8, 1907, he duly qualified as such member as required by law; also averring that at a regular meeting of such board held on January 9, 1907, at which defendants were present, he exhibited to said board, and to each of the defendants, his certificate of appointment aforesaid, and demanded of them that he be permitted to the use and enjoyment of his rights and office under such appointment, which were refused and denied him; further averring that defendants have at all times since refused to recognize plaintiff's right to sit as a member of such board and to exercise his rights under such apointment; and also alleging that he has no plain, speedy or adequate remedy in the ordinary course of law. Thereupon an alternative writ was issued as prayed for, commanding defendants to recognize the plaintiff as a member of such board, or to show cause at a date fixed, why they should not be compelled to do so. Upon the return day defendant Starling, in behalf of himself and his co-defendants, filed an answer, the material portions of which are, in substance, as follows: That said Ramsey had not prior to said meeting in January, 1907, abandoned his residence in this state, and that he was during all the year 1906, and during the months of January and February, 1907, a bona fide resident of the state and an acting member of said board. By such answer it is admitted that plaintiff received from the governor a certificate of appointment as a member of said board, but it is alleged therein that at the date such certificate was delivered to plaintiff by the governor there was no vacancy on such board, and hence that such certificate of appointment was and is void, and never became operative. The answer admits that plaintiff presented to the board and the members thereof such certificate of appointment, and that the defendans, as members of such board, refused to recognize plaintiff as a member, and informed

him that they could not do so for the reason that no vacancy existed at the date of his appoinment or since then. Attached to such answer and made a part thereof are the minutes of the meetings of the board held on January 8, 9 and 10, 1907, showing that Ramsey was present and participated in such meetings, also an affidavit subscribed and sworn to by said Ramsey tending to corroborate the foregoing allegations of the answer. Plaintiff demurred to such answer on the ground that the same fails to state facts sufficient to constitute a defense. The lower court sustained such demurrer, and, defendants having elected to stand upon their answer, an order was made, directing the issuance of a peremptory writ of mandamus as prayed for by plaintiff, and it is from such order that this appeal is prosecuted.

Appellants rely for a reversal upon the following propositions:

(1) That the action should have been begun in the name of the state ex rel. Frank W. Chandler, instead of merely in the individual name of such party.

(2) That R. S. Ramsey should have been made a party defendant.

(3) That under the facts alleged in the answer, and which are admitted by the demurrer, plaintiff's certificate of appointment to a membership on such board is not such evidence of his right to a seat thereon as will justify the order appealed from.

The first and second propositions merit by brief consideration. Conceding that the demurrer reaches back to the alternative writ as claimed, and enables defendants to avail themselves of any material defects appearing on the face thereof, we are agreed that neither of the objections urged are tenable. Under Revised Codes 1905, section 7808, it was not necessary for plaintiff to sue in the name of the state, as he has a special interest in the proceeding. This section provides: "When a special proceeding is prosecuted by one having a special interest in the proceeding, it shall not be necessary for the state to be joined as plaintiff therein, but the person prosecuting the same shall be known as the plaintiff and the adverse party as the defendant." Anything said in State v. Carey, 2 N. D. 36, 49 N. W. 164, cited by appellant's counsel, is not in point, as the foregoing section was not in force at the date of the decision of that case. It is equally clear that Ramsey is not a necessary party defendant. This is not an action to determine or to try Ramsey's title to the office. It is a special pro-

ceeding of a civil nature to compel defendants to recognize plaintiff's prima facie title and right to such office. The ultimate right thereto as between plainiff and the said Ramsey is not, and cannot be, involved in this proceeding; hence the latter is neither a necessary nor a proper party defendant. In 13 Enc. Pl. & Pr. p 656, it is said: "All persons whose co-operation is necessary for the performance of the act sought to be enforced, and who will have a joint duty to perform in case the writ is granted, must be made respondents." Obviously Ramsey could have no joint duty to perform with the parties who are made defendants under the writ prayed for. The whole case necessarily proceeds upon the theory that plainiff, prima facie, is vested with the right to membership on said board, which right is ignored by defendants, and that, as a necessary conclusion, Ramsey's membership ceased prior to the date of plaintiff's appointment; hence the latter could have no statutory duty in the premises. Since the decisions in Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025, and State v. Archibald, 5 N. D. 359, 66 N. W. 234, the question as to what issue is triable in such a proceeding as this is foreclosed in this jurisdiction. In the former case it was held that in cases like this "nothing can be tried, except such questions as affect the prima facie title of the relator." In the latter case it was said: "That it is proper to try in mandamus proceedings, all questions relating to the prima facie title is not open to debate in this state since our decision in Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025. See, also, State v. Johnson, 30 Fla. 433, 11 South. 845, 18 L. R. A. 410; Conklin v. Cunningham, 7 N. M, 445, 38 Pac. 170; State v. Common Council of City of Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595. The defendant has been removed from the office, and he is not in a position to contest the right of the relator to hold the office. The state might hereafter in quo warranto proceedings try the question of relator's eligibility to the office, but a judgment of ouster against him would not show that the defendant in this proceeding had had any right to the office during the relator's incumbency."

In the Butler Case, Chief Justice Wallin, in answering the defendant's contention to the effect that the facts alleged in the answer and admitted to be true by the demurrer put in issue relator's title to the office, and consequently relator should go out of court in such proceeding, and be required to resort to quo war-

ranto to establish his claim of title, said: "But the fallacy of this proposition is apparent for two reasons: First, as we have seen, the defendant, a private suitor, has no status which entitled him to become the champion of the state, and consequently, when he seeks to appear in that capacity, he is confronted by the rule which requires that in such a case the public must be represented by the proper official. Second. * * * Whether the fact pleaded in the answer * * * constitutes a bar to holding the office is a question of law presented by the demurrer. This question, and to determine which requires a trial, counsel insists should have been investigated by the trial court, and sufficiently determined at least to ascertain whether or not the question presented involved the title to the office, and, if it did, then counsel claims that the relator should under the rule be kept out of his office until the question so raised should be elsewhere tried and determined. In its final analysis counsel's position appears to be that where the answer in mandamus presents facts which go to the ultimate title, but do not touch relator's prima facie title, the relator must be denied the writ, and hence be kept out of office until another proceeding has settled the question thus thrust upon the court by the private suitor. This reasoning leaves out of sight the rule that counsel admits to be the prevailing one, viz., that title to an office cannot be tried by mandamus. Despite this concession, however, counsel vigorously contends that in this case—and, of course, all similar cases—the court must try and determine the question whether the facts set out in the answer do or do not involve the title. In our view this investigation is inhibited by the rule which forbids a trial of title by mandamus. Counsel's contention certainly implies that a relator must go out of court if the title is put in question by the answer * * *." We see no reason to depart from the rule thus early established by this court, and under which it is plain that appellants can avail themselves in this proceeding only of the defense that respondent does not possess a prima facie title to the office. We therefore conclude that Ramsey's rights, if any, are in no manner involved or affected in this proceeding, and hence he was not a necessary or proper party defendant.

This brings us to the merits of the case, which to some extent have already been touched on by the foregoing. At the threshold of appellant's contention upon the merits, it is asserted by his

counsel that the sole question is whether the governor's certificate of appointment to a membership upon any of the state boards is such evidence of the right to a seat thereon as will justify a court in enforcing the same by mandamus regardless of the facts. Counsel, in attempting to convince us that this question should be answered in the negative, concedes that it is the statutory duty of the governor to see that all offices are filled, and to make appointments to fill vacancies as required by section 86 of the Revised Codes of 1905; but he contends, in effect, that the governor in appointing plaintiff exceeded his statutory duty, and power, because, as claimed by him, no vacancy in fact existed on such board, as Ramsey was at the date of such appointment an incumbent of such office in the exercise of official functions de facto, and under color of right, and he cites and relies upon Butler v. Callahan, supra, in support of his contention that under such facts the writ prayed for will not issue. This line of reasoning begs the whole question. The fallacy in counsel's argument, as it seems to us, lies in the unwarranted assumption that the facts pleaded in the answer show that Ramsey's incumbency was "under color of right." Such is not the fact as against plaintiff, who holds a later certificate of appointment. There cannot well be two persons having color of right to the same office at the same time. One must give way to the other, and plaintiff, under the later certificate, has prima facie title and color of right to the office. The answer admits such prima facie right in plaintiff, but alleges, as did the answer in the Butler case, facts having a bearing merely upon plaintiff's ultimate right to the office. That issue cannot be tried in a mandamus case such as this, and hence the demurrer to the answer was properly sustained. So far as this proceeding is concerned, plaintiff's prima facie title and right to the office must prevail as such title and right is in no manner challenged, but, on the other hand, is admitted by the answer. Butler v. Callahan, supra. By the statute above cited the governor was not only empowered, but it was his duty, to fill vacancies existing in such office. He was therefore necessarily clothed with the power of determining, in the first instance, the question whether or not a vacancy in fact existed requiring the exercise of such appointive power. His powers in this respect were analogous to those of a canvassing board, and his decision, the evidence of which is the certificate of appointment, is entitled to and will be given the

same prima facie weight as that of the certificate of a board of election canvassers. The argument of appellant's counsel that it could not have been the legislative intent "to grant such unusual and dangerous powers to the governor," does not appeal to us as sound. Such argument is predicated upon a false premise. If such grant of power to the chief executive of the state is dangerous, it is likewise dangerous to grant to a board of canvassers similar functions. Past experience demonstrates the fallacy of counsel's assumption. It is very seldom, if ever, that such power is abused, but, conceding that occasional abuses occur, the fact remains that such power must be vested somewhere, and it must be conceded that ordinarily it is no more liable to abuse in the hands of the governor than elsewhere. Furthermore, nothing but temporary injury can result through a mistaken or willful abuse of the power. If a person is wrongfully clothed by an appointment with the prima facie title and right to an office, the rightful claimant is but temporarily divested of his rights. He may cause proper proceedings to be instituted to enforce such rights.

By the foregoing we do not mean to hold that the certificate of appointment will in all cases entitle the appointee to invoke this remedy. It merely clothes such appointee with a prima facie right to the office, but such prima facie right will prevail in such a case as this, with the single exception that it will not lie where the office is in the possession of a de facto officer. It is, of course, well settled that mandamus will not lie against a de facto officer, either to compel him to deliver the office to plaintiff or to try a conflicting title thereto. Butler v. Callahan, supra; 19 Am. & Eng. Enc. Law (2d Ed.) 769; 26 Cyc. 257, and cases cited. As said by the Chief Justice in Butler v. Callahan: "It is quite true, however, and the doctrine is elementary, that the writ will not issue either to admit into office or to try a conflicting title thereto, where the incumbent is in the exercise of official functions de facto and under color of right." The controlling question, therefore, is whether the answer shows that at the date of plaintiff's appointment and at the time of the commencement of this action, Ramsey was a de facto member of such board. If so, the demurrer was improperly sustained, as such fact, if established, will defeat plaintiff's recovery in this action and hence is a proper defense. A de facto officer is well defined by the Supreme Court of Wisconsin in State ex rel. Jones v. Oates, 86

Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912. Winslow, J., speaking for the court, there said: "It is not material here to consider who may be a de facto officer as to third persons and the public in general. The question is: Who is a de facto officer, as against the person holding a certificate of election, who has duly qualified, as required by law? On this question the law is well settled. A de facto officer is one who is in possession of an office, and discharging its duties, under color of authority. McCrary, Elec. (3d Ed.) section 218; 2 Dill. Mun. Corp. section 892. By 'color of authority' is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer." It was there held that defendant, who was a mere hold over incumbent of the office, was in no proper sense a de facto officer as against the relator. See, also, State v. Archibald, supra, where it was held that Archibald, whom the board had removed, but who still remained in the actual incumbency of the office, claiming a right thereto, was not, as against the relator, Moore, even a de facto officer, but was "holding the office without so much as color of title." Tested by these rules does the answer state a defense? We are clear that it does not. When stripped of legal conclusions, we think it wholly fails to put in issue any of the allegations of the alternative writ to the effect and tending to show that a vacancy in such office existed at and prior to the date of defendant's appointment. It nowhere denies the facts alleged in the writ that Ramsey prior to May 1, 1906, ceased to practice dentistry in the state, since which date he has not been a practicing dentist therein, and that prior to the date of plaintiff's appointment the said Ramsey delivered to defendant Starling, as secretary of such board, his resignation in writing as a member thereof, and that such resignation was prior to plaintiff's appointment, accepted by the governor.

By section 314, Rev. Codes 1905, it is provided that "all vacancies in such board shall be filled by appointment by the governor," and "no person shall be eligible to appointment on such board who is not a practicing dentist in this state." Section 422, Rev. Codes 1905, provides: "Every office shall become vacant upon the happening of either of the following events: (3) His resignation. * * * (7) His ceasing to be a resident of the state. * * * (9) His ceasing to possess any of the qualification of office prescribed by law." It is manifestly true, therefore, that, even if

Ramsey did not cease to be a resident of the state prior to such appointment of plaintiff, still, according to the allegations of the writ which stand unchallenged, except by mere legal conclusions, there was a vacancy in such office on December 22, 1906, under the express provisions of the Code above quoted, and such prior incumbent long prior to such date ceased to have even color of title thereto, and for this reason he was not on such date or at any subsequent date a de facto officer.

Our conclusion is, therefore, that the answer wholly fails to put in issue the plaintiff's prima facie title or to properly allege any facts constituting a defense, and hence the demurrer was properly sustained. Among the many authorities in addition to those hereinbefore cited which lend support to our views are the following: Conklin v. Cunningham, 7 N. M. 445, 38 Pac. 170; Cameron v. Parker, 2 Okl. 277, 38 Pac. 14; Werner v. Smith, 4 Utah, 238, 9 Pac. 293; Eldodt v. Territory, 10 N. M. 141, 61 Pac. 105; Thompson v. Holt, 52 Ala. 491; State v. Kipp, 10 S. D. 495, 74 N. W. 440; Driscoll v. Jones, 1 S. D. 8, 44 N. W. 726; Stevens v. Carter, 27 Or. 553, 40 Pac. 1074, 31 L. R. A. 342; State v. Johnson, 35 Fla. 2, 16 South, 786, 31 L. R. A. 357; Cruse v. State, 52 Neb. 831, 73 N. W. 212; State v. Hyland, 75 Neb. 767, 107 N. W. 113; Supervisors v. O'Malley, 46 Wis. 35, 50 N. W. 521; State v. Kersten, 118 Wis. 287, 95 N. W. 120; State v. Grant, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 1 L. R. A. (N. S.) 588, 116 Am. St. Rep. 982.

The order appealed from is accordingly affirmed. All concur.

(121 N. W. 198.)

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CHARLES G. LARSON v. FRANK NEWMAN, ADMINISTRATOR, ETC.

Opinion filed March 13, 1909.

**Brokers — Termination of Authority — Dissolution of Partnership.**

1. A landowner made a contract in writing with S. & Co., land agents, authorizing them to sell a piece of land on terms stated in the contract. Afterwards the firm of S. & Co. dissolved. S., continuing the business, made a contract to sell the land to plaintiff on terms somewhat different from those authorized in the agency contract, and signed the landowner's name thereto by himself as agent. In an action to compel the land owner to specifically perform the

contract, *held* that whatever authority was conferred upon S. & Co., by the agency contract was terminated upon the dissolution of the co-partnership, and S. had no further power under the contract.

**Brokers — Unauthorized Sale.**

2. The sale by an agent on any other terms and conditions than those authorized by the principal is not binding on the latter.

**Brokers — Sale — Ratification.**

3. Evidence insufficient to show a ratification by the principal of the contract of sale by S. to plaintiff.

**Witnesses—Transaction with Decedent.**

4. Under Rev. Codes 1905, section 7252, forbidding a party to an action against the heirs or representative of a decedent to testify to conversations or transactions with decedent; testimony by plaintiff, in an action to specifically enforce an alleged contract of sale of land with a decedent, that decedent promised to go to a certain town the next day, and fix up the deal on the terms of the contract of sale, was inadmissible.

Appeal from District Court, Ward county; *Goss*, J.

Action by Charles G. Larson against Frank Newman, administrator of the estate of George J. Newman, and another. Judgment for defendants, and plaintiff appeals.

Modified, and as modified, affirmed.

*Johnson & Nestos* and *Skulason & Burtness*, for appellant.

*Palda & Burke* (*Engerud, Holt & Frame*, of counsel), for respondents.

CARMODY, J. The plaintiff in this action seeks to compel the defendant to specifically perform a certain written contract, alleged to have been duly subscribed and executed by the plaintiff, and duly subscribed and executed on the part of the defendant by one C. Sangalli thereunto, duly authorized by an instrument in writing, theretofore duly executed and subscribed by the defendant, by the terms of which the defendant agreed to sell and convey to the plaintiff certain real estate consisting of 160 acres in Ward county. At the time of trial there was another action pending relative to the land in controversy, in which defendant George J. Newman was plaintiff, and Sangalli and plaintiff, Larson, were defendants. They stipulated that the rights of the parties to said action would be determined by the judgment in the case at bar. The

trial court made findings, and entered judgment dismissing this action, cancelling the contract alleged to have been entered into, and awarding the respondents possession of the real estate in controversy, and ordered $100 attorney fees to be taxed in favor of the respondents and against the plaintiff. Plaintiff appealed from the judgment, and demands a review of the entire case in this court. The facts which are material to the determination of the questions involved are as follows: On August 24, 1904, the defendant, who was then, and his heir at law now is, the owner of the real estate in question, listed the same for sale with the firm of C. Sangalli & Co., consisting of three members, real estate agents at Berthold. The listing contract is as follows: "Agent's Authority to Sell Land. Berthold, N. Dak., August 24, 1904. I hereby constitute and appoint C. Sangalli & Co., of Berthold, N. D., my exclusive agent to sell the following described lands: The northwest quarter of section 2 in township No. 155 of range No. 86, county of Ward, state of N. Dak. My net price to you on this land is $1,700.00. I want $1,200.00 paid down and will allow the balance to be paid in balance mtge. to be assumed by purchaser annual payments, with interest at the rate of — per cent per annum and I hereby agree to pay you a commission of ——— of said net price and in case of sale to furnish at my own expense a complete abstract of title and to convey the above-described premises by a good and sufficient deed or deeds of conveyance. Notify me if you get offer of $1,600.00. Gen'l Delivery, Chicago, Ills. 86 acres broken. This authority to remain in force for the period of 2 months from date and to continue in force thereafter until I shall have served 15 days' notice of cancellation upon C. Sangalli & Co., my herein constituted agent. George J. Newman. Mtge. $500.00, 10 per cent. Due 8-20-08."

Immediately after making the agency contract, defendant left the state, and his residence was unknown to Sangalli & Co., until about July 1, 1906, when Sangalli received a letter from him, asking if he had any chance to sell the land, how crops were looking, etc., giving his address as New York City. In the meantime, and before the contract in question for the sale of the land was entered into, the firm of Sangalli & Co. was dissolved, and the business was continued by C. Sangalli, which dissolution was unknown to defendant. On the 31st day of August, 1905, and after the dissolution of the firm of C. Sangalli & Co., C. Sangalli, claim-

ing under said contract to be the agent of defendant, entered into a contract with plaintiff, as follows:

"Earnest Money Contract of Sale.

"Berthold, N. Dak., August 31, 1905.

"Received of Charles G. Larson one hundred dollars ($100.00) as earnest money, and in part payment for the purchase of the following described property situated in the county of Ward and state of North Dakota, viz.: The northwest quarter of section No. two (N. W. ¼ sec. 2), in township one hundred and fifty-five (155) north, of range eighty-six (86) west. Containing one hundred and sixty (160) acres more or less according to the United States government survey thereof. Which I as duly authorized agent of George J. Newman, the owner of the above-described real estate, sold and agreed to convey to said Charles G. Larson for the sum of one thousand and eight hundred dollars ($1,800.00) on terms as follows, viz.: One hundred dollars ($100.00) in hand paid as above and $1,200.00 November 30, 1905; $500.00 mortgage to be assumed by the purchaser, payable on or before the dates as named above or as soon thereafter as a warranty deed conveying a good title to said land is tendered, time being considered of the essence of this contract. And it is agreed that if the title to said premises is not good and cannot be made good within one year from date hereof, this agreement shall be void, and the above one hundred dollars ($100.00) refunded. But if the title to said premises is now good, in his name, or can be made good within one year, and said purchaser refuses to accept the same, said one hundred dollars ($100.00) shall be forfeited to the said C. Sangalli. But it is agreed and understood by all parties to this agreement that said forfeiture shall in no way affect the rights of either party to enforce the specific performance of this contract.

"George P. Newman,

"By C. Sangalli, Agent. (Seal.)

"I hereby agree to purchase the said property for the price and upon the terms above mentioned and also agree to the conditions of forfeiture and all other conditions therein expressed.

"Charles G. Larson. [Seal.]

"..... the undersigned, owner of the above-described land, do hereby ratify the above sale and agreement.

"..... [Seal.]"

On receipt by Mr. Sangalli of the letter hereinbefore mentioned

he sent defendant a copy of the contract of sale, and also a deed for his signature, to which he replied as follows:

"New York, July 21, 1906.

"Friend Charles: In the earnest money contract it says 190' payable on or before the dates as named above, etc. Now, I don't know what that 190' is or what it is for. I had a notary public look at it and he did not understand it. He told me to write and have it explained. Now Charles, I have almost entirely forgotten the conditions of the contract I made with you; I did not think when I made it that you would find a buyer and now it is almost two years ago and the land certainly went up a little in that time. Now Charles, between you and me and the fence post, don't you think we could make Larson come up a little more on the price; he wants the land because it is handy to Parker. Sound him and tell me what you think of it. Now tell me what your commission is, and who pays it, Larson or I. Tell me if Larson is on the place this year. Let me know what taxes I had to pay last year, and if Stevenson has paid my interest to the Second National Bank of Minot. Now Charles, that is asking a good deal of you but I hope you will do it. Remember your commission will be all right. If there is not any other land handy he will come up. All right.

"Now, Charles, this is between you and me only. I wrote to Stevenson last summer; it looks funny he could not tell you my address. Now you know how land is selling better than I do. If you work for my best interest I will be thankful and a little more.

"Yours very truly, Geo. J. Newman.

"Address as before."

At the time of the alleged sale the land in question was rented for a term which would expire about November 1, 1906. Plaintiff made no payment, and took no possession of said premises until the fall of 1906, when he put some grain into a granary on the premises. After the commencement of this action a stipulation was entered into between plaintiff and defendant by the terms of which the plaintiff was to farm the land during the season of 1907 without it interfering with the rights of any of the parties to this action. On or about the 1st day of October, 1906, defendant returned to Berthold, when Sangalli and the plaintiff requested him to execute a deed for the land, which he failed and refused to do. The plaintiff then deposited $1,200 in a bank at

Berhold, with instructions to turn it over to defendant upon his executing a sufficient deed of warranty conveying to plaintiff the said land. He also notified defendant in writing of the deposit. After the commencement of this action defendant died, and upon the trial his administrator, Frank Newman, and his sole heir, Ann Newman, were by stipulation substituted as parties defendant.

Is the contract of sale herein mentioned defendant's contract? It was not signed by him in person. Plaintiff contends that Sangalli had authority, under the written agency contract, to sell, and make an executory contract binding upon defendant, and further claims that he, by his letters to Sangalli dated June 29, and July 21, 1906, and by other actions, ratified the contract of sale made for him by Sangalli to plaintiff. On the other hand, respondent contends that said contract of agency only conferred upon Sangalli & Co. the authority ordinarily possessed by real estate brokers, and that it did not empower them to make a written contract which would bind defendant; that even if it did create an agency to sell and contract in defendant's name, the contract executed by Sangalli is not binding on defendant for whatever power the agency contract conferred was in Sangalli & Co., which was a copartnership composed of three members, and was dissolved before the sale contract herein mentioned was executed between Sangalli and plaintiff, and, further, that the terms of sale stated in the agency contract were $1,200 cash and the assumption of a $500 mortgage, which was then on the premises; while the contract entered into between Sangalli and plaintiff was for $100 cash and $1,200 payable on the 1st day of November, 1905, which was three months after the contract was made; the plaintiff to assume the $500 mortgage. Appellant cites a large number of cases to sustain his contention that Sangalli, under the agency contract hereinbefore mentioned, had power to execute the contract of sale, and that it was valid and binding upon defendant. Under our view of the case it is not necessary to pass upon this contention, as we are agreed that whatever authority was conferred upon Sangalli & Co. by the agency contract was terminated upon the dissolution of the copartnership, and Sangalli had no further power under that contract. Martine v. Life Ins. Society, 53 N. Y. 339, 13 Am. Rep. 529; Johnson v. Wilcox, 25 Ind. 182. The sale contract was unauthorized, void, and not binding upon the defendant for the reason that the terms of sale therein set forth were

materially different from those required by the agency contract, in that the agency contract required the $1,200 to be paid in cash, while the sale contract gave three months' time for the payment of said sum. It also contains some provisions regarding title to the land, the forfeiture of $100 to Sangalli in case the plaintiff refused to accept same, and some other provisions not contained in the agency contract. The sale by an agent on any other terms and conditions than those authorized by the principal is not binding on the latter. De Sollar v Hanscome, 158 U. S. 216, 15 Sup. Ct. Rep. 816, 39 L. Ed. 956; Holbrook v. McCarthy, 61 Cal. 216; Speer v. Craig, 16 Colo. 478, 27 Pac. 891; Taylor v. White, 44 Iowa, 295; Veeder v. McMurray (Iowa) 23 N. W. 285; Siebold v. Davis, 67 Iowa, 560, 25 N. W. 778; Dayton v. Buford, 18 Minn. 126 (Gil. 111); Jackson v. Badger, 35 Minn 52, 26 N. W. 908; Nat. Iron Armor Co. v. Bruner, 19 N. J. Eq. 331. And, unless defendant ratified the contract of sale entered into between Sangalli and the plaintiff, the judgment of the district court must be affirmed, except as to attorney fees of $100.

Appellant contends that the defendant Newman ratified the contract of sale by his letters to Sangalli dated June 29, and July 21, 1906, hereinbefore referred to, and also by his conversation and conduct after his return to Berthold in the fall of 1906. The letter written to Sangalli by defendant on June 29, 1906, only refers to the land as follows: "Let me know if you had any chance to sell that land and how crops are looking and all the news in general." In answer to this letter Sangalli sent him a copy of the contract of sale, and also deed for his signature. In reply thereto defendant wrote the letter in which he stated that he had received the earnest money contract, part of it he did not understand, and had a notary public look at it who did not understand it, and asked him to write and have it explained. And then goes on to say "Now Charles I have almost entirely forgotten the conditions of the contract I made with you. I did not think when I made it that you would find a buyer and now it is almost two years ago, and the land certainly went up a little in that time. Now Charles, between you and me and the fence post, don't you think we could make Larson come up a little more on the price; he wants the land because it is handy to Parker. Sound him and tell me what you think of it. Now tell me what your commission is, and who pays it. Larson or I. Tell me if Larson is on the place this year.

Let me know what taxes I had to pay last year, and if Stevenson has paid my interest to the Second National Bank of Minot. Now Charles, that is asking a good deal of you, but I hope you will do it. Remember your commission will be all right. Now, Charles, this is between you and me only." This letter, which is the one principally relied upon by appellant, is in our opinion far from a ratification of the sale contract. It does not state that he will consummate the sale, or that he is satisfied with it, or that Sangalli was authorized to make it; neither did he execute the deed sent him by Sangalli. On his return to Berthold in the fall of 1906 he repudiated the contract and refused to carry out its terms. True, plaintiff testified that, in a conversation he had with Newman after his return to Berthold, he promised to go to Minot the next day and fix up the deal on the terms of the sale contract. This testimony was seasonably objected to by respondents, and was inadmissible under the statute, which deprives a party to an action against the heirs or representatives of a deceased to testify as to conversations or transactions had with the said deceased. Section 7252, Rev. Codes 1905; Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729; Regan v. Jones, 14 N. D. 591, 105 N. W. 613. The trial court allowed attorney fees at $100. This was error, and that amount must be deducted from the costs taxed in the district court, and the judgment modified to that extent.

The judgment as modified is affirmed. All concur.

(121 N. W. 202.)

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HALVOR J. HAGEN v. SEVERIN SACRISON AND GUNHILD GUNDERSON.

Opinion filed November 10, 1909.

**Wills — Perpetual Charities — Suspension of Power of Alienation — Trusts — Non-Action of Trustee — Discretion to Delay Sale.**

1. By his will, the testator, after providing a competency for his son and sole heir at law, directed that the remainder of his estate (specifically describing the same) shall be devoted to a worthy perpetual charity by the establishment in his native country, the Kingdom of Sweden, of a children's home "for the reception, care, nurture, succor and support of the destitute children," and directing that such home, when established, shall be under the charge and custody of the proper officer in Torrskog socken having the proper supervision of the poor. To such end he directed his executor to

sell the real property described "at such time or times after my death as in his best judgment, will bring the most money into his hands, but, in any event, not later than five years after my death, unless such period be extended by order of the county court." Then follow certain recommendations to his executor that he arrange with proper authorities of Torrskog socken for the contribution by such socken of a sum of money equal to one-half the cost of establishing and maintaining such home, if possible, and that the services of such authorities and officers in and about the control and management of the home shall forever be free of charge as far as the fund therein created is concerned. Then follows the following:

"I desire that, in case any of the matters of detail herein set forth cannot, either by reason of lack of legal authority or because of conflict with any law or any cause, be carried out as herein expressed, it shall be understood that my directions herein are merely recommendations and that the same shall not stand in the way of the accomplishment of the main object of this bequest, to wit, the amelioration of the condition of the poor children in Taskog Sogn aforesaid.

"Inasmuch as it is impossible for me to, even generally, direct the carrying out of the intent of this bequest, it is necessary that a great latitude be left to my executor in the accomplishment of my main object; and having full confidence in him, both as to his ability and integrity, I willingly leave every matter of judgment and discretion entirely to him, and in all matters pertaining to this bequest, I grant to him the fullest powers conformable to law, the same as if such matter were specifically mentioned and he thereunto especially empowered."

*Held*: (1) That the direction to sell the real property described operated to convert the same into personalty. (2). That the mere creation of the trust therein mentioned does not, ipso facto, suspend the power of alienation. That such power of alienation is only suspended by such a trust, where a trust term is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the nonaction of the trustee, or in consequence of a discretion reposed in him by the creator of the trust.

The statute of perpetuities is pointed only to the suspension of the power of alienation, and not at all to the time of its actual exercise.

The statute against perpetuities is not violated by directions in the will which may involve some delay in the actual conversion of the property, arising from any cause; nor does the fact that the trustee is vested with a discretion to delay the sale of the real estate, not exceeding a certain period mentioned, involve an unlawful suspension of the power of alienation.

**Wills — Charitable Trusts — Liberal Construction.**

2. Charitable trusts, which is the character of the trust in the case at bar, are highly favored, and a liberal construction will be adopted in order to render them effectual.

**Wills — Charities — Construction — Condition Precedent.**

3. The provisions of the bequest directing the executor to make certain arrangements, if possible, with the authorities in Torrskog socken regarding the establishment and maintenance of such home, are construed as mere recommendations of the testator, and not as conditions precedent to the carrying out of such bequest.

**Wills — Charities — Testator May Dispose as He Likes within the Law — Discretion of Trustee.**

4. The provisions of the will relating to such charitable bequests are not too vague, indefinite and uncertain to be legally enforceable. The owner of property may do as he pleases with it, provided the disposition be not to unlawful purposes, and what he may do himself he may do by agent while living, or by his executor after death. It is, accordingly, *held* that the testator had a legal right to vest in his executor the widest possible latitude for the exercise of his judgment in carrying out such bequest. The provisions of the will, which it is contended, render the same indefinite and uncertain, are, as above stated, merely recommendations, and not conditions precedent. Furthermore, the record discloses that the muicipality known as "Torrskog socken" is ready and willing to accept and carry out the terms of the trust, and, in any event, these are questions which do not affect the validity of the bequest.

**Wills — Charities — Certainty of Trust.**

5. The fact that the will fails to expressly designate a trustee by name to hold such fund and to administer the trust does not operate to defeat the trust, when, by the language of the will, aided by extrinsic evidence for the purpose of identification, it can be determined whom the testator intended. The fundamental maxim applies that, "That is certain which is capable of being made certain."

*Held,* construing the will in the light of the foregoing rule, that the testator manifestly intended to designate as trustees of this fund such officers and their successors in office as have, under the laws of Sweden, supervision of the poor in Torrskog socken. Whether such designation operates in law as a designation of the municipality of Torrskog socken as such trustee, not determined.

**Wills — Charities — Trustees in Foreign Country — Refusal to Act — Presumption that Foreign Court Would Appoint.**

6. Where a charitable bequest is made to trustees in a foreign country, the court will not assume that, should such trustees refuse

to act, a foreign court will permit the trust to fail, and will assume that it will appoint a trustee. The general rule is that a trust shall never fail for want of a trustee.

**Wills — Charities — Title to Realty Pending Conversion.**

7. Until the real property is actually converted into money by the exercise of the power in trust conferred upon the executor, the legal title thereto rests in the executor as trustee by necessary implication, or in the heir at law for want of the designation of a trustee in the will. If in the latter, it is not by virtue of the will but by operation of law on account of the failure of the testator to designate such trustee in his will.

**Wills — Charities — Power of Sale — Exercise of Power.**

8. Such will confers upon the executor a power in trust to sell and convert such real property into money, and such power may be executed without any act on the part of the heir, even though he be held, by operation of law, to be the trustee of the legal title to these lands.

**Wills — Certainty as to Beneficiary.**

9. Construing the language of the will, *held,* that such will is not void for uncertainty as to the beneficiaries. The intention of the testator apparently was to restrict such charity to the poor and destitute children in Torrskog socken, and the class of persons intended as the objects of his bounty is sufficiently designated. The general class designated may or may not include the pauper poor. This was a matter which he had a legal right to and did impliedly delegate to the trustees of the fund to be administered; such trustees being impliedly clothed with the incidental power to select the individuals, within the general class, who are to partake of his bounty.

Appeal from District Court, Richland county; *Allen, J.*

Action by Halvor J. Hagen against Severin Sacrison. Judgment for plaintiff, and defendant appeals.

Affirmed.

*W. S. Lauder* and *Ink & Wallace,* for appellant.

Where a trust in a will is void, power of sale falls with it and the property descends to the heirs. Jones v. Kelly, 72 N. Y. Supp. 24; Harrington v. Pier, 82 N. W. 345; McHugh v. McCole, 40 L. R. A. 724; Haward v. Peavey, 21 N. E. 503; 1 Williams on Exrs. 663, et seq.; Read v. Williams, 125 N. Y. 560; Parker v. Linden, 113 N. Y. 28, 20 N. E. 858; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413.

Suspension of the power of alienation must be based on lives.

Moore v. Moore, 47 Barb. 260; Henderson v. Henderson, 46 Hun. 509; Hawley v. James, 16 Wend. 61; Hone v. Van Schaick, 20 Wend. 564; Garvey v. McDevitt, 72 N. Y. 556; Cruikshank v. Chase, 113 N. Y. 337, 21 N. E. 64; DeWolf v. Lawson, 21 N. W. 615; Booth v. Baptist Church, 126 N. Y. 237, 28 N. E. 238; Trowbridge v. Metcalf, 5 App. Div. 323, 39 N. Y. Supp. 241; People v. Simonson, 126 N. Y. 299, 27 N. E. 380; Brandt v. Brandt, 13 Miscl. 433, 34 N. Y. Supp. 684.

The will is void for uncertainty of trustee. King v. King, 3 Pac. 436; White v. Howard, 46 N. Y. 144; McCord v. Ochiltree, 8 Blackford, 15.

Also for uncertainty of beneficiaries. Timmerman v. Dever, 17 N. W. 230; 29 Am. & Eng. Enc. Law, 1056; Anderson's Law Dictionary, 1089; Langley v. Barnstead, 63 N. H. 247; Mock v. Murcie, 9 Ind. App. 536; In re Extension Hancock Street, 18 Pa. St. 26; Fosdick v. Hempstead, 11 L. R. A. 715; Attorney General v. Clarke, 2 Amb. Case, 221, p. 422; Tyssen, Char. Bequests, p. 141; In re Hoffen's Estate, 36 N. W. 407; Howard v. Peace Soc., 49 Me. 288.

A power given an executor to select beneficiaries must be definite. Downing v. Marshall, 23 N. Y. 366; Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305; Tilden v. Green, 130 N. Y. 29, 14 L. R. A. 33; Read v. Williams, supra; People v. Powers, 147 N. Y. 104, 41 N. E. 432; Hope vs. Brewer, 136 N. Y. 126, 32 N. E. 558; Ayde v. Smith, 44 Conn. 60, 26 Am. Rep. 424; Fifield v. Van Wyck, 94 Va. 557, 64 Am. St. Rep. 746; Gambel v. Trippe, 75 Md. 252, 15 L. R. A. 235; Pritchard v. Thompson, 95 N. Y. 76; Lane v. Eaton, 69 Minn. 141, 38 L. R. A. 669; Heiss v. Murphey, 40 Wis. 276; In re Hoffin's Estate, 36 N. W. 407; Scott v. West, 24 N. W. 161; People v. Powers, 147 N. W. 104, 35 L. R. A. 502; In re Fuller's Will, 44 N. W. 304.

Courts cannot found charities; testator must devise his own scheme. Bascom v. Albertson, 34 N. Y. 584; Beekman v. Bonsor, 23 N. Y. 306.

Trustee must be capable of taking and holding. Kirk v. King, 3 Pa. 436; White v. Howard, 4 N. Y. 144; Green v. Dennis, 6 Conn 293, 16 Am. Dec. 58; State Methodist Episcopal Church v. Warren, 28 Md. 338; Lane v. Eaton, supra.

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The rule against perpetuities is relaxed in favor of charities. Ould v. Washington Hospital for Foundlings, 24 L. Ed. (U. S.) 450.

Statute as to perpetuities is not violated where title can vest in the heirs or executor, subject to the execution of the trust. Baker v. Copenbarger, 151 Ill. 103; Downing v. Marshall, 23 N. Y. 366.

Device will not fail where intention is revealed, although not expressed with technical accuracy. Skinner v. Harrison Township, 18 N. E. 529; Van Gorder v. Smith, 99 Ind. 404; Bell County v. Alexander, 22 Tex. 351.

"The poor" of district, mean those maintained at public expense. Heuser v. Harris, 42 Ill. 425; Prickett v. People, 88 Ill. 115; Preachers Aid Society v. England, 106 Ill. 125; Mary's Succession, 2 Rob. 438; Sickles v. New Orleans, 29 C. C. A. 204; State v. Osawkee Twp., 14 Kan. 418; State v. Gerard, 37 N. C. 201; Beardsley v. Selectmen, 53 Conn. 489.

A municipality charged with care of the poor, can be compelled to act as trustee. Perin v. Carey, 16 L. Ed. 701; McDonogh v. Murdoch, 14 L. Ed. 732; Dailey v. New Haven, 14 L. R. A. 69; Craig v. Secrist, 54 Ind. 419; Pond v. Berg, 10 Paige Ch. 140: Masterson v. Townshend, 10 L. R. A. 816; Holmes v. Walter, 62 L. R. A. 986; Moran v. Moran, 39 L. R. A. 204; Crerar v. Williams, 21 L. R. A. 454.

A trustee need not be named if pointed out. 2 Pom. Eq. Jur. Sec. 1002, 2009, 1013; Masterson v. Townshend, supra.

The trustee designated in a will or a beneficiary can enforce it. Chambers v. Baptist Educational Society, 40 Ky. 215; Strong v. Doty, 32 Wis. 381; People v. Cogswell, 45 Pac. 270; Baptist Church v. Presbyterian Church, 57 Ky. 635; Attorney General v. Soule, 28 Mich. 153; Tryee v. Bingham, 100 Mo. 451; Trustees Emory & Henry College v. Shoemaker College, 92 Va. 320, 23 S. W. 765; Vidal v. Girard, 11 L. Ed. 205; Grimes v. Harmon, 35 Ind. 198; Tunstall v. Wormley, 54 Tex. 476; Girard v. Philadelphia, 19 L. Ed. 53; Sickles v. New Orleans, 26 C. C. A. 204, 214; Rev. Codes, 1905, 4892.

Action by Halvor J. Hagen against Severin Sacrison, in-

volving the construction of item 6 of the last will and testament of one John Sacrison, deceased. By this appeal the conclusions of law of the district court are alone challenged; there being no dispute as to the facts. The findings of fact of that court, so far as here material, together with its conclusions of law, are as follows:

"(1) That John Sacrison died on or about the 25th day of November, 1905, in Richland county, N. D., and was, at the time of his death, a resident of said Richland county. That he left a last will and testament, which was, with the petition mentioned in finding of fact No. 2, presented to and filed in the county court of Richland county and is a record therein. That at the time of his death said testator owned estate, both real and personal, within the state of North Dakota, and in the said county of Richland. That in said will the petitioner, Halvor J. Hagen, was named as sole executor. That said testator left no wife and only one child, to wit, the respondent, Severin Sacrison, his son.

"(2) On December 1, 1905, the petitioner, Halvor J. Hagen, duly presented and filed in the county court of Richland county a petition for the probate of the will of said John Sacrison, deceased, which will (omitting the first four items thereof which provide for the payment of his debts and funeral expenses and a liberal allowance to his only son and sole heir, Severin Sacrison) is as follows:

"'Item 5. I nominate and appoint my friend and business adviser of many years standing, Halvor J. Hagen, * * * sole executor of this will, granting unto him full power to do any and all lawful acts herein enjoined upon or recommended to him, and especially to make any and all conveyances of lands or transfers of property which may be necessary or advisable to enable him to fully and effectually carry out the intent of this will, and particularly the provisions which are to follow. That there may be no misunderstanding or misinterpretation of the provisions which follow and of the confidence reposed by me in my said executor, I desire to state that my said executor has, for many years, been and now is, my chosen business adviser and manager who has had a very large share in the care and management of my property and interests and to whose business judgment I am greatly indebted; and as I have confided in him fully during my lifetime and have found my confidence well founded and merited I have

no hesitation whatever about reposing like confidence in his integrity and ability with reference to my property after my death. * * *

" 'Item 6. Having provided my son and only heir a competency herein; having all my life long lived frugally and labored hard in the acquirement of my property, and feeling certain that the mantle of true charity covereth a multitude of shortcomings, it is my will and earnest desire that the remainder of my estate hereinafter specifically described shall be devoted to a worthy charity as hereinafter specified. To that end, therefore, I will and direct that all my remaining lands [describing the same] shall be, by my executor, sold at such time or times after my death as in his best judgment will bring the most money into his hands, but in any event not later than five years after my death, unless such period be extended by order of the county court of said Richland county, and the fund arising from such sale of lands, together with its earnings, if any, during said time, shall by my said executor be devoted to charity as nearly as may be in the following manner, to-wit: I desire that there shall be founded, established and maintained in my native county or district known as Taskog Sogn Darsland, in the Kingdom of Sweden, a children's home for the reception, care, nurture, succor and support of the destitute children of that vicinity, and that such children's home, when so established, shall be under the charge and custody of the proper officers of such district of Sogn, having the proper supervision of the poor, but whose official designation is not known to me at this time, the selection of such officers being left to my executor to be selected and designated in accordance with the laws of the Kingdom of Sweden. That this object may be accomplished I will and direct that my said executor shall use such part or portion of the funds arising as aforesaid as he may deem reasonably necessary for the establishment of such children's home and that the remainder of such fund shall be by him turned over to the proper officers aforesaid to be by them safely invested in accordance with the laws of the Kingdom of Sweden, the interest and income therefrom to be used by such officers for the support and maintenance of such children's home. It is my desire that my executor arrange with the proper authorities of said Taskog Sogn that in the establishment of said children's home said Taskog Sogn shall contribute a sum of money equal to one-half the neces-

sary cost of such establishment; that my said executor contribute from said fund the other half of such cost and that if possible my said executor arrange with such authorities that for the maintenance of such children's home they will provide a permanent fund or income sufficient to properly maintain the same with the income from the balance of the fund hereby created and to be devoted to such purpose. It is also my desire that my said executor so arrange with such authorities and officers that their services in and about the control and management of such children's home shall forever be free of charge as far as the fund hereby created may be concerned. I desire that in case any of the matters of detail herein set forth cannot either by reason of lack of legal authority or because of conflict with any law, or for any cause, be carried out as herein expressed, it shall be understood that my directions herein are merely recommendations and that the same shall not stand in the way of the accomplishment of the main object of this bequest, to-wit, the amelioration of the condition of the poor children of Taskog Sogn aforesaid. Inasmuch as it is impossible for me to even generally direct the carrying out of the intent of this bequest, it is necessary that a great latitude be left to my executor in the accomplishments of my main object; and having full confidence in him, both as to his ability and integrity, I willingly leave every matter of judgment and discretion entirely to him, and in all matters pertaining to this bequest I grant to him the fullest powers conformable to law the same as if such matters were specifically mentioned and he thereunder especially empowered.

"'Item 7. In case of the failure of the bequest herein made to my son Severin, by reason of his death, without issue, prior to my death, then the property devised to him, both real and personal, shall be also included in the bequest made in item 6 herein, and be administered according to such bequest.

"'Dated this 9th day of October, 1905.

"'John Sacrison.'

"(Duly attested.)

"After due notice according to law, and upon a hearing duly held in said county court on January 9, 1906, * * * an order and decree of the county court was duly made and entered, establishing said will as the last will and testament of said John Sacrison, admitting the same to probate, and appointing the peti-

tioner, Halvor J. Hagen, sole executor of said will. That thereupon letters testamentary were duly issued out of said county court to the said Halvor J. Hagen as executor of said will, and the said executor thereupon qualified and entered upon the discharge of his duties as such executor, and has not been suspended or removed, but is in full execution of his said trust.

"(3) That within the statutory period after the entry of said decree, * * * the respondent, Severin Sacrison, appealed to this court from the whole of said decree. That thereafter said appeal from said decree was dismissed by this court upon the stipulation of the parties thereto, and judgment of dismissal was entered in this court, and the record on said appeal was thereupon returned to the county court of said Richland county. Thereafter, and on May 12, 1906, the parties entered into and filed in the county court a stipulation in the following words: 'It is stipulated and agreed by and between the parties to the above-entitled cause: That, whereas, a motion has been made in the above-entitled court for an order vacating and setting aside the decree heretofore entered herein on January 9, 1906, admitting to probate a document purporting to be the last will and testament of one John Sacrison, deceased; and, whereas, it is the desire of all parties interested in the estate of said John Sacrison, deceased, both as heirs at law and beneficiaries of said will, that a judicial construction shall be had determining the sufficiency, validity, legal effect, and binding force of the provisions contained in paragraphs numbered items 6 and 7 of said will; and, whereas, the proceeding by said motion and upon petition as provided by law to vacate said decree and order and to test the validity of said portion of said will would involve a large expense: Now, therefore, it is stipulated that the portion of said last will and testament in paragraphs numbered items 6 and 7 shall be submitted to said county court for construction as to the sufficiency, validity, legal effect, and binding force thereof, and that such submission shall be made at a time agreed upon between the parties, or upon five days' notice by either party, or at a time to be fixed by order of said court, and that either party interested may take such testimony as may be necessary with reference to the issues so to be submitted, and that such submission shall have the same force and effect as if the same had been done upon the offering of said will for probate, and that all objections on the part of the petitioner

in the proceeding for the probate of said will and on the part of the executor of said will to such submission and construction by the court which go to the fact that such submission and construction are made after the entry of the decree and order admitting said will to probate, be, and the same are hereby, expressly waived, and if it be found, as matter of law, that such submission and construction cannot be had without opening and vacating the decree of said court in so far as the same refers and relates to said items 6 and 7 of said will, then the same shall be deemed vacated and opened to that extent and to that extent only.'

"(4) It was stipulated between the parties, and I find it to be a fact, that Torrskog socken, in Darsland, in the Kingdom of Sweden, was the birthplace of the testator, John Sacrison, and that he was a native thereof.

"(5) That under the Constitution and laws of the Kingdom of Sweden a socken is a territorial municipality of the Kingdom of Sweden, and that Torrskog socken aforesaid is such a territorial municipality of said Kingdom of Sweden, corresponding on a small scale to a county in the state of North Dakota, and that all sockens of the Kingdom of Sweden, including Torrskog socken, have constantly in office competent persons whose official duty it is to have supervision, charge, custody and control of the poor of such sockens and of the poor funds of such sockens; such officers being commonly known and designated as 'poor wardens,' or 'wardens of the poor.' That in the municipality of Torrskog socken the municipal officers, who are known and designated as the 'kommunalmand' of such wardens of the poor, have supervision, charge, custody, and control of the poor of such sockens, and the poor funds thereof. That there were at the time of making said will and at the date of the death of said testator, and are at this time, such poor wardens in office in Torrskog socken aforesaid.

"(6) That under the Constitution and laws of the Kingdom of Sweden the municipality of Torrskog socken has legal power and authority to take, receive and administer personal property upon trust to the use, benefit and behoof of the poor children within said socken. That there were at the date of said will and at the date of the death of said testator, and that there are now, in said Torrskog socken, poor and destitute children.

"(7) That the word 'Taskog,' as used in the testator's will,

is commonly pronounced by Swedes and those familiar with the Swedish language, 'Tawskog.' That the word 'Sogn' as used by the testator in said will, is the Norwegian form of the word 'socken,' and is ordinarily by Norwegians and those familiar with the Norwegian language, pronounced 'soggon.' That the name 'Dalsland,' in the spoken language of the common people of Sweden and Norway and persons familiar with the language spoken by such common people, is commonly pronounced 'Darsland.'

"(8) That there is no place, community or municipality in the Kingdom of Sweden known officially by the title 'Taskog Sogn Darsland.'

"(9) That under the laws of the Kingdom of Sweden a citizen of that kingdom who has a wife or child living at the time of his death can only devise by will to charity an amount equal to one-half of the estate of which he died seized. That the fund devised by the testator in this case under item 6 of said will is of a greater value than the one-half of the estate of which he died seized.

"(10) That the respondent, Gunhild Gunderson, who has not appealed from the decree of said county court herein, neither has nor claims any rights or benefits under the will of the testator at this time.

"From the foregoing findings of fact, the court now makes and files the following conclusions of law:

"(1) That by the making of the will and the death of the testator, John Sacrison, the lands mentioned in item 6 of said will became in equity converted into money, and that therefore the bequest mentioned in said item 6 of said will is a bequest of personal property and to be administered as such.

"(2) That the power of alienation of said lands is not by said will suspended for any period whatever.

"(3) That the beneficiaries of the charity sought to be established by said will are definite and certain, to-wit, the poor and destitute children of Torrskog socken in the Kingdom of Sweden, for whose support, care and maintenance, the municipality of Torrskog socken aforesaid may be legally liable and chargeable under the laws of the Kingdom of Sweden.

"(4) That the title to the funds arising and to arise from the sale of the lands mentioned in item 6 of said will in accordance with the terms thereof vests as matter of law in the municipality

of Torrskog socken in the Kingdom of Sweden, subject, however, to the trust created by said will, to-wit, that the income thereof shall be devoted by said municipality, through its proper officers, to the providing of a home, care, nurture, succor and support of the destitute children of said municipality.

"(5) I find as matter of law that the recommendation of the testator contained in said item 6 of said will with reference to the establishment of the children's home as provided in said will. is reasonably capable of being carried out and fulfilled in accordance with the true meaning and intent of said will without the executor of said will being necessarily compelled to invest any portion of said fund in the real estate in the said Kingdom of Sweden; and, further, that whether the said municipality of Torrskog socken shall or shall not see fit to comply with the recommendation of the testator with reference to the matters recommended to be done by said municipality has no effect on the validity of the bequest contained in said item 6, because, as matter of law, the conditions of said bequest, according to the true intent and meaning thereof, will be fulfilled without any such compliance on the part of said municipality by the payment over by the executor of said will of the said fund to the proper officers of said Torrskog socken, authorized under the Kingdom of Sweden to receive the same on behalf of said socken in trust as provided in said will, that the same be invested by said socken, acting through its proper officers, and the income arising therefrom be devoted solely to the purpose of the trust mentioned in said item 6 of said will.

"(7) I find further as matter of law that the bequest set forth in said item 6 of said will is a valid bequest for the founding of a perpetual charity, which bequest, is in all things capable of enforcement in accordance with the true intent and meaning of said will and in conformity with the laws of the state of North Dakota and the laws of the Kingdom of Sweden.

"(7½) Not more than one-half of the total value of the testator's estate can be distributed under the provisions of item 6 of said will, and in case the funds in the hands of said executor, when ready for distribution, amount to more than one-half of such total value of such estate, then the excess over and above such one-half of such total value will not pass by said item 6 of said will, but will be and remain a part of the general estate of the decedent to descend according to the laws of this state.

"(8) That the petitioner is entitled to a judgment and decree of this court affirming in all things the judgment of the county court of Richland county, entered herein upon the 22d day of September, 1906, establishing said will of John Sacrison as the last will and testament of said John Sacrison and as valid and enforceable in all its parts.

"Let judgment be entered accordingly.

"Dated at Lisbon, the 2d day of December, 1907.

"By the court: Frank P. Allen,

"Judge of the District Court."

Thereafter, and on January 17, 1908, the appellant caused a judgment to be entered by the clerk pursuant to the findings, conclusions, and order above mentioned; the petitioner, Halvor J. Hagen, having refused to enter any formal judgment herein, his counsel taking the position that such formal judgment was neither necessary nor permissible. It is from such judgment, and not from the order of date December 2, 1907, that this appeal was taken. Respondent made a motion in this court to dismiss such appeal; the basis of his motion being that there is no warrant in law for the entry of such judment, and that the same is void upon its face, and his position being that the appellate jurisdiction of the district court, as defined by statute, does not confer on that court power to enter a formal judgment and that the findings and conclusions constitute the decision of that tribunal from which an appeal must be taken, if taken at all.

FISK, J. (after stating the facts as above.) The motion for a dismissal of the appeal should, we think, be denied; but, in view of our decision upon the merits, we deem it useless to state our reasons for denying such motion or to further notice the same.

The assignments of error are nine in number; but they all relate to the correctness of the conclusions of law numbered 1, 2, 3, 4, 5 and 7, and such conclusions merely involve the question of the validity of item 6 of such will. Generally speaking, the facts in this case call for the application of certain well-recognized rules of construction and interpretation of charitable trusts, as follows: "Charitable trusts are highly favored, and a liberal construction will be adopted in order to render them effectual." 5 Am. & Eng. Enc. Law, 897, and cases cited. See, also: Duggan v. Duggan, 63 U. S. App. 149, 92 Fed. 806, 34 C. C. A. 676; In re Upham's Estate, 127 Cal. 90, 59 Pac. 315; In re Willey's Will, 128 Cal.

1, 60 Pac. 471; Fay v. Howe, 136 Cal. 599, 69 Pac. 423; Strong's Appeal, 68 Conn. 527, 37 Atl. 395; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; St. James Orphan Asylum v. Shelby, 60 Neb. 796, 84 N. W. 273, 83 Am. St. Rep. 553; In re John's Will, 30 Or. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; Harrington v. Pier 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924; 7 Cur. Law, 629. Such trusts are not within the rule against perpetuities, nor are they affected by or within the scope of statutory or constitutional provisions against perpetuities in general. 5 Am. & Eng. Enc. Law, 902. See, also, recent cases cited in 1 Supp. to Am. & Eng. Enc. Law, page 955. Such trusts are distinguished from an ordinary trust by the uncertainty of their beneficiaries. Such uncertainty does not cause a charitable trust to fail. In addition to the authorities above cited, see: Grant v. Saunders, 121 Iowa, 80, 95 N. W. 411, 100 Am. St. Rep. 310; Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 79 S. W. 831. The names of the beneficiaries need not be mentioned in the will creating the trust. If the language used indicates with reasonable certainty the objects of the testator's bounty, it is sufficient. Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104; 5 Am. & Eng. Enc. Law, 917. Charitable trusts do not fail for want of trustees. The legal estate, in such a case, is regarded in abeyance, or as vested in the heirs or executors of the donor for the use of the beneficiaries, or the court will appoint a trustee to carry out the charitable purposes of the testator. 5 Am. & Eng. Enc. Law, 920, and volume 1, Supplement thereto, 959, and cases cited. See generally upon the subject of charitable trusts the exhaustive note in 14 L. R. A. (N. S.) 49-155.

It is appellant's contention in the case at bar: That the charitable trust sought to be established is void because it suspends the power of alienation of the property therein described for a period prohibited by the laws of this state; that it is too indefinite and uncertain; that there is no trustee named in the will to take and hold the property and administer the trust; that item 6 of the will is too indefinite and uncertain as to the ultimate beneficiaries; and that there is no method pointed out by which such beneficiaries can be definitely ascertained. If the trust attempted to be established is valid and enforceable, it is conceded that the directions to the executor to sell the real property operated to effect an equitable conversion of such land into money. That such equitable

conversion of the real estate into personalty would be effected as of the date of the testator's death is well established. Penfield v. Tower, 1 N. D. 216, 46 N. W. 413, and cases cited.

But it is contended by appellant's counsel that item 6 of the will is void because, as claimed, it suspends the power of alienation of the property therein described for a period which is prohibited by the laws of this state, and we are referred by counsel in support of their contention, to sections 4744 and 4745, Rev. Codes 1905. By these sections the absolute power of alienation cannot be suspended for a longer period than during the continuance of the lives of persons in being, with a certain exception not here material. If counsel's premise be true, their conclusion, no doubt, would be sound; but, as we construe item 6 of the will, the power of alienation of the lands described therein is not suspended at all; nor was such result contemplated by the testator. The executor is invested with an absolute and unconditional power to sell and convert the real estate into money and to devote such fund to the charitable use therein mentioned. When thus applied in accordance with the instructions of the testator, the rules of law against perpetuities have no application. In addition to the foregoing authorities, see In re John's Estate, 30 Or. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242, and Ould v. Hospital Co., 95 U. S. 303, 24 L. Ed. 450. Appellant bases his contention that the rule against perpetuities is violated upon the ground that the limit of time in which the executor may sell and convert the lands into money is fixed at five years, but that such period may be indefinitely extended by order of the county court. Counsel are clearly in error in such contention. The above language of the will in no manner suspends the power of alienation. Such power of alienation was not suspended for an instant, as the executor had the right to exercise such power immediately after the death of the testator. As stated in 22 Am. & Eng. Enc. Law, 720: "The statute applies to power of alienation and not to its exercise. * * * The statute is directed against the suspension of the power of alienation, and does not concern itself with the actual exercise of the power. Hence a direction in a will giving the executor discretion as to when he shall sell the land and distribute the proceeds is valid, since the power of alienation is not suspended, though it may not be exercised during the period; and the fact that the testator limited the time within which the sale should take place,

or desired the postponement of the sale for a certain time, or suggested a time when it should be made, will not work a suspension of the power if the direction is advisory and does not create a trust for a time certain"—citing Robert v. Corning, 89 N. Y. 226; Fitzgerald v. Big Rapids, 123 Mich. 281, 82 N. W. 56; Hope v. Brewer, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458; Atwater v. Russell, 49 Minn. 59, 51 N. W. 629, 52 N. W. 26; Deegan v. Wade, 144 N. Y. 573, 39 N. E. 692; Chanler v. New York, etc., Co., 34 App. Div. 305, 54 N. Y. Supp. 341; Deegan v. Von Glahn, 75 Hun. 39, 26 N. Y. Supp. 989; Kirk v. Kirk (Sup.) 12 N. Y. Supp. 326; Rausch v. Rausch (Sup.) 31 N. Y. Supp. 786.

In Robert v. Corning, supra, Andrews C. J., among other things, said: "But the mere creation of a trust does not, ipso facto, suspend the power of alienation. It is only suspended by such a trust, where a trust term is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the nonaction of the trustee, or in consequence of a discretion reposed in him by the creator of the trust. The statute of perpetuities is pointed only to the suspension of the power of alienation, and not at all to the time of its actual exercise. * * *" In that case it was strenuously insisted by respondent's counsel that the testator intended the will to vest the legal title to his real estate in the executors, and that this is the legal effect of the power of sale. The court does not determine the correctness of such contention; the court saying: "But it is unnecessary to determine whether the executors took, under the will in question, the legal title to the real estate, for, in the view we take of the will, there was no suspension of the power of alienation, whether the executors took a trust estate, or were simply donees of a trust power. In either character, whether as trustees or as executors only, they could at any time, from the moment of the testator's death, have conveyed an absolute fee in possession. The suspension of the power of alienation of the real estate is supposed to result from the direction of the fourth section of the will, that the sale of the testator's real estate, situate in the state of New York, should be made by the executor at public sale in the city of New York after three weeks' notice by publication in four daily newspapers of

the city, and also from the provision in the eighth section that, 'in view of the present great depression in real estate,' the executors might exercise a discretion as to the time of sale not longer than three years after the testator's death. * * * The statute of perpetuities is not violated by directions which might involve some delay in the actual conversion or division of property, arising from the necessity of giving notice, or doing other preliminary acts. Such delays are not within the reason or policy of the statute. The statute was aimed against the creation of inalienable trust estates or contingent limitations, postponing the vesting of titles beyond the prescribed period. * * * We are also of the opinion that the discretion vested in the executors to delay the sale of the real estate not exceeding three years did not create a trust term for any period of time and involved no suspension of the power of alienation. * * * The power of sale was not fettered by the discretion given by the will. The executors could sell and convey the land at any time by a perfect title."

By the power of sale the executor was expressly empowered to sell and convey such legal title for the purpose of carrying out the trust which he was required to do within five years after the testator's death. By operation of the will, at the death of the testator the property at once became dedicated to a perpetual charity. Such gift to charity took effect in præsenti, and, as stated in Re John's Estate, supra: "The only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode which the donor would have applied to the execution of the charity." As stated elsewhere in said opinion: "The property is taken out of commerce and goes instantly into perpetual servitude to charity. While the form of charity may vary, and a succeeding form become effective, contrary to the rule, the primary object, that of charity, continues and is allowable, through the law's regard for charitable uses, and in consideration of the beneficial result flowing therefrom. Storrs Agricultural School v. Whitney, 54 Conn. 342, 8 Atl. 141. * * * A gift may be made in trust for a charity not in esse, but to come into being at a time uncertain in the future, or which is to take effect upon some contingency that may possibly not happen within a life or lives in being and 21 years and 9 months afterwards, and which does not contravene the rule, provided there is no gift, in the meanwhile,

to or for the benefit of any private corporation or person. The doctrine finds support upon the ground that the intention in favor of charity is absolute; the gift and the constitution of the trust is immediate—takes effect in præsenti. * * *"

Appellant's contention that, conceding there is a trustee in whom the title rests in trust, still the rule against perpetuities obtains because the duration of such trust is not limited and might exceed the legal limit of time, and the title could not be alienated by the trustee except pursuant to the terms of such trust, is without merit. As before stated, the power of alienation is not suspended for an instant, and it is immaterial whether it be held that the title to the real estate descended to the heir by operation of law for the want of a testamentary trustee, or whether it was left by the will to a trustee. In any event, and by whomsoever held, the title is thus held in trust for this charitable purpose, and the executor is clothed with the undoubted power to at once sell and convey such title for the purpose of carrying into effect such charitable gift. The contention of appellant is, we think, fully answered by the Court of Appeals of New York in Hope v. Brewer, 136 N Y. 126, 32 N. E. 558, 18 L. R. A. 458, and cases cited; also, by the Minnesota court in Atwater v. Russell, 49 Minn. 57, 51 N. W. 629, 52 N. W. 26 and Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104.

Item 6 of the will contains, among other things, the following provisions: "It is my desire that my executor arrange with the proper authorities of said Taskog Sogn that, in the establishment of said children's home said Taskog Sogn shall contribute a sum of money equal to one-half the necessary cost of such establishment and that my executor contribute from said fund the other half of such cost, and that, if possible, my said executor arrange with such authorities that, for the maintenance of such children's home they will provide a permanent fund or income, sufficient to properly maintain the same, with the income from the balance of the fund hereby created and to be devoted to such purpose. It is also my desire that my said executor so arrange with such authorities and officers that their services in and about the control and management of such children's home shall forever be free of charge, as far as the fund hereby created may be concerned." It is urged by appellant's counsel that the foregoing provisions are conditions precedent, and, being uncertain of fulfillment, the attempted

gift to charity must fail, as the time when the title would vest in the beneficiaries is left indefinite and uncertain. Such contention is devoid of merit. The provisions above quoted are not conditions precedent, but are mere recommendations or expressions of a desire on the part of the testator. The language of the will clearly shows this to be true, as the following sentence demonstrates: "I desire that, in case any of the matters of detail herein set forth cannot * * * be carried out as herein expressed, it shall be understood that my directions herein are merely recommendations and that the same shall not stand in the way of the accomplishment of the main object of this bequest, to-wit, the amelioration of the condition of the poor children in Taskog Sogn aforesaid." Such provisions being merely recommendations, the validity of the bequest is not dependent upon whether or not the officers of the municipality of Torrskog socken may be compelled or permitted to administer the trust, or whether, if they do so, it shall be done in their official capacities, or under the jurisdiction and supervision of the proper court. Skinner v. Harrison Township, 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137.

It is next contended that item 6 of the will is too vague, indefinite and uncertain to be legally enforceable; the particular grounds of objection being: First, that the testator has left to the executor too wide a latitude in carrying out the charitable bequest; and, second, that the provisions wherein the executor is requested to arrange with the authorities of Torrskog socken for the contribution by the socken of one-half the cost of establishing the child's home, and directing him, if possible, to arrange with such authorities for the maintenance of the home, is too uncertain of accomplishment. It is a noticeable fact that counsel fail to cite any authority in support of the first ground mentioned, and we believe none exists. On the contrary, ample authority exists in support of the right of the testator to vest in his executor the widest possible latitude to exercise his own best judgment in carrying out such a bequest, and we entertain no doubt that the will is valid in so far as this feature of the same is concerned. In many of the cases above cited, the executor or trustees were vested with a discretion fully as broad, if not broader, than was done by the testator in the case at bar. In addition to the foregoing authorities, see: Haynes v. Carr, 70 N. H. 463, 49 Atl. 638; Power v. Cassidy, 79 N. Y. 602, 35 Am. Rep. 550; In re Dulles, 218 Pa. 162,

67 Atl. 49, 12 L. R. A. (N. S.) 1177, and numerous cases cited in note. In the latter case, among other things, it was said: "The fundamental law of Pennsylvania in regard to property, which ought not to require restatement as often as it does, is that the owner may do as he pleases with it, provided the disposition be not to unlawful purposes; and what he may do himself he may do by agent while living, or by executor after death. This principle disposes of this case. Miss Dulles, living, could have taken her securities out of her strong box, and handed them to the appellants with directions, even verbal, to distribute them, in their discretion, among religious, charitable and benevolent objects or institutions. That disposition would have been valid and unassailable. There is no good reason why Miss Dulles, dead, could not make the same disposition of her property by testament. * * * The discretion which was hers to exercise, she chose to delegate to her executors. It was her right to do so, and, so long as their discretion is not legally abused, its exercise is as valid as if it was expressly her own."

Regarding the second ground of objection, the same has, we think, been sufficiently disposed of by what we have heretofore said, to the effect that the provisions which it is claimed render item 6 uncertain are not conditions precedent at all, but are merely recommendations of the testator; and, furthermore, it appears that the municipality known as Torrskog socken is ready and willing to accept and carry out the terms of the trust, and, in any event, as held by the Indiana court in Skinner v. Harrison Township, supra, these are questions which do not affect the validity of the bequest. See, also, Kurzman v. Lowy, 23 Misc. Rep. 380, 52 N. Y. Supp. 83.

It is next contended that no trustee is designated in the will who is to hold the fund in trust; that from the will itself no one can tell in whom the title to the property is to rest. It is, of course, true that the title to this fund must rest some place. It is equally true that the will fails to expressly designate a trustee by name to hold such fund and to administer the trust; but it by no means follows from this that such trust must necessarily fail, if by the most liberal construction of the language of the will, aided by extrinsic evidence for the purposes of identification, it can be determined that the testator intended that a certain entity, competent to take and administer the trust, should thus act. Such

rule of construction should be invoked in the light of the well-recognized presumption in favor of the validity of such bequests, and the fundamental maxim: "That is certain, which is capable of being made certain." Also: "A will is to be construed according to the intention of the testator. When his intention cannot have effect to its fullest extent, it must have effect as far as possible." Rev. Codes, section 5140.

The testator clearly intended that the fund arising from the sale of these lands should be devoted to a worthy and perpetual charity, to-wit, "the amelioration of the condition of the poor children in Torrskog socken aforesaid." In order to give effect to such intention, there must be a trustee capable of taking and administering a trust of this character. As the bequest is one creating a perpetual charity, no individual could act as such trustee. Is it possible, from the provisions of the will, aided by extrinsic evidence as to identification, to determine with reasonable certainty whom the testator intended to designate as such trustee? If so, whom did he intend should take title to this fund and administer such perpetual charity? From the record in this case the answers to these questions are not difficult. By item 6 of the will the testator directs that such children's home, when established, "shall be under the charge and custody of the proper officers of such district or sogn having the proper supervision of the poor, but whose official designation is not known to me at this time, the selection of such officers being left to my executor to be selected and designated in accordance with the laws of the Kingdom of Sweden." This language furnishes unmistakable proof that the testator intended to vest title to such fund in such officers and their successors in office as have under the laws of Sweden, supervision of the poor in such socken, in trust for the purpose aforesaid. The fact that the testator could not designate them by their proper official title is not at all material, as they were designated with sufficient particularity to enable the executor, or any one else, by the aid of extrinsic facts, to determine to an absolute certainty the trustees intended. Whether, as intimated by respondent's counsel, the effect of designating such officials, and by necessary implication their successors in office, necessarily operated as a designation of the municipality of Torrskog socken as such trustee, we need not determine; nor is it material, for appellant's contention that no trustee was sufficiently designated is fully answered by

holding that either such officers and their successors in office, or such municipality, were designated and are capable of acting. "Where a charitable bequest is made to a trustee in a foreign country, the court will not assume that, should the trustee refuse to act, a foreign court will permit the trust to fail, but will assume that it will appoint a trustee." Kurzman v. Lowy, 23 Misc. Rep. 380, 52 N. Y. Supp. 83. See, generally, upon the question of certainty as to trustees, the many authorities cited in the exhaustive note in 14 L. R. A. (N. S.) 104-116. See, also, the very recent case of Grant v. Saunders, 121 Iowa, 80, 95 N. W. 411, 100 Am. St. Rep. 310, involving a charitable bequest in which many of the questions involved in the case at bar, including the question here under consideration, were disposed of adversely to appellant's contention. In that case the testator designated one Barber R. Fouche as trustee to administer such perpetual charity without providing a successor to such trustee at her death. The court said: "The contention that the trust must fail because the court cannot appoint trustees to act in the place of the one named in the will is not sound, in our judgment. Such a contingency has not yet arisen, nor may it ever arise; and why should we anticipate imaginary difficulties for the purpose of defeating that sweet charity, which 'in thought, speech and deed challenges the admiration and affection of mankind.' Christianity teaches it as its crowning grace and glory. Chief Justice Ryan in Dodge v. Williams, 46 Wis. 91, 1 N. W. 92, 50 N. W. 1104. The will provides that the entire fund shall be used as directed, without limit as to time, and we may presume that it will be so expended during the life of the present trustee. Quinn v. Shields, supra. Moreover, the general rule is that a trust shall never fail for the want of a trustee. 1 Perry, section 38; Seda v. Huble, 75 Iowa, 429, 39 N. W. 685, 9 Am. St. Rep. 495. And if it should ever become necessary for the court to appoint another trustee, we see no insurmountable obstacle in the way of its so doing. True, whatever remained of the fund would necessarily have to be distributed as the judgment of the appointed trustee might dictate; but the worthy poor 'we have always with us,' and they, as a class, were the objects of the testator's charity. The selection of the individuals from among their number must necessarily be left to the judgment of some one. To Miss Fouche is given the right to first execute the charitable purpose, and, although the testator does not expressly

provide for the appointment of others by whom the objects shall be selected and the fund distributed when she shall decease, or for any other reason be incapable of acting, it cannot be that he intended his gift to fail. He created it for a specific charitable purpose, and he might well suppose, if his attention were called to the matter, that proper means of executing his purpose could be provided through the medium of the courts, if in any matter of detail his provision therefor was insufficient."

Another very recent case is that of Kemmerer v. Kemmerer, 233 Ill. 327, 84 N. E. 256, 122 Am. St. Rep. 169. In that case no trustee was designated; but the testator's widow was named as executrix, "with full power to execute" the will, and duties were imposed upon her by the will which belong only to a trustee, and it was held that the trust does not fail for want of a trustee, since the widow, though named only as executrix, may carry into effect the provisions of the trust, and if she fails to act a court of equity will appoint a trustee. The court said: "In creating a trust the testator need not employ the words 'trust' or 'trustee.' If he has named a person in his will, and has directed him to carry out all or a portion of the provisions which have been made for the benefit of others therein, the person thus named will be held to be a trustee, and, if he cannot carry out the provisions of the will except the legal title to the property to be held to be in him as trustee, then he will be held, by implication, to hold the legal title to the property which he is directed to convey. 2 Underhill on Wills, section 781; 1 Perry on Trusts, section 262; 2 Pomeroy's Eq. Jur. (2d Ed.) section 1011; Hale v. Hale, 125 Ill. 399, 17 N. E. 470; Olcott v. Tope, 213 Ill. 124, 72 N. E. 751."

Such also seems to be the statutory rule in this state. Section 5750, Revised Codes 1905, provides: "When a trust exists without any appointed trustee, or when all the trustees announced die or are discharged, the district court of the county or judicial subdivision where the trust property, or some portion thereof, is situated, must appoint another trustee and direct the execution of the trust. * * *"

But appellant's counsel ask: "In whom does the title to the property in question now vest?" Under the doctrine announced by the Supreme Court of Illinois in Kemmerer v. Kemmerer, supra, it vests in the executor as trustee; but whether such is the fact or whether it vests in the heir by operation of law for want of the

designation of a trustee thereof in the will, we are not required to determine. It certainly vests in the one or the other. If in the latter, it is not by virtue of the will, but by operation of law on account of the failure of the testator to designate by will such trustee, and the heir may be required, if necessary, to execute the trust. In any event, the will confers upon the executor a power in trust to sell and convert such real property into money, and such power may be executed without any act on the part of the heir, even though he be held to be, by operation of law, the holder in trust of the legal title to these lands. This sufficiently disposes of appellant's fourth contention.

It is next contended that the will is void for uncertainties in the beneficiaries. In this we are also unable to agree with appellant's counsel. Much of appellant's argument on this phase of the case is predicated upon an erroneous construction of the language of the will. We quote from counsel's brief: "Under the terms of the will it is the testator's intention that the property involved is to be used for the care, nurture, succor, and support of the destitute children of the vicinity of Torrskog socken, and therefore it was not contemplated by the testator that the beneficiaries of the will should be confined exclusively to that socken, but rather those residing in that socken and the vicinity thereof." We do not thus construe the will. When item 6 is considered as a whole, the intention of the testator is manifest to restrict such charity to the poor and destitute children in Torrskog socken. The words "of that vicinity" must be held to relate to the territory included within such socken. Such construction is made necessary by the subsequent language in item 6, wherein the testator directs that such children's home "shall be under the charge and custody of the proper officers of such district or Sogn having the proper supervision of the poor. * * *"; by his expression of a desire that the executor arrange with such authorities to contribute one-half the cost of establishing such home, and, if possible, arrange with such authorities to provide a permanent fund or income sufficient to properly maintain the same. But what places such construction beyond the realm of debate is the language in the latter portion of the item, wherein the testator declares that the main object of the bequest is "the amelioration of the condition of the poor children in Taskog Sogn aforesaid." But, even under the construction contended for by appellant's counsel, authorities are

numerous sustaining bequests of this character as against similar assaults. See: Kemmerer v. Kemmerer, 233 Ill. 327, 84 N. E. 256, 122 Am. St. Rep. 169; St. James Orphan Asylum, et al. v. Shelby, 60 Neb. 796, 84 N. W. 273, 83 Am. St. Rep. 553; In re Nilson's Estate, 81 Neb. 809, 116 N. W. 971; Hope v. Brewer, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458; Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104; Re John's Estate, 30 Or. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242; Thompson's Ex'r v. Brown, 116 Ky. 102, 75 S. W. 210, 62 L. R. A. 398, 105 Am. St. Rep. 194; Sherman v. Congregational Home Missionary Society, 176 Mass. 349, 57 N. E. 702.

But it is strenuously contended that the bequest is void for uncertainty because the testator has not designated with sufficient particularity the chidlren whom he intended as the objects of his bounty. The designation is "the destitute children," and, in another place, "the poor children in Taskog Sogn aforesaid." Whether the testator had in mind any particular class of the poor and destitute children in such socken we cannot determine. He designated a general class, which may or may not include the pauper poor, and he directed that such children's home, when thus established, shall be under the charge and custody of certain officials of the socken. We think it may be fairly implied therefrom, in the absence of anything to the contrary, that he intended to vest in such officials the incidental powers to select the individuals within the general class thus designated who are to partake of his bounty. In this we find ample support in the authorities, a few of which we cite: Hunt v. Fowler, 121 Ill. 269, 12 N. E. 331, 17 N. E. 491; Woodruff v. Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346. And see, generally, cases cited in note 14 L. R. A, (N. S.) 133-139.

In Woodruff v. Marsh, supra, the bequest was "for the purpose of maintaining and supporting a home for destitute and friendless children, permanently, * * * to be known as the William L. Gilbert Home; the same to be under the care and control of the above-named persons as trustees." It was contended that this bequest was void for indefiniteness, uncertainty, and the absence of any grant of power to select the beneficiaries. In overruling such contention, the court said: "In devises and bequests of this nature, our law requires either certainty in the particular persons to be benefited, or certainty as to the class of persons to be benefited,

with an ascertained mode of selecting them out of such class. The testator, in the present case, describes the persons whom he intends to benefit as 'destitute and friendless children;' the mode of benefit to be 'maintaining and supporting a home' for them, 'permanently,' at a place particularly specified, to be known as the 'William L. Gilbert Home,' the same to be under the care and control of the trustees whom he has selected, and their successors in the trust. * * * We think that the trustees who are to maintain and support this home, and under whose care and control it is expressly placed, are thereby invested with ample power to select for its inmates from time to time, subject only to the limitations imposed in the concluding portion of the will, such individuals of the class of destitute and friendless children as they, or a majority of them, may think proper, or to commit the power of selection to suitable officers or agents under their supervision. This power to admit includes power to exclude, and to remove after admission. All such acts are naturally incident to the control of the institution." The foregoing reasoning impresses us as sound, and is strikingly applicable to the case at bar, and furnishes a sufficient answer to appellant's contention.

In arriving at this conclusion, we are not unmindful of the express concession in respondent's brief to the effect that such bequest is not sufficiently definite as to the beneficiaries if the will is construed to apply solely to children other than those maintained at public expense. While there are authorities in support of the construction contended for by respondent's counsel, we are convinced that the adoption of such construction would operate to thwart, in some degree at least, the apparent intention of the testator. The length of this opinion forbids a review of the many cases cited by counsel upon this interesting question. Suffice it to say that an examination of them, and many others, has served to satisfy us that the rule above announced will more nearly effectuate the evident purpose sought to be accomplished by the testator, and this is and should be the constant aim in view by the court.

The lower court, by its conclusion of law numbered 7½, held, in effect, that under the laws of Sweden but one-half of the estate can be devoted to such charity, and hence that, to the extent that the will attempts to leave more than this for such purpose, it cannot be carried out. In view of the language of such foreign

law, as disclosed by the findings, it is doubtful if such conclusion is correct. Such law purports to operate upon the testamentary powers of citizens of Sweden only; but, in any event, it is at least a debatable question whether the validity of such bequest, in so far as this feature thereof is concerned, should not be determined by the courts of Sweden, where the charity is, by the will, to be administered. But we do not understand that this question is before us, as the correctness of such conclusion is not challenged, by respondent, either by appeal or otherwise.

It follows that the portions of the judgment appealed from are correct, and the judgment must be, accordingly, affirmed. All concur.

(123 N. W. 518.)

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OLE H. NILSON v. G. W. HORTON, L. E. HORTON AND W. H. HORTON, CO-PARTNERS AS HORTON & COMPANY.

Opinion filed November 6, 1909.

**Appeal and Error — New Trial — Insufficiency of Evidence.**

1. The granting or refusing of a new trial for insufficiency of the evidence to sustain the verdict is largely within the sound judicial discretion of the trial court, and its decision should not be disturbed except for an abuse of such discretion.

**Same — Conflicting Evidence.**

2. Where the evidence is conflicting, and there is evidence legally sufficient to sustain the verdict under the instructions given, the verdict cannot be said to be contrary to such instructions.

Appeal from District Court, Traill county; *Pollock*, J.

Action by Ole H. Nilson against G. W. Horton and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

*F. W. Ames* and *Bangs, Cooley & Hamilton*, for appellants.

*Chas. A. Lyche*, for respondent.

CARMODY, J. This is an appeal from a judgment in favor of the plaintiff and an order of the district court of Traill county denying defendant's motion for a new trial. The action was brought to recover damages for breach of an express contract of

warranty, alleged to have been made by defendants upon the sale to the plaintiff of a certain gray mare. All the negotiations for the sale, from its inception to its consummation, were had by the plaintiff with one Chris. Kopseng, the authorized agent of the defendants. It is alleged by plaintiff: That, at the time of the purchase of the mare, Kopseng represented and warranted her to be sound and free from all infirmities; that upon the strength of the warranty he was induced to and did purchase the mare, paying therefor the sum of $135; that at the time of such purchase the mare was affilicted with the disease known as "glanders;" and that she communicated the disease to four other horses belonging to the plaintiff, all of whom were destroyed by the official authorities. The plaintiff seeks to recover for the loss of the five horses and for certain other special damages. The defendants denied the warranty of the mare, and claimed that plaintiff bought her upon his own responsibility, after a trial of several days, that the plaintiff did not rely on any warranty made by the defendants, but relied wholly upon his own judgment, and did not purchase until after a full and fair trial. The case was tried before a jury, who found for the plaintiff. Upon the verdict so rendered, judgment was entered against the defendants for the amount of $754, being the value of the five horses destroyed and interest thereon. Two errors are assigned: (1) That the evidence is insufficient to justify the verdict. (2) That the court erred in overruling defendants' motion for a new trial; the evidence being insufficient to sustain the verdict, and the verdict being strictly against the law as laid down by the court in its charge relating to the sale of personal property on trial.

We are of the opinion that neither of them can be sustained. We have carefully considered the evidence as to its sufficiency to sustain the verdict, and are satisfied that there is a substantial conflict, and that therefore the rule generally followed by appellate courts, namely, that when a new trial is applied for upon the alleged insufficiency of the evidence to support the verdict, and there exists a conflict in the evidence, the granting or refusing to grant it is largely within the sound judicial discretion of the trial court, and its decision should not be disturbed except for an abuse of such discretion. Pengilly v. Case Mfg. Co., 11 N. D. 249, 91 N. W. 63; 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, Hutchins

& Co., 17 N. D. 600, 119 N. W. 39. Where the verdict rests upon evidence of a substantial nature, it is not error to refuse a new trial because of its alleged insufficiency. State v. Foster, 14 N. D. 561, 105 N. W. 938. This court will not reverse an order denying a motion for a new trial for the alleged insufficiency of the evidence to justify the verdict when the verdict is supported by evidence of a substantial nature. Libby v. Barry, 15 N. D. 286, 107 N. W. 972.

In their brief defendants say: "While the evidence respecting the existence of glanders in the mare at the time she was bought would undoubtedly have sustained a verdict for the defendants on that issue, still there is probably sufficient evidence upon that question to sustain the verdict for the plaintiff; but we earnestly contend that the evidence shows conclusively that the mare was not bought in reliance upon any warranty of soundness, but that she was first taken upon trial, used for several days, and then purchased solely upon the plaintiff's own judgment as to her fitness and condition." On the question of warranty, plaintiff testified substantially as follows: That about April 20, 1905, he wanted to buy a horse and went to the office of defendants to see if they had one for sale. Chris Kopseng was there, and said they had a good mare for sale. Plaintiff went with Kopseng and looked at the mare and asked the price. Kopseng said $135, and that he would guarantee the mare to be sound in every way. Plaintiff left the barn and in about 10 or 15 minutes went back and took the mare on these conditions. He would not have bought her only for the warranty which induced him to purchase the mare. He settled for her by note with Kopseng. On cross-examination he testified that in April, 1905, he went to Hatton to buy a horse, saw Kopseng, and asked him if they had a good horse to sell. He said, "Yes, a good mare." He said himself that he would guarantee the mare or warrant her; that he would warrant her to be sound and true in every respect. He said plaintiff could take the mare out on trial and keep her until he was satisfied with her and then come in and settle for her. Plaintiff took the mare out and tried her, and had her about a week before settling for her. He gave the note April 24th. The reason plaintiff did not give the note before was that Kopseng said plaintiff could give the note when he took the mare, or he could take her out and try her; if she was not satisfactory, he was not going to keep her, and that is why he did not give the note at the time he took her from Hatton. When Kopseng came

out after the note, plaintiff was drilling, said the mare was satisfactory, pulled well, seemed full of life, appeared to be a good animal, worked along with his other horses, and kept up with them. On redirect examination he testified that when he took the mare to try her, it was to see if she would work with his other horses, and whether she was adapted for farm purposes. At the time he gave the note he was still relying upon the warranty of the defendants.

On behalf of the defendants, Chris. Kopseng testified on the question of the warranty substantially as follows: On April 15, 1905, at Hatton, N. D., plaintiff asked Kopseng if he had a horse for sale. He said, "Yes," and took plaintiff to the barn to look the mare over. Plaintiff said he liked her, and asked Kopseng if she was broken to be driven by ladies. Kopseng said, "Yes," and said he would guarantee the mare to be sound and true in every form, shape, and manner, to be hooked to any machinery except a heavy load, which he did not know whether she was used to or not because she was a light animal for a heavy load. They talked for a while, and Kopseng asked plaintiff if he wanted the mare. Plaintiff hesitated and asked if he could try her. Kopseng answered that if plaintiff was not satisfied with his guaranty he could take and try the mare at his farm for seven or ten days. Plaintiff said on these conditions that he would take her. He took the mare, and on April 24th Kopseng went out to plaintiff's farm, where he was working the mare on a drill. Kopseng asked if he liked her, and plaintiff said that she was fine—just as good as any of his own, if not a little better according to size. Kopseng then asked plaintiff if he was satisfied to sign a note in settlement of the mare. Plaintiff said he was and signed the note. Kopseng testified that on the said 15th of April he made the following entry in the day book: "April 15, 1905. Debtor Ole H. Nilson. The gray Erickson mare. To be settled when tried." On cross-examination he testified as follows: "Q. You said that Nilson did not want to accept your guaranty? A. Yes. Q. And what did he say? A. He says, 'Can I take that mare out for trial.' I says, 'Yes, keep her 7 or 10 days,' or I says to him to 'Come in and settle when it is convenient for you, or, if not, I will take a trip down and get a note signed.' Q. He told you that he didn't pay any attention to the guaranty, did he? A. He certainly did. Because he would not settle for the mare on them conditions, before he tried the mare."

This is substantially all the evidence on the question of the warranty. On this evidence we think the jury was warranted in finding the verdict for the plaintiff, and the court did not err in refusing to set the verdict aside for insufficiency of the evidence

The only other error complained of is that the verdict is strictly against the law as laid down by the court in its charge. The evidence as to the warranty is conflicting, and, as there is evidence legally sufficient to sustain the verdict under the instructions given, the verdict cannot be said to be contrary to such instructions. 29 Cyc. 820, and cases cited under note 34.

Finding no error in the record, the judgment and order appealed from are affirmed. All concur.

(123 N. W. 397.)

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CHARLES W. JOHNSTON v. ELLING K. SPOONHEIM.

Opinion filed November 23, 1909.

**Evidence — Declaration of Party in Interest.**

1. Courts must be governed by the facts and circumstances of each case as considered, and from them alone determine whether the declarations of a party in interest, made in the absence of the litigant, are admissible in evidence.

**Same — Hearsay — Res Gestae.**

2. As a general rule, statements of parties in interest, made in the absence of the litigant, are incompetent as evidence, unless there exists, in the surrounding circumstances or the nature of the case, some acceptable substitute for the usual test of an oath and cross-examination.

**Evidence — Declaration of Grantor — Good Faith of Deed.**

3. The father of the plaintiff was greatly involved financially, and with his wife deeded to plaintiff a farm. The consideration expressed in the deed was $1. In a contest between a creditor and the son, in which the question of the good faith of the transfer of the farm was involved, a notary was permitted to testify to the effect that the father and mother, when the deed was drawn from them to the son, stated to him, in the absence of the son and of the creditor, that Charles (the son) was dissatisfied with having worked for such a long time and receiving nothing for his labor on the farm, and that unless he got something to show for his work would go west and take up a farm for himself, so to recompense him for his work,, and give him something to show for it, they were going to give

him the farm. It was not shown what brought out such statement by the parents. Such statement was not made under circumstances which were a substitute for the usual test of an oath and cross-examination, neither was it a part of the main act or fact, and was made under circumstances which admitted of premeditation and voluntary wariness seeking to manufacture evidence.

*Held,* that its admission was prejudicial error.

Appeal from District Court, Grand Forks county; *Fisk,* J.

Action by Charles W. Johnston against Elling K. Spoonheim and another. Verdict for plaintiff, and from an order denying a new trial, defendants appeal.

Reversed.

*George A. Bangs,* for appellants.

*Skulason & Skulason,* for respondent.

SPALDING, J. This is an action brought to recover damages for the conversion of 688 bushels of wheat. On the trial the jury returned a verdict for the plaintiff, assessing his damages at $439.95. The taking of the grain and its value were admitted. The question at issue was its ownership. Defendant took possession of it under a chattel mortgage given by the plaintiff's father and mother on all the grain to be grown on certain described land during the year 1905. This chattel mortgage was given the 12th day of November, 1904. The land was then owned by the plaintiff's father, Samuel C. Johnston. A warranty deed to the land on which the mortgaged crop was grown, namely, the southwest quarter of section 10, township 150, range 53, in Grand Forks county, from Samuel C. Johnston and wife, Fannie, to respondent, was recorded in the office of the register of deeds on the 3d day of January, 1905. This deed bore date December 14, 1904, and the acknowledgment of the grantors was taken on the 31st day of December, 1904, by John Hempstead, a notary public. The consideration named in the deed was $1. It appears from the record that the father of the plaintiff was deeply involved financially, that the plaintiff resided with the father and the mother on the land described, and that subsequent to the execution and delivery of this deed the father deeded the remainder of the land owned by him to the mother in consideraion of love and affection and $1. The deed to the son was made subject to a mortgage amounting to $3,225. The trial was conducted without much reference to the pleadings, and it was contended that the deed from the

father to the plaintiff was made in bad faith and without valuable consideration, for the purpose of defrauding appellant, among others. Considerable evidence was submitted having a tendency to establish this claim, and the case was tried on the theory that the title to the grain followed the title to the land, and it was assumed that if the transfer to the son was invalid, as against the appellants, the lien of the chattel mortgage attached to the grain taken by them and was enforceable, and, on the other hand, that if the transfer was made in good faith for a valuable consideration, etc., the grain belonged to the son. The charge to the jury rested on this theory. Defendants made a motion for a new trial, which was denied by the trial court, and this appeal is taken.

The record shows some conflict in the evidence as to the good faith of the transaction; but the effect of the verdict, in the absence of error, would be to determine that the deed given by the father and mother to the respondent was given in good faith, and that the ownership of the crop raised was in the son. Without discussing the subject of voluntary conveyances and their effect as against the creditors of the grantor, because that subject was apparently not considered by the trial court and was not argued in this court, we proceed to consider the errors assigned by the appellant as far as material to a determination of the controversy. Hempstead, a notary, was called as a witness for the plaintiff in rebuttal, and was inquired of as to anything having come to his knowledge at the time he drew the deed for the parents as to why the transfer was made and as to his knowledge of any circumstances connected with the transfer. The inquiry was duly objected to as far as it might refer to any statements made by the vendor, and the objection overruled, whereupon the witness answered as follows: "They stated to me that Charles was dissatisfied with having worked for such a long time and receiving nothing for his labor on the farm, and that he, unless he got something to show for his work, would go West and take up a farm for himself. So to recompense him for his work, and give him something to show for it, they were going to give him this farm. This is the understanding I got." This statement was made, not when the deed was executed and acknowledged, but when it was drawn, December 14, 1904, and, on the one side, it is claimed that its admission was prejudicial error, and, on the other, that it was a part of the res gestæ, and properly received in

evidence in favor of the plaintiff. This is the most vital question to be determined. We think, in the absence of authorities to the contrary, that most courts would say at once that such a declaration might be self-serving and, if made in the absence of the parties, not under oath, and under the circumstances of this case, it should not be admitted for consideration by the jury; but there are authorities which appear to hold such declarations admissible. In our judgment the best reasoning and the safest authorities to follow are to the effect that they are inadmissible. The books are filled with definitions of "res gestæ" and rules relating to the admissibility of evidence as a part of the "res gestæ." It would be a hopeless task to attempt to classify and apply them. It is nevertheless settled that no fixed or definite rule can be laid down applicable to all cases, and that courts must be governed by the facts and circumstances incident to and surrounding the transaction being considered, and from them alone determine whether the declarations of a party in interest, made in the absence of the litigant, are admissible. 11 Enc. of Evidence, 373; Hall v. State, 48 Ga. 607; Mitchum v. State, 11 Ga. 615; Lund v. Tyngsborough, 9 Cush. (Mass.) 36; Beaver v. Taylor, 1 Wall. 637, 17 L. Ed. 601.

The record fails to disclose what brought out the statement of the parents. We are left in the dark as to whether the notary made inquiry of them to gratify his curiosity, or whether they volunteered the information. Authorities may be produced on all sides of every question which the fertile brains of ingenious counsel have sought to connect with the so-called subject of res gestæ. Heated controversies have been waged in the legal magazines and journals of this country and England over the propriety of admitting declarations as a part of the res gestæ. Mr. Wigmore, in his work on Evidence, directs shafts of most caustic satire and ridicule on the subject, and, in many respects, hardly any two authorities are in harmony relating to it. The term may be said to be made use of largely because the obscurity of its meaning furnishes a refuge for courts and counsel who are unable to locate their ideas under any other subject. Without attempting to tread the maze which the authorities present, a few simple suggestions will furnish our reasons for holding this statement inadmissible. As a general principle, we apprehend that statements of this character are incompetent unless there exists some accept-

able substitute for the usual test of an oath and cross-examination, and that to make such statements admissible the circumstances under which they are made must furnish such substitute. Hupfer v. National Dist. Co., 119 Wis. 417, 96 N. W. 809. Wharton on Evidence, section 259, says: "The sole distinguishing feature is that such acts (statements) must be the automatic and necessary incidents of the litigated act; necessary in this: That they are part of the immediate preparations for and emanations of such act, and are not produced by the calculated policy of the actors, and they must stand in immediate casual relation to the act—a relation not broken by the interposition of voluntary intellectual wariness seeking to manufacture evidence for itself." To permit the admission of such declarations, it is generally conceded that they must form a part of the act itself. Let us inquire how the statement in question comports with these tests. Was it made under circumstances which furnish a substitute for an oath and cross-examination? If it was not, its admission amounts to the submission to the jury of the unsworn statement of a witness made outside the presence and hearing of the party against whom it is sought to use it and without any cross-examination or opportunity to cross-examine.

We can see nothing in the circumstances to lend to the statement or declaration the solemnity incident to a sworn statement. Does it come within the requirement quoted from Wharton on Evidence? Samuel C. Johnston, the grantor and father of the plaintiff, was deeply involved financially. He, together with his wife and their son, the plaintiff, lived on the land described in the chattel mortgage. The parents gave appellant a mortgage on the crop for the ensuing year to secure an indebtedness. Four weeks thereafter they deeded the land to the plaintiff, then 26 years of age. He always resided with the father and worked upon the farm Their interests appear to have been common. No visible change of position or possession, nor in the manner of conducting the work or the business of the farm, occurred when the deed was given nor during the next season. No express agreement to pay the son for services is shown to have been made, other than the declaration complained of may tend to show. All other land owned by the father was shortly thereafter deeded by him to the mother in consideration of $1 and love and affection. Their chattels were disposed of: They moved west, and about the time the debt to

appellant matured, the son transferred the land to a stranger. In fact, the series of transactions following the giving of the mortgage to appellant carry strong earmarks of fraud. There is much evidence of an almost total disregard of moral and legal obligations to their creditors. In view of these facts, the circumstances, and the conditions, we are unable to say that the statement received in evidence was the automatic and necessary incident of the litigated act, and that it was not produced by the calculated policy of the parents, or the result of intellectual wariness seeking to manufacture evidence for itself, and intended to serve the purpose which it is sought to make it serve in case trouble should come from appellants or other creditors. On the contrary, if the parties were laying the foundation for defrauding their creditors through the disposition of the father's property to the son and the mother, nothing would be more natural than to drop premeditated remarks intended to show the good faith of the transfer. Was the statement which was received a part of the principal act? By "principal act" we mean, not the act of deeding or conveying the real estate, but the good faith of the transaction. It was offered in evidence for the apparent purpose of showing the bona fides of the transfer to the son. The bona fides of the transfer depended upon the nature of the consideration and the object of the parties. This statement, while made with reference to the consideration, was not made contemporaneous or in connection with any consideration or any transfer of consideration, and therefore does not form a part of the main act. It was made in connection with the act of drawing a deed. It is sought to use it in a testimonial character; that is, to place it before the jury for the purpose of impressing its members with the belief that a valuable consideration passed. In other words, the use made of it is, not to show that a statement was made relating to the matter, but to prove by the statement the facts related in the statement. In effect, the parents told the notary that there was a valuable consideration, and the jury is asked to believe that a valuable consideration passed because the parents told the notary so.

We think it clear that it was error to admit the statement in evidence under the circumstances surrounding it. Many authorities lay down the general principle that statements made under such circumstances are properly admitted in evidence. Courts appear

to have adopted the general statement so made as authority for admitting self-serving declarations; but, on careful examination of a large number of the authorities which state the rule in general terms, we find they were made solely with reference to the admission of declarations against the interest of the party making or offering them. We find a great variety of cases where declarations made when a deed was executed or contract entered into, or a similar transaction took place, were admitted; but in nearly every instance, we discover, on examination, that the circumstances have been such as to furnish a substitute for an oath. We may briefly illustrate: Suppose these parents and son had gone before the notary to execute and deliver the deed, and while doing so had engaged in an animated controversy as to the amount or terms of the consideration; one claiming a greater sum and a longer time than the other. The fact that they engaged in an animated controversy and disagreed on the subject would present, when the testimony of the notary was offered to show what was said on the two sides, an altogether different question, yet it would be testifying as to the statements or declarations of the parties when they appeared before him to execute a deed. Had the father and mother made a statement to the notary as to the consideration to be paid, executed and left the deed with him for delivery on the son delivering him a sum of money or other consideration, then a different question would be presented. So we could go through a long list of circumstances and facts which might naturally arise in connection with such actions which would, when arising, relate to the statements, and in many instances, at the same time, form a part of the main act, and which the circumstances would show could not have been premeditated. There is no end to the variations which might occur in such connection, and the statements be admissible in some instances and inadmissible in others. We cite some authorities sustaining our conclusions.

Mr. Wigmore, in his valuable work on Evidence (volume 3, section 1788), says: "What the hearsay rule forbids is the use of testimonial evidence, i. e., assertions uttered not under cross-examination." The declarations of a vendor as to the purpose he had in view in making the conveyance are self-serving and cannot be used to show the good faith of the parties in making the sale when it is attacked by creditors as fraudulent. Johnson v. Burks,

103 Mo. App. 221, 77 S. W. 133; Fisher v. True, 38 Me. 534; Wilson et al. v Sherlock, 36 Me. 295; Colquitt v. Thomas, 8 Ga. 258; Heywood v. Reed, 4 Gray (Mass.) 574; Buckingham v. Tyler, 74 Mich. 101, 41 N. W. 868; Tucker v. Tucker, 32 Mo. 464; Hoover et al. v. Cary, 86 Iowa, 494, 53 N. W. 415. In U. S. v. Mertz, 2 Watts (Pa.) 406, many judgments had been entered against Mertz before he conveyed his real estate to his son in consideration of the alleged indebtedness of the father to the son. The indebtedness consisted in the fact that the son had worked abroad and the father had received his wages; but the work did not amount to the value of the estate, but might have amounted to its value subject to the incumbrances. The question of the good faith or fraud of the transfer from the father to the son was in issue, and, on behalf of the son, the plaintiff, it was offered to prove by the scrivener who wrote the deed that the father told him at the time he was writing it that the object was to secure his son for money which he had earned when working for himself which the father had received. Chief Justice Gibson, in stating the views of the court, says: "That the evidence was erroneously received admits not of an argument. There is an intuitive exception to the competency of exculpatory protestations by a party charged with fraud. His declarations are never admitted to make evidence for himself, when they are not part of the res gestae, and explanatory of a concommitant act, which is here the employment of a scrivener, and entirely irrelevant to the matter in issue. There is a class of cases in which questions of competency have arisen on declarations of the grantor in presence of the parties, and at or immediately preceding the execution of the deed; but, in these, the evidence was offered to establish, not to rebut, a fraud. * * * If such communications were admitted into the jury box, they would never be wanting as a preparatory step to collusion, and their effect would be fatal to justice." In Trimmer v. Trimmer, 13 Hun. (N. Y.) 182, the court held that declarations made by a grantor in a deed as to the terms of payment for the land deeded, and when to be paid, were improperly admitted, and the court says: "The plaintiff's counsel claims that the declaration was a part of the res gestæ. Not so, it was merely a casual conversation between the grantor and the scrivener, having no necessary connection with the act of signing or delivering the deed, and no legitimate tendency to characterize or

qualify the deed, in the face of the written declaration contained in it that the consideration was paid. The res gestæ were the transactions between the parties to the deed, and the words which passed casually between the grantor and the scivener, who in no way represented the grantee, were no part of them. The testimony was clearly inadmissible." In Fisher v. True, 38 Me. 534, it is held that, where the sale of property is alleged to have been fraudulent, the vendee cannot give in evidence the declaration of the vendor in previously offering to sell the same to other persons, nor show that he was advised to purchase it. Johnson v. Burks, 103 Mo. App. 221, 77 S. W. 133, presents a case where a debtor claimed to be a good faith purchaser of a lot from her father, holding under a deed expressing a consideration of natural love and affection and the sum of $10, and it was contended that testimony that the father had told the witnesses the object and purpose he had in view in making the deal should have been admitted. The court says these declarations of the father of the defendant were not against his interest at the time they were made, but were in their very nature self-serving, and that it did not know of any authority that gave countenance to the notion that the declarations of the grantor are admissible in evidence in favor of a voluntary or fraudulent grantee to show a valuable consideration, where the deed itself recites the consideration to be that of love and affection and a mere nominal consideration. We think the statement considered and held inadmissible in Balding v. Andrews et al., 12 N. D. 267, 96 N. W. 305, was less clearly so than the one in the case at bar.

A number of highly respectable authorities hold that statements of this nature cannot be received in evidence where the parties making them are accessible as witnesses, except for the purpose of corroborating their testimony. It is not necessary to pass upon this rule; but it may be added that the record discloses that the father was present in court, at least the day before Hempstead testified, and that the mother's testimony was taken by deposition. The deposition of the mother covered the very subject which Hempstead's testimony related to, namely, the consideration for the deed, and was in conflict with the statement made to Hempstead. She testified that: "There was no other reason other than to give him the land at that time. We gave it to him for the reason that we wanted to give him something that

he could call his own. There was no other consideration." In view of the nature of the record in this case, the admission of the testimony of Hempstead as to the statement of the parents when the deed was drawn constitutes reversible error. Some other questions are discussed in appellant's brief; but they are either without merit, or will not arise on a retrial of the action, and need not be noticed.

The order appealed from is reversed, and a new trial granted. All concur, except MORGAN, C. J., dissenting.

FISK, J., being disqualified, HON. C. A. POLLOCK, Judge of the Third Judicial District, acted in his place.

MORGAN, C. J. (dissenting.) I think that the evidence of the notary public was admissible as part of the res gestæ, and explanatory of the giving of the deed. I do not find any particular conflict as to the rule applicable to the admission of declaration made at the time of the doing of the act. The difficulty or disagreement occurs in applying the rule to the declarations in each case. Much diversity exists in applying the rule as to declarations made or as to acts done under the same or similar circumstances. The rule in civil cases is clearly stated in Elliott on Evidence, an excellent and practical treatise on that subject, as follows: "As already shown, the term 'res gestæ' is applied somewhat indefinitely to various classes of cases; but, generally speaking, the doctrine involves the admissibiity of the principal fact, and the propriety of characterizing or explaining it, and the connection of the declaration with it so as to illustrate, elucidate, or explain it. A typical case therefore is that in which the act or conduct in question is equivocal and in itself has no definite and certain legal significance, without showing the entire transaction or circumstances, but which can be made definite, characterized or given a legal significance, by words accompanying the act or conduct, and so connected with it as to constitute a part of the transaction. The words in such a case are used and admitted as characterizing or elucidating the principal fact, and not as evidence of the truth of the assertion they make as an independent matter." Volume 1, section 522. Another author lays down the rule in the following language: "In questions of fraud or bona fides, an adequate judgment can in general only be formed by having a perfect view of the whole transaction, and this includes the conversation which forms a part of it. The language which is

used on any occasion forms a part of the res gestæ. The declarations and acts of the debtor made before the transfer and contemporaneous with it are admissible. They are admissible evidence in favor of the grantee as well as of the creditor. The acts or declarations of the grantee which accompany the transfer stand on the same footing as those of the debtor. So far as acts and declarations of the parties form a part of and assist in giving character to the transaction, they constitute a part of the res gestæ, and are competent evidence." Bump on Fraudulent Conveyances (4th Ed.) section 593.

If the declarations in this case had been made after the transaction had been completed, they would have been hearsay, and not admissible; but there are some exceptions to the rule in regard to such declarations, and under such exceptions they are not deemed to be hearsay evidence. If the declarations are made as part of the res gestæ, they are not hearsay, although they were made in the absence of one of the parties to the litigation. Declarations made while the transactions are in process of completion are admissible whether they are in favor of, or adverse to, the interests of the declarants. When the statement in this case was made, the agreement, if any had ever been made, had not been completed. If any promises had previously been made, they were still unexecuted. The statement was therefore explanatory, to a certain extent, of the contemplated execution of the deed. It was not therefore a narration of a past event or agreement, but pertained to the act which was then being done. It tended to characterize the act of executing the deed. I do not disagree with much that is stated in the majority opinion. I reach a different conclusion on the application of the principles therein stated to the declarations in this case. I think that the declaration was made contemporaneously with the making of the deed, and become, in effect, a part of the transaction. If that is true, the declarations were admissible, although they might have been, in reality, self-serving declarations and intended to bolster up a fraudulent scheme. That fact would go to the weight, and not to the competency, of the evidence.

I fail to see that it is material whether the principal, or main fact—the res gestæ—be deemed the drawing, signing, or acknowledging of the deed, or the good faith of the consideration, as declared in the majority opinion. Whether the good faith of the act

of delivering the deed or the good faith of the consideration be the res gestæ, the grantors declared, in reference thereto, that the deed was being drawn for a valuable consideration, and this declaration was made before it became a closed or past transaction. It was the validity and good faith of the deed that was being contested. The deed was in evidence, and expressed equivocally only, what the consideration was. To show fully the nature of the transaction, this declaration was competent, as explanatory thereof and as a part thereof, having been made while the deed was being executed. In attempting to make a rule that it must appear that the declarations were made under such solemn circumstances that a substitute for an oath and for cross-examination is furnished, the opinion would bar the admission of all such declarations in contract matters. In contract matters such declarations are admissible if made as a part of the transaction and while it was going on, and it is the presence of this fact that is deemed of sufficient significance as part of the litigated act to render the declarations admissible without having been made under oath or subject to cross-examination. The following authorities are in point as to the competency of such evidence: 24 Am. & Eng. Enc. Law (2d Ed.) 662, and cases cited; Kenney v. Phillipy, 91 Ind. 511; Bushnell v. Wood, 85 Ill. 88; Kent v. Harcourt, 33 Barb. (N. Y.) 491; Jones on Evidence, section 236; Elliott v. Stoddard, 98 Mass. 145; Bergman v. Twilight, 10 Or. 337; Boyden v. Moore, 11 Pick. (Mass.) 363; Hart v. Newton, 48 Mich. 401, 12 N. W. 508; Woolery v. Woolery, 29 Ind. 249, 95 Am. Dec. 629.

It is apparent to me that the majority opinion is grounded upon a notion that the judgment appealed from is based on a fraudulent scheme. The fact that the trial court refused to set the verdict aside on a motion for a new trial ought to set that notion at rest. If the trial judge erred, however, in refusing to set the verdict aside, the judgment should be reversed on that ground, and not by refinements in attempting to avoid a plain and well-established rule of evidence.

The judgment should be affirmed.

(123 N. W. 830.)

THE STATE OF NORTH DAKOTA v. GEORGE KRUSE.

Opinion filed December 23, 1909.

**Intoxicating Liquors — Information — Indictment — Nuisance — Elements of the Offense.**

1. Where the prosecution for keeping and maintaining a common nuisance is only against the person, and where the state does not seek an order of abatement of the nuisance or to establish a lien against the premises in which the nuisance was maintained, an information charging the keeping of the place where the forbidden acts are committed is sufficient.

**Same — Instructions.**

2. Instructions complained of examined, and *held* prejudicial to defendant.

**Same — Evidence.**

3. Evidence as to who rented the building where the alleged nuisance was maintained was, on motion of the state, stricken out. *Held,* error.

**Criminal Law — Taxation of Costs.**

4. In cases of conviction the costs of prosecution in criminal actions should be taxed by the clerk the same as in civil actions.

Appeal from Ward County Court; *N. Davis,* J.

George Kruse was convicted of maintaining a common nuisance, and he appeals.

Reversed, and new trial ordered.

*F. B. Lambert,* for appellant.

*Andrew Miller,* Attorney General, and *Dudley L. Nash,* State's Attorney, for respondent.

CARMODY, J. The defendant was convicted in the county court of Ward county of the offense of keeping and maintaining a common nuisance during the two years immediately prior to February 17, 1908, in violation of the provisions of chapter 65 of the Penal Code (Rev. Codes 1905, sections 9353-9395), and appeals from the judgment of conviction and the order denying his motion for a new trial. Upon being arraigned he interposed a demurrer to the information upon the following grounds: (1) "That it does not substantially conform to the Code of North Dakota for the year 1905." (2) "That more than one offense is charged therein." (3) "That the facts therein stated do not constitute a

public offense"—which demurrer was overruled. This ruling is assigned as error but is not argued in appellant's brief.

The description of the place in the information is as follows: "A saloon in a building situated in the city of Minot, in said county and state."

John J. Lee, sheriff of Ward county, testified: That he knew the defendant. Arrested him at the Minot Hotel in the city of Minot, Ward county, N. D., in the evening between 8 and 9 o'clock. Saw him behind the show case. After the arrest the sheriff compelled defendant to open a box in the kitchen, out of which the sheriff took part of a barrel of Val Blatz beer. There was a padlock on the box. The sheriff told the defendant to open it, and defendant said he would get the keys. He walked out and the sheriff went with him. Defendant then came back, took the keys out of his pocket and opened it. The box from which the beer was taken was built like a counter, with a cover and a table cloth over it. There was room for a couple of barrels. There was only one barrel there, and it was pretty near full. About a dozen bottles had been taken out. The bottles were branded "Val Blatz beer." The sheriff arrested the defendant on the 22d day of December, 1907. Had no search warrant; had a warrant for defendant. Defendant told the sheriff that he could look elsewhere in the building. Defendant opened the box himself.

Thomas Lacy testified: That he resided at Minot for 14 years. Knew the defendant for about two and a half years. Knew him during the year 1907. He was running the Minot Hotel. Lacy boarded there for a while in November, 1907, before Defendant was arrested. Bought meal tickets from him. Bought beverages from the defendant, probably in November. Bought them in the rear end of the hotel. The beverage was of a kind of reddish color. It looked like beer; was labeled "Peerless beer." Bought the same beverage from the defendant in the same hotel several times. Paid him 35 cents a bottle for it. He handed out the beverage personally. Lacy probably drank out of bottles and glasses. Defendant pulled the caps off the bottles and delivered them to Lacy personally. This occurred in the Minot Hotel, Ward county, N. D.

W. J. Carroll testified: That he lived in Minot for 21 years. Knew the defendant for about a year. Was in the Minot Hotel during the year 1907. Saw the defendant there. Carroll went there to get change, eat meals, and get something to drink. He got

beer from the defendant; could not tell how many times; once or twice a week, and maybe more; paid the defendant 35 cents a bottle, and he delivered the beer to Carroll personally. This was in the room off the kitchen. Carroll thinks defendant went in the direction of the kitchen to get the beer; sold it by the bottle. There were some chairs there. Defendant delivered it to them. Carroll was usually there once or twice a week, and again for a whole week he would not be there. Ordinarily he paid the defendant for the beer. Once or twice the defendant treated to beer. Carroll was in there and drank beer during August, September and October, 1907; got the beverage out of beer bottles. Some of them were labeled "Blatz" and some "Gund's Peerless."

W. S. Shaw testified: That he lived in Minot for about seven years. Knew the defendant and knew his hotel. Could not swear that he bought anything to drink in the Minot Hotel during the summer. He was in there with other parties a time or two and drank with them; got the stuff in bottles. It looked like beer and tasted like beer. They paid defendant for it. Defendant handed out the bottles himself and took the money. This was in August, September or November, 1907.

Section 13 of our prohibition statute (chapter 110, page 321, Laws 1890) declares that "all places where intoxicating liquors are sold, bartered or given away, in violation of any of the provisions of this act, 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 act, are hereby declared to be common nuisances," and it is further provided that the owner or keeper of such place shall, upon conviction thereof, "be adjudged guilty of keeping a common nuisance." The selling of intoxicating liquors contrary to the provisions of this act does not constitute the offense nor does the keeping of intoxicating liquors for sale contrary to the provisions of this act constitute the offense. Neither is the offense committed by permitting persons to resort to the place for the purpose of drinking intoxicating liquors as a beverage. They are evidences of the offense. It is keeping the place where these things, or some of them, are done, that constitutes the offense. Proof of keeping by the defendant, and that any one of the prohibited acts was done by the defendant in such place during such keeping, would make the offense complete. State v. Dellaire, 4 N.

D. 312, 60 N. W. 988; State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Thoemke, 11 N. D. 386, 92 N. W. 480.

Appellant attempted to show, by the owner of the hotel building in which the nuisance was alleged to have been maintained, that the building was rented to appellant's wife, also, that meal tickets were issued by her. This evidence was objected to by the state, and the objection sustained, and some evidence that was given on these points, was, on motion of the state, stricken out. These rulings are now complained of as error. While it is not necessarily the owner of the building, but the keeper, who is guilty of maintaining a nuisance, and while the wife may own or rent the property in which the nuisance is maintained, if the husband permits a common niusance to be kept and maintained in the building by his wife and enjoys the fruits of the illegal traffic, then he must share with her the responsibility therefor, or if he assented to and participated in the business, or exercised acts of control over the property, then he was guilty of keeping a nuisance. When the husband lives in the house and exercises acts of control and management, he is the keeper, notwithstanding the wife may own or rent the building and carry on the business therein and receive all the profits. State v. Rozum, 8 N. D. 548, 80 N. W. 477. Still, in our opinion, the evidence objected to and stricken out should have gone to the jury on the question of who was the keeper of the place, who had the care, custody and superintendence of it, and the court erred in the ruling complained of.

Appellant complains of the instructions of the trial court. The only parts of the instructions that we shall consider in this opinion are as follows: "If you find from the evidence that the defendant sold or kept for sale beer, at the time and place mentioned in the information, you must find him guilty of keeping and maintaining a common nuisance, even though you find that he did not own or lease the place.

"It is wholly immaterial as to who owned or leased the place, provided you are satisfied from the evidence, beyond a reasonable doubt, that the defendant at such place sold beer, or kept beer for sale, unlawfully.

"The keeping of intoxicating liquors at the place for sale unlawfully, or the selling of intoxicating liquors at such place, or the permitting of persons to resort to a place for the purpose of drinking intoxicating liquors as a beverage, is what constitutes the crime

charged, and if you find from the evidence to your satisfaction, beyond a reasonable doubt, that any of these things were done by the defendant in the place mentioned and at the times mentioned in the information, you should find him guilty."

The court had, previous to giving the instructions complained of, given to the jury correct instructions as to law. The state's attorney in his brief claims that the defendant could not be prejudiced by the instructions complained of for the reason that the court had in a previous portion of his charge given correct instructions. We cannot assent to this proposition. The instructions complained of were given last, and we cannot say that the jury did not base its verdict of guilty on the instructions complained of. In any event, appellant was entitled to have his case submitted to the jury on correct instructions as to the law constituting the offense with which he was charged.

Appellant's contention that the description in the information of the place where the alleged nuisance was maintained is insufficient must be overruled. The information sufficiently describes the place of the alleged nuisance. The state did not seek an order of abatement in this case, nor was any attempt made to establish a lien against the premises in which the nuisance was maintained. Hence the description was sufficient. State v. Ball (decided recently by this court) 123 N. W. 826; State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Thoemke, 11 N. D. 386, 92 N. W. 480; State v. Wisnewski, 13 N. D. 649, 102 N. W. 883; Commonwealth v. Logan, 12 Gray (Mass.) 136; Commonwealth v. Gallagher, 1 Allen (Mass.) 592; State v. Kreig, 13 Iowa, 463; State v. Waltz, 74 Iowa, 610, 38 N. W. 494; State v. Lang, 63 Me. 215.

The court taxed $500 costs. Appellant complains of the taxation of costs in his brief, but does not assign it as error, neither did he, as far as the record shows, bring the matter to the attention of the trial court. Section 9545 of the Revised Codes of 1905 reads as follows: "In all cases of conviction, costs of prosecution shall be taxed against the defendant, and enforced as other judgments in criminal causes." While we cannot review the taxation of costs by the county court in the case at bar, we are of the opinion that costs in criminal actions should be taxed by the clerk the same as in civil actions.

Judgment and order reversed, and a new trial ordered. All concur.

(124 N. W. 385.)

NOTE—See note to State v. Nelson, 13 N. D. 122. Possession and display of U. S. Revenue License is prima facie, not conclusive evidence. State v. Momberg, 14 N. D. 291, 103 N. W. 566. Error to charge "any liquors which contain any percentage of alcohol, if sold as a beverage," is intoxicating. State v. Virgo, Id. 293, 103 N. W. 610. Where one procures kegs of beer with no previous arrangement with others, and permitted all to drink of it, who desired, and paid for the same, a price fixed and requested by him, such sales are unlawful. State v. Nelson, 14 N. D. 297, 103 N. W. 609. Sale by a storekeeper in good faith of patent medicine, is no violation of the prohibition law, although such medicine contains alcohol as an ingredient. State v. Williams, 14 N. D. 411. Whether sale of liquid is made as a medicineis or beverage is for the jury. Id. Instruction, that a sale of patent medicine is unlawful unless made by a registered pharmacist, is erroneous. Id. Information charging an offense as committed "on the 1st day of January, 1904, and on divers and sundry days and times between that day and the 24th day of April, 1905, and on the 24th day of April, 1905," is sufficiently certain, and not duplicitous. State v. Brown, 14 N. D. 529, 104 N. W. 1112. An information charging a nuisance as kept in two adjacent buildings within the same curtilage, particularly describing the place, is neither uncertain nor double. Id. Where a nuisance is charged, as in a frame building on certain described lots, evidence that one is maintained in another building on same lots is not relevant. State v. Poull, 14 N. D. 557, 105 N. W. 717.

Information must describe the place where nuisance is maintained before abatement proceedings can be based thereon. Id. "Place" means a particular building or apartment where sale is made, or intoxicants kept for sale.

Error to instruct if liquor contained the alcoholic principle and could reasonably be used as a beverage. State v. Seeling, 16 N. D. 177, 112 N. W. 140. Act requiring publication of government liquor license is constitutional. State v. Hanson, 16 N. D. 347, 113 N. W. 371. Federal power to tax does not interfere with state's right to prohibit. Id. State may order publicity to be given to the possession of a government liquor receipt for liquor tax. Id. Liquors delivered F. O. B. in Minneapolis consigned to a buyer in North Dakota are sales in Minnesota. Frankel v. Hillier, 16 N. D. 387, 113 N. W. 1067. Vendor's knowledge of vendee's intent to dispose of the liquors sold in violation of the prohibition law of North Dakota, is no defense to claim for the purchase price due such vendor. Id. Contract of partnership to sell intoxicants unlawfully affords no defense to vendee's claim for liquor sold it, if the latter was no way connected with the illegal contract. Id. Railway station records and receipts showing delivery of intoxicating liquors in large quantities, are competent evidence in a prosecution for violation of prohibition law. State v. Dahlquist, 17 N. D. 40, 115 N. W. 81.

An information charging "that continuously between certain designated dates defendant kept and maintained a place where intoxicating liquors were continuously sold, etc., is sufficient. State v. Stevens, 19 N. D. 249, 123 N. W. 888. Limit of period of imprisonment for fine and costs under the prohibition law is six months. State v. Stevens. Id. Information may charge violation of prohibition law as second offense, although complaint at preliminary examination did not so charge. State v. O'Neal, 19 N. D. 426, 124 N. W. 68. May charge nuisance as committed on a specifically described tract, although different mode of description was employed in complaint before committing magistrate. State v. ONeal. Id. If nuisance is charged as existing on a particular quarter section of land, no proof that it existed elsewhere is admissible. Id. It is error to charge that a defendant can be convicted of keeping a nuisance elsewhere than the place specified in the information. Id. In prosecution for nuisance against the person only, and not against the place, the mere charging of keeping is sufficient. State v. Ball, 19 N. D. .... 123 N W. 826. Where proof shows a sale of beer, it is proper for the court to charge that beer is intoxicating. Id. "Dispense" means to deal out, distribute, to give. Id.

In prosecution of violation of prohibition law, attorney general may appear before the grand jury with all powers of state's attorney. State v. District Court, 124 N. W. 417.

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## STATE OF NORTH DAKOTA EX REL L. M. DAVIS v. C. C. WILLIS, A. J. DELANCE, RALPH ABBOTT AND J. W. FABRICK, AS THE COUNTY CANVASSING BOARD OF WARD COUNTY, NORTH DAKOTA.

Opinion filed January 18, 1910.

**Mandamus — Parties — Public Interest.**

1. A petition in a mandamus proceeding brought in the name of the state, on the relation of a party who does not profess to act in an official capacity, which shows on its face that the relator is seeking to vindicate, not a private right of concern only to himself, but a matter of public interest, in which all the electors and taxpayers of a county are concerned, and interested equally with him, may be properly made and presented to the court by any citizen of the locality affected.

**Mandamus — County Division — Laches.**

2. Where the result of the canvass of the vote, cast upon the proposition to divide a county and create from a portion thereof a new county, is announced on November 30, 1908, and a proceeding in mandamus, for the purpose of testing the accuracy and sufficiency of the certified statement produced and announced by the county board of canvassers, is commenced on January 22, 1909, and in the interval between these dates the only public act in any manner af-

fecting the new county is the appointment by the governor of county commissioners therefor, the laches and delay of the relator in the mandamus proceeding are not so gross and unreasonable that a court should refuse to consider his application upon the merits.

**Mandamus — Nature of Writ.**

3. The writ of mandamus is not a mere writ of right, but a high, prerogative mandate that will, in the exercise of sound, judicial discretion, and on equitable principles, be issued only when called for by circumstances so exceptional that, if the extraordinary relief afforded by the writ is refused, a failure or miscarriage of justice will result. It will not be awarded in a proceeding involving only the public interest, even where a prima facie right to legal relief is shown, if it appears that it will serve no other purpose than to require an idle ceremony on the part of public officers, or will produce a barren and fruitless result, not affecting the public interest beneficially or otherwise.

**Mandamus — Judgment — Res Adjudicate.**

4. A citizen of a county, acting as relator in a matter affecting only the public right, and applying in the name of the state for a writ of mandamus, will not be regarded as acting in any personal sense whatever, but only as a representative of the public interest, and is concluded with reference to any fact adjudged or admitted, or which might have been adjudged, in a former judicial proceeding in which the same public interest was plaintiff or defendant, and is bound by the facts that are or might have been adjudged in the former proceeding as fully as though he were named as a party thereto.

A judgment, duly entered in an action or proceeding of which the court has jurisdiction against a county or its legal representative, in a matter of general interest to all its citizens, is binding upon the latter, though they are not nominally parties to the suit. To hold that each citizen of the county, after a question is once adjudicated on the application of a public representative, is still at liberty to commence an action in court and relitigate the question in his own name would be in effect to nullify the judgment, and to ignore the rule that the well-being of society requires that matters once judicially settled shall not be again repeatedly brought into litigation.

Appellant, as a citizen of Ward county, applies for a writ of mandamus requiring the county board of canvassers to reconvene and prepare a new abstract of its canvass of the vote cast at an election, held upon a proposition legally submitted to divide Ward county and create from a part thereof the new county of Mountraille. As ground for such application he shows that said board, on its first canvass of the vote cast, considered and entered in its certified abstract, certain results taken from tally sheets and other memoranda not entitled to official recognition.

*Held*, that, unless it can be said that the appellant states facts showing that if the writ issue and the county board of canvassers

produce a new abstract, it will show an aggregate result the reverse of that formerly produced, appellant does not present a case that will warrant the exercise of the extraordinary remedy of mandamus. If, however, it can be said that the petition shows that the result produced by a recanvass of the vote will be the contrary of that shown by the first canvass, appellant is concluded, and will not be heard to question such result, as in a proceeding in certiorari, formerly adjudicated and necessarily involving the same fact, the representative of the public interest admitted that the result shown by the abstract of the board of county canvassers upon its first canvass was the true result of the vote, and the court, in passing upon such fact, so determined and adjudged.

Appeal from District Court, Ward county; *Templeton,* J.

Application by the State of North Dakota on the relation of L. M. Davis, for a writ of mandamus requiring respondents, as the county board of canvassers of Ward county, to reconvene and prepare a new abstract of the vote cast at an election held upon a proposition to divide Ward county and create from a portion thereof the new county of Mountraille. From an order of the district court denying the writ, relator appeals.

Affirmed.

*L. W. Gammons* and *John E. Greene,* for appellant.

Where canvassers have declared a result, they may be compelled by mandamus to reconvene and declare a correct result where they have neglected their duty in the first canvass. 15 Cyc. 384 and note 91; Smith v. Lawrence, 49 N. W. 7; Rich v. Board, 59 N. W. 181; Belknap v. Board, 54 N. W. 376, 696.

Where the right or duty affects the state in the sovereign capacity apart from the people at large, action is by the proper public officer; but if the public apart from the state is affected, any citizen may sue out the writ of mandamus. 26 Cyc. 401-403; State v. Carey, 2 N. D. 36, 49 N. W. 164; State v. Langlie, 5 N. D. 594, 67 N. W. 958; State v. Lien, 68 N. W. 748; State v. Matley, 24 N. W. 200. The person sought to be bound by res adjudicata, must have appeared in both actions in the same capacity. 24 Am. & Eng. Enc. Law, 734, 714.

To constitute laches in mandamus the delay must be gross and unreasonable. 26 Cyc. 393, 394 and 395; Barker v. Montana Gold Mining Company, 89 Pac. 66.

Unsettled state of law on account of conflicting decisions and pending litigation may excuse delay. People v. Lantry, 62 N. Y.

Supp. 630; People v. Scannell, 59 N. Y. Supp. 679; Duke v. Turner, 204 U. S. 623.

*Geo. A. Bangs,* for respondent.

Where the duty is public in its nature, mandamus issues only at the instance of duly constituted authorities; a private citizen can apply only when he has a special interest not pertaining to other citizens. Dean vs. Dimmick, 18 N. D. 397, 122 N. W. 245; Smith v. Mayor, 81 Mich. 123, 45 N. W. 964; Thomas v. Hamilton, 101 Mich. 387, 59 N. W. 658; State v. Inhabitants, etc., 25 Me. 297; Mitchell v. Boardmen, 79 Me. 469, 10 Atl. 452; Weeks v. Smith, 81 Me. 538, 18 Atl. 325; State v. Co., 68 S. C. 540, 47 S .E. 979 at 983; Chapman v. People, 9 Colo. App. 268, 48 Pac. 153; Linden v. Board, 45 Cal. 6; Marina v. Graham, 67 Cal. 130, 7 Pac. 442; Colnon v. Orr, 71 Cal. 43, 11 Pac. 814; Ashe v. Supervisors, 71 Cal. 236, 16 Pac. 783; People v. Budd, 47 Pac. 594; Fritz v. Charles, 145 Cal. 512, 78 Pac. 1057; Doolittle v. Supervisors, 18 N. Y. 155; Bamford v. Hollinshead, 47 N. J. L. 439; Atwood v. Patre, 56 Conn. 80, 14 Atl. 85.

Relator, aware of his rights, should act promptly, prevent others acting to their detriment, relying upon the result of the proceedings. Rice v. Board, 50 Kan. 149 at 154, 32 Pac. 134; People v. Judge, 41 Mich. 31; Eggleson v. Judge, 15 N. W. 55; People v. Chapin, 104 N. Y. 96 at 102, 10 N. E. 141; State v. Supervisors, 38 Wis. 554; In re Depeaux's Estate, 50 Pac. 682; McConoughey v. Judge, 57 Pac. 81; Gray v. Judge, 14 N. W. 666; State v. Com'rs, 9 S. E. 692 at 694; State v. Court, 46 Pac. 232; Moore v. Ass'n, 47 S. W. 716; State v. Nichols, 73 Pac. 50; State v. Gibson, 86 S. W. 177 at 181; State v. Judge, 91 N. W. 175.

Court will not compel a board to do what in substance it has already done. Wiedwald vs. Dodson, 30 Pac. 580; State v. Com'rs, 26 Kan. 419; State v. Beck, 57 Pac. 935; People v. Board, 137 N. Y. 201, 33 N. E. 145; People v. Board, 129 N. Y. 360, 29 N. E. 345; State v. Wittemore, 9 N. W. 93; Highs Ex. Leg. Rem. Sec. 40, 14-26; Baker v. Board, 69 N. W. 656; Rice v. Board, 32 Pac. 134; Shellabarger v. Williamson, 32 Pac. 132; State v. U. S. Ex. Co., 104 N. W. 556.

Matters determined in action by the attorney general to fix the status of Mountraille county are res adjudicata. Freeman on Judgments, 178; 23 Cyc. 1406; Sauls v. Freeman, 4 So. 525, 12 A. S. R. 190; Nichols v. MacLean, 101 N. Y. 526, 5 N. E. 347; Giblin v.

North Wisconsin Lumber Co., 111 N. W. 499; Kaufer v. Ford, 110 N. W. 364; Locke v. Comm., 69 S. W. 763; Lyman v. Faris, 5 N. W. 621; Cannon v. Nelson, 48 N. W. 1033; Silver v. Traverse, 47 N. W. 888, 11 L. R. A. 804; McConkie v. Ramley, 93 N. W. 505; City v. Ellis, 61 N. W. 886; Elson v. Comstock, 150 Ill. 303, 37 N. E. 207; Ashton v. City, 133 N. Y. 187-192, 30 N. E. 965, 28 A. S. R. 619; Harman v. Auditor, 123 Ill. 122, 13 N. E. 161; Sabin v. Sherman, 28 Kan. 205, Terry v. Town, 35 Conn. 526; S. P. R. Co. v. U. S., 18 Sup. Ct. Rep. 18.

A judgment against a county in a matter of general interest, binds all the people of the county. 2 Van Fleet's Former Adjudication, pages 1150 and 1157; McEntire v. Williamson, 65 Pac. 244; Shanahan v. So. Omaha, 89 N. W. 285; Holt Co. v. Co., 80 Fed. 686; Harshman v. Knox Co., 122 U. S. 306, 30 L. Ed. 1152; Scotland Co. v. Hill, 112 U. S. 183, 28 L. Ed. 692; Labette Co. Commr's. v. U. S., 112 U. S. 217, 28 L. Ed. 698; State v. Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723.

ELLSWORTH, J. This appeal is taken from an order of the district court of the Eighth judicial district denying the application of appellant for a writ of mandamus, directed to respondents as the county canvassing board of Ward county. Appellant alleges, in his petition to the district court for the writ of mandamus, that he is an elector and taxpayer of the county of Ward; that on the 3d day of November, 1908, a general election was held within said count of Ward, and at said election there was submitted to the electors of said county a proposition to change the boundaries of Ward county, and to create from a portion of the territory thereof, a new county, to be known as Mountraille, and that such proposition was voted upon at said election; that the respondents, as the duly organized county canvassing board for Ward county, during the month of November, 1908, convened, and, after organizing as required by law, proceeded to make a canvass of the votes cast at said general election upon the proposition to create the county of Mountraille, and prepared and certified as the result of such election an abstract showing that there were 4,207 votes cast in favor of said proposition and 4,024 votes cast against it. The petition further alleges that the respondents, while acting as such county canvassing board, in making an abstract of the votes cast in Ward county upon the proposition to create said county of Mountraille, failed to perform the duty required of

them by law, and failed to make a true, full and complete abstract of the votes cast at said election upon the said proposition, but, on the contrary, made an incomplete, incorrect, and false abstract of said votes, and included in said abstract the number of 1,449 votes as having been cast at said election in favor of said proposition, of which said votes there was and is no certified return of election precinct inspectors or judges. Here follows a list of 52 precincts of Ward county, from each of which it is alleged there has been included in said abstract a certain number of votes as cast at said election, both in favor of and against the proposition to create the county of Mountraille. That the votes against the said proposition unlawfully included in the said abstract aggregate in number 858. That in each and all of said precincts the certified returns of the election officers do not disclose that any votes whatever were cast on the proposition to divide Ward county, and that there is not, and never has been, on file in the office of the county auditor of said county any certificate, or any information of any character, that may be lawfully considered to show that any votes were cast in many of said precincts, either in favor of or against said proposition. That appellant as relator in such petition is informed and believes that the respondents in preparing said abstract consulted certain tally sheets and other unofficial memoranda, and, wholly from such data unrecognized by law, determined and included in their abstract of votes, as having been cast in favor of said proposition, a total of 1,449 votes, and against said proposition a total of 858 votes. That the pretended votes alleged to be unlawfully and wrongfully included in said pretended abstract of votes are sufficient in number to change the result of the said election, as shown by said abstract so prepared, and that a true, complete, and lawful canvass of the votes cast at said election for and against said proposition will disclose that it is defeated by a large majority, and that said board should so make its abstract to show, and should so certify. Appellant then alleges that by reason of the foregoing facts the respondents, as the county canvassing board of Ward county, have not completed their duties as specified by law, and have not made a lawful canvass of the votes cast at said election on said proposition, and have not presented a true and complete abstract of the votes so cast, and prays for a writ of mandamus requiring the said board of canvassers to re-

assemble and reconvene for the canvass of the election returns of said county, on the proposition to create the county of Mountraille, and that in making such canvass they take into consideration only certified statements or returns duly signed by inspectors or judges of election in each of the several precincts, and refrain from reference to or consideration of any unofficial memoranda, tally sheets, or uncertified statements of any kind with respect to any votes cast, whether in favor of or against said proposition, and upon the completion of such canvass to make a properly certified abstract thereof as required by law.

Upon the presentation of this petition to the district court an alternative writ of mandamus was issued and served upon the respondents, who made answer, admitting all allegations of appellants' petition with reference to their appointment and organization as the county canvassing board of Ward county and their convening as such board for the purpose of making, among other things, a canvass of the vote cast upon the proposition to create the new county of Mountraille. They further allege that they in all things fully complied, and sincerely attempted to comply, with each and all of the provisions of law governing the canvass of said votes and the making of an abstract thereof, and that they did in good faith honestly, and sincerely attempt to make a full, fair, honest, complete and accurate canvass and abstract of the votes; that in the regular election blanks furnished by the county auditor of Ward county to the various precincts for use by the officers at said election there was not contained any prepared blank form of certificate to a statement of the vote upon the various propositions for the division of the county of Ward, including that to create the county of Mountraille, and that, as a consequence, in the returns from the different election precincts there was no regular form of certificate of the vote cast in favor of or against such proposition made out and transmitted by the precinct officers; that the officers in some of the precincts interlined the result of such vote in the regular form of certificate furnished them with the ordinary election return blanks; that the officers in other precincts made out statements or certificates of the votes cast, upon separate sheets of paper which were attached, either by fastening with pins or otherwise, to the regular certificates and pollbooks, and returned in that way; that the officers, in a few of the precincts, because of the failure to furnish to them a form of certificate of

the statement of the vote on said proposition, neglected to furnish any statement whatever, and in such case the canvassing board ascertained the result of the vote upon this proposition in such precinct by consulting the tally sheets which came with the regular returns; that in each case in which a statement and certificate was furnished by the precinct officers, such statement was used by respondents as a basis for the entries made by said board in their official abstract, and that in no instance was there any information used as a basis of the canvass of such vote by said board other than the statements interlined into the regular certificates, special certificates made out upon separate sheets by the election officers, or the tally sheets prepared by such officers at said election; that great care was exercised by respondents in arriving at the true result of said vote as cast at said election, and in their best judgment and opinion the result of the canvass as heretofore announced by them on or about November 30, 1908, is a true, correct, full and complete canvass of the votes upon the proposition to create said new county of Mountraille, and that there were actually cast in favor of such proposition 4,207 votes, and against the same 4,024 votes; that the canvass of the votes of Ward county, including the canvass upon the proposition to create the county of Mountraille, was completed on or prior to the 30th day of November, 1908, and that immediately thereafter respondents, as such canvassing board, made out their abstract and return, as required by law, to the Secretary of State of the state of North Dakota, in which abstract there was included a statement of the votes cast for and against the proposition to create Mountraille county, which abstract was immediately transmitted to the Secretary of State in order that the said Secretary of State might make his certificate as required by law to the governor of the state, and the county of Mountraille be organized in accordance with the provisions of law.

As a further defense to the cause of action alleged in appellant's petition, the respondents then show that, after the canvass of the vote and the transmission of said certified abstract to the Secretary of State, T. F. McCue, then Attorney General of the state of North Dakota, made application to the Supreme Court of the state of North Dakota for a writ of certiorari, in which application was stated the same facts hereinbefore set out with reference to the general election in Ward county, the submission to the electors of said county, at said election, of the proposition to create the

county of Mountraille, and two other counties, to be known as Burke and Renville, within the limits of said Ward county; that thereafter the county convassing board of said Ward county, after having canvassed said votes, found and certified that there were cast at said election, in favor of the proposed county of Mountraille, 4,207 votes, and against said proposition, 4,024 votes; that pursuant to the requirements of the state law the county auditor of Ward county had duly certified to the secretary of state the result of such election upon the proposition to create the county of Mountraille, showing that a majority of the vote cast was in favor of such proposition, and that the secretary of state, acting pursuant to the statute in such case provided, was about to notify the governor of said state of the result of said election upon said propotition, to the end that the governor might proceed to appoint county commissioners for such county and to complete the organization of the same; that said certificate and return of the auditor of Ward county to the secretary of state was erroneous and void, "for the reason that, while such proposition (to create the county of Mountraille) received a majority of all the votes cast at said general election upon that particular proposition, such proposition did not receive, and was not adopted by, a majority of all the legal votes cast in said Ward county at said election, as contemplated and required by section 168 of the Constitution of the state of North Dakota;" that pursuant to this application of the Attorney General a writ of certiorari was issued from the Supreme Court of the state, requiring the county auditor of Ward county and the secretary of state of North Dakota to return and certify to the Supreme Court all proceedings, certificates, and returns in the custody and under the control of either, with respect to the proposition to create said county of Mountraille, together with the legal number of votes cast at said general election for state and county officers within said Ward county, in order that the said court might cause to be done thereon what is right, and according to law ought to be done; that thereupon the secretary of state made answer, to which he attached the certificate of the county auditor of Ward county, showing the results of the election held in said county of Ward on the date aforesaid, showing the results of such election with respect to the county and state officers voted for at said election, and the vote upon the several propositions for the division of Ward county, including that providing for the creation

of the new county of Mountraille, and by his answer alleged that it was his purpose and intention, pursuant to said auditor's certificate of the result of said election, to notify the governor of the state of North Dakota that the proposition to change the boundary lines of Ward county, and to establish therein the county of Mountraille, had received the vote requisite to the creation of said new county, that the governor of North Dakota might act thereupon by the appointment of commissioners for said county of Mountraille, as contemplated by law; that thereupon said proceeding for a writ of certiorari was heard by the Supreme Court on the 29th day of December, 1908, upon the merits, and that thereafter, on the 14th day of January, 1909, the Supreme Court of the state of North Dakota did render its decision and opinion, by which the application of the attorney general for a writ of certiorari was denied, and the temporary writ issued in the proceeding quashed and annulled; (here is quoted at length the opinion of the Supreme Court of North Dakota in State v. Blaisdell, 18 N. D. 31, 119 N. W. 360); that upon the filing of the decision of the Supreme Court of North Dakota the secretary of state did certify the result of such election to the governor of the state of North Dakota, and that thereupon the governor did appoint county commissioners for said county of Mountraille, and that said commissioners had, prior to the date of said application for mandamus, qualified, met, organized, and appointed several of the officers of the said new county of Mountraille and that by reason of such facts the said county is now completely organized and existing as a county of the state of North Dakota; that such organization is based upon the determination of the issue in said certiorari proceedings, which proceedings were based upon the necessary assumption that there had been a full, accurate, legal and complete canvass of the vote cast upon the proposition to create the said county of Mountraille, by the canvassing board of the county of Ward; that, by reason of the facts alleged, appellant as such relator is guilty of laches, and the matters alleged in his application for the writ of mandamus as a ground for the granting of such writ are res adjudicata, and that appellant as relator in said proceeding is estopped to allege, and should not be heard now to set up, facts which bring in question the result of the vote cast upon such proposition.

Upon the presentation of this answer by respondents, appellant demurred thereto, and all questions arising upon the application

were heard before the district court on or about the 24th day of February, 1909. On such hearing the respondents contested the right of appellant to a writ of mandamus upon four points, as follows: (1) That the relator, Davis, has not shown such interest or right to move in a matter of this character as will authorize him to maintain this application for a writ of mandamus; (2) that appellant by his laches and delay in waiting from November 30, 1908, until January 22, 1909, with full knowledge of the manner and result of respondents' canvass of said vote, was now estopped, and should not be heard to question the correctness or sufficiency of such canvass; (3) that mandamus is not a writ of right, and that the court, in the exercise of sound judicial discretion, and in the promotion of equitable principles, should not issue the writ to require the recanvass by respondents of the vote cast at said election, when it did not appear that such recanvass, if legally conducted, would produce a different result; and (4) that by the decision and judgment of the Supreme Court in the certiorari proceedings instituted by the attorney general of the state, the fact that the majority of the vote cast upon the proposition to create the new county of Mountraille at said election was in favor of said proposition is res adjudicata, and that relator is estopped, and should not be heard to again bring up for judicial determination the same fact in this proceeding. The district court overruled the first and second points of objection presented by respondents, and sustained their contentions upon the third and fourth points; and thereupon entered an order denying the writ of mandamus. Upon appeal to this court respondents make the same contentions, and present the same points of defense, relied upon by them in the district court. We will therefore consider these points in the order in which they are mentioned.

The petition of appellant, as relator, contains no express allegation that the subject-matter is of public concern, or that he is moving in the interest of the large class of citizens constituting the resident electors and taxpayers of Ward county; but his proceeding is entitled in the name of the "State of North Dakota," and on its face discloses that he is seeking to vindicate, not a private right of concern only to himself, but a matter of public interest, in which all electors and taxpayers of Ward county are concerned and interested equally with him. In these particulars his proceeding

is to be distinguished from that in the case of Dean v. Dimmick, 18 N. D. 397; 122 N. W. 245, in which the relator does not profess to move in the name of the state. Under a rule of practice, first announced by this court in 1891, and subsequently adhered to, "where the controversy does not concern the state, as such, but does concern a large class of citizens in common, as, for example, the citizens and taxpayers of a particular county, town, city or district, the required affidavit (for mandamus) may properly be made by any citizen of the locality affected." State v. Carey, 2 N. D. 36, 49 N. W. 164; State v. Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723. We, therefore, hold upon this point that a sufficient interest to maintain the application, if meritorious in other respects, is shown by appellant's allegation that he is an elector and taxpayer of the county of Ward.

While the delay of appellant in waiting from November 30, 1908, to January 22, 1909, before commencing this proceeding is not explained in a manner than is entirely satisfactory, it appears that the only matter of public interest that had intervened during that interval was the appointment by the governor of North Dakota of county commissioners for the new county. Under the circumstances, therefore, we are of the opinion that, if appellant was, upon the merits of his application, entitled to a writ of mandamus, its issuance at the time of his application would not have produced such confusion in the pubic service as to warrant the district court in refusing to entertain the application on the ground that his laches and delay were gross and unreasonable.

From an examination of the moving papers and the admissions of the answer, it is apparent that respondents, as the county canvassing board of Ward county, exceeded their duty in entering upon their abstract of the votes cast in said county upon the proposition to create the new county of Mountraille, a record of votes from certain precincts, of which the precinct officers had made no certified statement or return. The duties of a canvassing board are purely ministerial, and in performing them they are limited to a consideration of the certified statements returned by the precinct election officers. State v. McKenzie, 10 N. D. 132, 86 N. W. 231. It is admitted by respondents that, in the case of at least a few of the precincts, they took the results entered on their abstract from tally sheets, or other unofficial memoranda which should not have been considered. Does it follow from this that

respondents will be required by mandamus to reconvene and prepare an abstract upon which will be shown only the votes of which they have before them evidence that can be legally recognized, in the absence of any express showing that will reasonably warrant a belief, on the part of the court applied to, that such new abstract, when produced, will show a result not only different, but the reverse of that appearing on the abstract here in question?

Appellant strenuously contends that the interests he represents are entitled, as a matter of right, to a writ of mandamus requiring that such new abstract be made out by respondents when it is shown that a recanvass of the votes will necessarily produce a certificate differently worded, though the general result may still be the same. In other words, his contention seems to be that the public interest demands that there be produced and placed of record by respondents a certified abstract showing that a certain vote was returned by the precinct election board in a form that can be officially recognized, whether or not the existing political status of Ward county is in any manner affected thereby. If this contention can on principle be sustained, then it may be conceded that appellant is entitled to a writ of mandamus in this case whether or not his moving papers show that the new abstract would present a result the reverse of that shown by the one already prepared.

The reasonable presumption is that, an election being held in Ward county on the day in question, and a proposition in which the people were generally interested legally presented to the electors for determination, votes were cast pro and con thereon in all of the election precincts of the county. We cannot disregard the fact raised by this presumption for no other reason than that no certified statement of the number of votes cast for and against the proposition was made by the precinct election officers. The presumption that a vote in about the amount shown on the abstract was actually cast, though irregularly determined, is certainly stronger than the presumption, which appellant urges, that no vote was cast because there is no return thereof made that can be recognized officially. If respondents were required to reconvene as a county canvassing board in accordance with the prayer of appellant, it would be their legal duty, not only to enter on a new abstract the votes from all precincts of which there was a certified statement, but also to require the presence of the election officers from the precincts in which no such return was made, and to ob-

tain from them a proper certificate on which to act. Revised Codes 1905, section 673. While there is no presumption that such certificate, when so obtained, would show exactly the same results entered by respondents on the abstract prepared by them, there is a presumption that it would show some vote on the proposition; and, in the absence of an express allegation that the number of such votes so shown will produce a different result, it will be presumed that the result shown by the abstract already prepared is substantially correct.

If the result shown is substantially correct, appellant is not entitled to a writ of mandamus merely for the purpose of producing a certificate somewhat different, but not showing a reverse result to the one already made by the county canvassing board. The writ of mandamus is not a mere writ of right. It will not be awarded in all cases, even where a prima facie legal right to relief is shown. It is a high prerogative writ that will, in the exercise of sound judicial discretion and on equitable principles, be issued only when called for by exceptional circumstances, and where, if the extraordinary relief afforded by the writ is refused, a failure or miscarriage of justice will result. High on Extraordinary Remedies, sections 14-15; Tennant v. Crocker, 85 Mich. 328, 48 N. W. 577; State v. U. S. Express Co., 95 Minn. 442, 104 N. W. 556.

Unless a different certificate of the county board of canvassers will show, with reference to the vote upon the proposition to create the new county of Mountraille, a result exactly the contrary of that shown by the abstract prepared, its preparation will vindicate only a mere barren right. The status of the county of Mountraille will be entirely unchanged, and the public interest which appellant represents will be entirely unaffected, beneficially or otherwise. Respondents will be put to great inconvenience ,and the county of Ward to great expense, in order that an experiment may be made for the purpose of testing the absolute technical correctness of the certified abstract prepared by the county board of canvassers. In our view the writ of mandamus should not be awarded for the purpose of compelling an act which, even though legally required, would be fruitless of any remedial or beneficial result. The reconvening of respondents as the county board of canvassers, and the preparation of a new abstract in the absence of a reasonable belief that the result shown by the new abstract would be

the contrary of that previously produced, would be a mere idle ceremony, which, while perhaps interesting to appellant and a few of his fellow citizens, would not serve the public interest to any extent whatever, and certainly not in any manner adequate to the expense and trouble required to produce it. Baker v. Board of State Canvassers, 111 Mich. 378, 69 N. W. 656; Rice v. Board of Canvassers, 50 Kan. 149, 32 Pac. 134; State v. Stevens, 23 Kan. 456; State v. Board of County Commissioners, 27 Fla. 438, 8 South. 749; State v. Board of Health, 49 N. J. Law, 349, 8 Atl. 509; People v. Board of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; Gilliam v. Green, 122 Ga. 322, 50 S. E. 137; State v. Albin, 44 Mo. 346.

There is, however, as heretofore noted, in appellant's petition for mandamus, an allegation to the effect "that the pretended votes so unlawfully and wrongfully included in said pretended abstract of votes are sufficient in number to change the result of said election, and a true, complete and lawful canvass of the votes cast at said election for and against said proposition, will disclose that said proposition was defeated by a large majority, and that said board should so certify." The trial court found that this allegation, coupled with the other averments and suggestions of the writ, did not amount to an assertion that a majority of the votes actually polled upon the proposition of forming the new county were opposed to the proposition. It is evident from the attitude of appellant's counsel before this court, as well as before the district court, that they did not, as we have before pointed out, rely upon such allegation, but, as the trial court states in its memoranda, "took the bold position that it is immaterial what the final result may be; * * * the writ must issue." Having, however, held that mandamus should not issue unless it clearly appears from the moving papers that there is reasonable cause to expect a different, fruitful and beneficial result, we will assume that the averments of appellant's petition assert such result, and will view the case upon the point of whether or not appellant can now be heard to say that the result of the vote actually cast is the reverse of that shown upon the abstract produced by respondents. We have already held that appellant, proceeding as he does in the name of the state, and upon a cause of action affecting the citizens of Ward county, is not acting in a private or personal capacity, but stands as a representative of the public interest. If it were otherwise,

under our holding in Dean v. Dimmick, he would not be permitted, over the objection of respondents, to maintain this proceeding. Standing as he does as representative in a matter of general interest to all of the citizens of Ward county, he is concluded with reference to any state of fact which was or might have been adjudged against that interest in a former action in which the same interest was plaintiff or defendant. "It is elementary that all questions which were, or might have been, litigated in an action or proceeding of which the court has jurisdiction are res adjudicata as to all parties thereto and their privies, and the rule applies to mandamus proceedings." Kaufer v. Ford, 100 Minn. 49, 110 N. W. 364.

It is apparent, therefore, that appellant, acting as he does as a representative of the public interests of the citizens of Ward county, is privy to any other action in which the same interest was brought in question, even though not by name a party thereto. For "in any inquiry with reference to the binding force of a former judgment the term 'parties' includes all who are directly interested in the subject matter, and who have a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment." Ashton v. City of Rochester, 133 N Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619; Robbins v. City of Chicago, 71 U. S. 657, 18 L. Ed. 427. The proceedings entitled "State of North Dakota v. Blaisdell" was an application for certiorari, brought in the name of the state by the attorney general, for the purpose of determining the status of Mountraille county as one of the municipalities of North Dakota. The determination of this status necessarily included an investigation of and finding upon the question of whether or not a majority of the vote upon the proposition to create such county, as shown by the official statement of the county board of canvassers, was in favor of such proposition. Otherwise it would not have been necessary for the Supreme Court to pass upon any other question presented by that proceeding. In the moving papers of that proceeding, as shown by the answer in this case, the attorney general, acting on behalf of the citizens of Ward county, expressly admitted, that, while the proposition or measure for the division and organization of the county of Mountraille "received a large majority of all the votes cast at said general election upon that particular proposition, such proposition did not receive, and was not adopted by a majority of all the legal votes cast in said Ward county at such

election, as contemplated and required by section 168 of the Constitution of the state of North Dakota." The Supreme Court, in passing upon the questions presented by that case, holds that: "None of the propositions received a majority of the votes cast thereon, except the one relating to the creation of the county of Mountraille. This question received 4,207 affirmative votes and 4,024 negative votes. * * * It is apparent from these figures that the proposition to create the new county of Mountraille, while receiving a majority of the votes cast on that proposition, did not receive more than half as many favorable votes as the total vote for governor." State v. Blaisdell, 18 N. D. 31, 119 N. W. 360. The final order of the court in quashing the writ of certiorari and dismissing the proceeding established the status of Mountraille county as an existing entity under all questions that were or might have been there presented.

Appellant urges, however, that he is not bound by any of the facts adjudged in that proceeding, for the reason that he was not a party thereto, and that the record of that proceeding nowhere discloses any connection of his with that case. It is apparent, however, that plaintiff, acting as he does in a representative capacity, is, constructively at least, a party to any action or proceeding in which the same interest was plaintiff. He also claims that it was impossible for the Supreme Court in that proceeding to call in question the legality of the acts of the canvassing board of Ward county. It will be noted, however, that the basis of the proceeding was the certificate of the county auditor of Ward county to the result of the vote upon the proposition to create the county of Mountraille, as shown by the abstract that is brought in question here. If the result so certified was not only incorrect, but the reverse of that warranted by the facts, and the board could be required to prepare an abstract showing the true result, certainly a consideration of that question was obviously of prior importance to that of whether the vote actually shown by the abstract constituted a majority vote such as is contemplated by the constitution. In order that the court might reach and consider the question that was passed upon in the certiorari proceeding, either an admission or judicial determination of the correctness of this result was first necessary; and such admission was made, as we have seen, by the representative of the public right, and acted upon by the court. "A judgment against a county or its legal rep-

resentative, in a matter of general interest to all its citizens, is binding upon the latter, though they are not parties to the suit. * * * Either this must be true, or each citizen, and perhaps each citizen of each generation of citizens, must be at liberty to commence an action and litigate the question for himself, either in his own name or in that of the municipality, or of the people of the state, or in some other mode adapted to the litigation of the question." Freeman on Judgments, section 178. It is held that such perpetual repetition of litigation would be, "in effect, to nullify the judgment, and to ignore the rule that the well-being of society requires that matters once judicially settled should not be relitigated." Locke v. Commonwealth, 113 Ky. 864, 69 S. W. 763. Where one case involving a question of county or state interest has been heard upon the merits and decided, equity requires that the county or state should not be exposed to repeated suits at the instance of parties nominally different although the interest represented is the same, "in order that there may come a time in which litigation of this character shall end." Sabin v. Sherman, 28 Kan. 289.

It is our conclusion, therefore, that the question of the result of the vote cast in Ward county upon the proposition to create the new county of Mountraille is res adjudicata so far as appellant is concerned. Being a citizen and taxpayer of Ward county, he was constructively a party to the certiorari proceeding, and had the right to be heard, and to have any question pertinent to the issues litigated in that proceeding adjudicated. He remained silent while the attorney general, acting as his representative, admitted the correctness of the result shown by the abstract of the board of county canvassers, and only when it has been decided that such result, if correct, establishes the status of Mountraille county as an existing county of North Dakota, does he attempt to bring a proceeding that can be maintained only upon a showing that the result is the reverse of what the representative of the public interest has admitted it to be. This point once litigated, the public interest requires that it should be at rest. Otherwise the political status of the county of Mountraille, as announced in the case of State v. Blaisdell, might be again brought in question by any citizen of the county of Ward; and, as shown from the summary of the entire vote presented in that case, these citizens number between 9,000 and 10,000. To hold that this mass of

people, throughout this and succeeding generations, might maintain separate actions bringing in question the municipal status of Mountraille county would be to declare judicial chaos.

We find, therefore, that appellant is concluded, and will not be heard to assert that a recanvass of the votes by the county canvassing board of Ward county would produce a result different from that admitted to be correct in the case of State v. Blaisdell. We further find that, unless a result the reverse of that shown by the first canvass would with reasonable probability be produced by a recanvass, the writ of mandamus will not issue for the purpose of compelling an idle ceremony that can at best produce only a barren and fruitless result.

The order of the district court denying the writ of mandamus is affirmed. All concur.

(124 N. W. 706.)

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CHARLES H. BURKE v. ADAM SCHARF.

Opinion filed November 19, 1909.

Rehearing denied January 5, 1910.

**Champerty and Maintenance — Law in Force in This State.**

1. The common-law doctrine making void, as against a person in possession, a deed of land adversely held as against the grantor, where the grantor has not been in possession of the land or received the rents thereof for a period of at least one year, remains in force in this state. (Galbraith v. Payne, 12 N. D. 164, 96 N. W 258, followed.)

**Champerty and Maintenance — Deed by Person out of Possession.**

2. Section 8733, Rev. Codes 1905, prescribes that it shall be a misdemeanor to convey a pretended title by a person out of possession not receiving the rents of the premises for one year. Deeds executed in violation of that section are void as to the persons in possession, and as to them the title is in the grantor, notwithstanding such deed.

**Quieting Title — Adverse Claims — Right to Possession Adjudicated.**

3. Under chapter 5, page 9, Laws 1901, an action to determine adverse claims and to quiet title may be brought by one in possession or by one out of possession, and the right of possession may be determined in such action, and a restitution of the possession may be adjudged in the decree.

**Vendor and Purchaser — Vendee's Possession Is that of Vendor.**

4. Under contracts for the purchase of real estate where possession is given to the vendee by the vendor, such possession is that of the vendor, while the contract remains in force and until it is complied with or repudiated, and such possession is not adverse to the vendor.

**Vendor and Purchaser — Purchase of Outstanding Titles — Estoppel.**

5. While the contract remains in force, and the vendee remains in possession thereunder, he is estopped from buying an outstanding title, and thereby repudiate the vendor's contract and at the same time retain the possession secured by him by virtue of the contract.

**Vendor and Purchaser — Champerty and Maintenance — Purchase of Outstanding Title.**

6. Where an action is brought by one out of possession against the vendor and vendee in such contract, and the plaintiff in that action has legal title to the land and conveys such legal title to the vendee, and the action is afterwards dismissed this does not constitute a constructive eviction of the vendee, entitling him to retain possession under the title thus purchased against the vendor on the contract, as such deed to him is void and champertous as against the vendor in possession.

**Champerty and Maintenance—Purchase of Outstanding Title — Conveyance to Grantee in Possession.**

7. When the holder of the legal title to real estate who is out of possession conveys such title to a third person who is not in possession of said real estate, and at the same time said holder of the legal title conveys to one who is in the legal possession of said premises through a vendee holding under a contract for the purchase of the land, and the deed to the person not in possession is first delivered, said first deed is void on account of the adverse possession of the land as against the grantor, and the second deed, after its delivery, becomes effective, and conveys the legal title to the premises.

Appeal from District Court, Ramsey county; *Cowan*, J.

Action by Charles H. Burke against Adam Scharf to determine adverse claims to real property, and to quiet title. Judgment for plaintiff, and defendant appeals.

Affirmed.

*Anderson & Traynor* and *Guy C. H. Corliss*, for appellant.

*Burke, Middaugh & Cuthbert*, for respondent.

MORGAN, C. J. The complaint of the plaintiff states the following facts: On the 26th day of April, 1901, the defendant and

one Brown entered into a contract in writing whereby the defendant purchased from said Brown 160 acres of land in Ramsey county, N. D., for the agreed price of $1,600, payable by delivering to said Brown one-half of the crops grown upon said land each year. The defendant has paid upon said contract the sum of $516.88, in two payments, the last payment having been made in January, 1903, and no payments have been made after that date, although the defendant has raised crops upon said land during other years, but has not turned over the proceeds thereof; that said Brown has sold and transferred, by a quitclaim deed, all his right, title and interest in the land and in the contract, to plaintiff herein; that on the 3d day of January, 1905, the plaintiff served a notice upon the defendant wherein his defaults in making payments upon said contract were recited, and he was required by said notice to comply with the terms of the contract within thirty days from the date of service of said notice upon him; that the said notice was personally served upon said defendant, and on the 19th day of September, 1905, the plaintiff caused to be served upon said defendant a further notice in writing wherein and whereby he was notified that the contract entered into by him and said Brown, which had been duly assigned by said Brown to the plaintiff, was canceled, terminated, and ended, and the defendant was further required to relinquish possession of said premises. In said notice, the note which said defendant had given to said Brown for the purchase price of said land, dated April 26, 1901, for the sum of $1,600, was offered to be returned to the defendant; that the defendant refused to accept said promissory note, and the plaintiff thereafter caused the same to be deposited in the Ramsey County National Bank of Devils Lake, with instructions to said bank to deliver it to said defendant without conditions upon his demand therefor.

The complaint also contains the following allegations: "That, by reason of the premises, defendant's right to said premises and the possession thereof have ended, and the plaintiff is the owner in fee simple and entitled to the immediate possession of said premises and the whole thereof, and on information and belief that the said defendant claims certain estates or interests in, or lien, or incumbrances upon said premises adverse to the plaintiff." The prayer for relief is in the following language: "Wherefore, plaintiff prays judgment that it be adjudged and decreed that

the said defendants be required to set forth all their adverse claims to the property above described, and that the validity, superiority, and priority thereof be determined; (2) that the same be adjudged null and void, and that they be decreed to have no estate or interest in, or lien, or incumbrances upon said property; (3) that this title be quieted as to such claim, and that defendants be forever debarred and enjoined from further asserting same; (4) that he recover possession of the premises described (if possession be desired); (5) that he have such other general relief as may be just, together with costs and disbursements."

The defendant appeared and answered, setting forth the following facts: After admitting the making of the contract, and that crops were grown on said land during the years 1903 and 1904, and that no payments were made upon said contract except those set forth in the complaint, and that the defendant did not accept the return of the promissory note, and that the notices set forth in the complaint were duly served upon the defendant, the answer alleges that all defaults were waived by the plaintiff by reason of his delay in forfeiting said contract. The answer further contains a denial that the plaintiff or said Brown is, or ever was, the owner of said premises or in possession thereof. The answer further alleges that the defendant is now the owner in fee simple of said land, by virtue of a conveyance thereof to him from one Verone Deutz, who was the owner thereof on the 19th day of December, 1903, on which day she conveyed the same to this defendant; that said Verone Deutz was the absolute owner of said premises by virtue of having title thereto through regular conveyances in regular chain from Howard, the original owner and patentee of said land. The answer demands the following relief: "Wherefore, the defendant asks that he be decreed to be the owner in fee simple of the above described land; that the plaintiff be decreed to have no interest in said property; that the title to said property be quieted in said defendant; that the defendant have possession of the promissory note, for his costs and disbursements herein, and for such other and further relief as the court deems equitable."

The complaint sets forth a cause of action to determine adverse claims. The facts show that the plaintiff claims to be the absolute owner of this land, through a sheriff's deed under a foreclosure of the Howard mortgage, and alleges cancellation and forfeiture of the

contract between Brown and the defendant. The complaint is drawn under chapter 5, p. 9, laws 1901, prescribing when an action to quiet title and determine adverse claims may be brought by one in possession, or by one out of possession. This was intended, and does serve the same purpose as the action of ejectment under the old practice. Under this act, title to land may be determined and possession of land decreed to the party having the title thereto, after proper proceedings. In other words, the title to land and restitution of the possession may be decreed in an equitable action brought to determine adverse claims and to quiet title under said chapter.

The defendant answers by setting forth absolute ownership in himself, and asks for affirmative relief; that the title be quieted in him by virtue of such ownership under the Deutz deed. The district court made findings of fact and conclusions of law in favor of the plaintiff and against the defendant, and ordered judgment in favor of plaintiff quieting the title in him, and ordered that the plaintiff have possession of said premises. The judgment or decree did not adjudge that the plaintiff have possession of the premises. The defendant has appealed from the judgment entered pursuant to such findings of fact and conclusions of law, and demands a review of all the evidence under the provisions of section 7229, Revised Codes 1905.

The following facts are conceded: Both parties claim title through Howard as their source of title, and he was the patentee of the land from the United States government. Plaintiff claims through a sheriff's deed under foreclosure of a mortgage given by said Howard. This foreclosure is conceded to have been invalid. It is not disputed that Brown was in possession of the premises under the sheriff's deed, or that he placed the defendant, Scharf, in possession of said land under the executory contract for the purchase of said land, set forth in the plaintiff's complaint. It is also now conceded that Scharf has never been out of such possession under said contract since April 26, 1901, when said contract was entered into. No person has ever been in actual possession of said land except the plaintiff, or Brown, or the defendant, since the year 1886, when Howard left said premises. On June 1, 1901, one, Joseph Blass, who continued to be the owner of the fee to this land on account of said invalid foreclosure, conveyed the same to one Walters, for a nominal consideration of $5.50, and, on the

same day, said Blass conveyed the same to said Brown for a consideration of $5.50. The Walters deed was delivered first, although both deeds were mailed to the respective grantees at the same time, but the Brown deed was sent to a bank at Devils Lake with instructions to deliver to him when said consideration was paid, which caused the delay in the delivery of this deed. The plaintiff contends that the Walters deed was void under the provisions of section 8733, Rev. Codes 1905, making it a misdemeanor to convey a pretended title unless the grantor has been in possession of the land, or received the rents thereof for a space of one year before the giving of the deed. It is beyond dispute that the land was then adversely held as against Blass, by Brown or Scharf, and that Blass had not been in possession thereof, nor had he received the rents thereof for more than one year prior to giving such deed. The defendant claims that Blass' deed could not convey and did not convey any title to Brown for the reason that there was no title that Blass could convey to Brown after the Walters deed. In other words, the contention is that the Brown deed was a nullity because Blass had conveyed all of his title to Walters, and, because that deed was first delivered, the Brown deed never became effective for any purpose.

Conceding, for the purpose of this case only, that the Brown deed was subsequent to the Walters deed because held by the bank until the consideration was paid and until after the Walters deed was delivered, we cannot agree with the conclusion that the Brown deed was a nullity. When the Walters deed was executed and delivered, neither Blass nor Walters was in possession of the land. The possession was actually in Scharf, and his grantor, Brown. This being true, the Walters deed was void as to the persons in possession and holding adversely, under the decision of this court in Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258. So far as the persons in possession of the land are concerned, the deed conveyed nothing, and, as against these parties, the title was still in Blass. After the delivery of the deed to Brown the title passed to him, as the possession of Scharf was not adverse to him. Scharf's possession was Brown's possesion. Such possession was held solely by virtue of the contract for the purchase of the land between Brown and Scharf. That contract was still in force, and there is no contention that payments had been fully made thereon, or that the terms of same had been fully complied with.

The appellant cites but one case in attempting to sustain the doctrine contended for by him that the Brown deed was a nullity by reason of the former deed to Walters. The case relied on is Dever v. Hagerty, 43 App. Div. 354, 60 N. Y. S. 181. This case was expressly overruled on the appeal to the Court of Appeals in 169 N. Y. 481, 62 N. E. 586. The reasons given for a reversal, in the opinion of the Court of Appeals, are conclusive, in our judgment, of fallacy in appellant's contention in this case. The fact that the Walters deed was void as to the persons in possession, and that the Blass deed to Brown conveyed the title to Brown, would determine this appeal in plaintiff's favor, were it not for the fact that Scharf is, and has been, in possession of the land under the contract for the sale thereof by Brown to him. Blass conveyed to Walters, Walter to Deutz, and Deutz to Scharf. The latter deed was given for an actual consideration of $500. The deed from Blass to Walters being void for the reason stated, the other deeds conveyed nothing, as they were based upon the void deed of Blass to Walters. Whether the deed from Blass to Brown was valid is a disputed point in this case, upon another ground, which is that Scharf was the only person actually in possession of the land, and, that in consequence thereof, the deed to Brown was void by reason of the provisions of said section 8733. Brown's possession, it is claimed, was not actual, but constructive only. This is appellant's contention, although the evidence shows, beyond dispute, that Brown placed Scharf in possession of the land under the contract. Scharf admits this in his testimony, and there is no countershowing. It is not attempted to be proven that Scharf had fully complied with the contract. He had never relinquished the possession that he secured solely by virtue of the contract. He had not repudiated the contract in any way when the Blass deed was given to Walters. He does not claim that he was originally in possession by virtue of any other claim to the land, nor under any other deed or conveyance of title. It remains, therefore, to be decided who was in possession of the land as between Brown and Scharf as against the Blass deed. It is undisputed that Scharf was in actual, physical possession of the land, and it cannot be denied that Scharf's possession was under Brown and could not be maintained at that time except under Brown's contract. There are authorities which lay down a principle of law that, before a deed is void by reason of champerty or maintenance, the adverse possession must be actual

(5 Am. & Eng. Enc. Law, 839); but it is not a fair construction of these authorities to say that they mean anything more than that the possession must be actual as against a merely constructive possession. As between Scharf and Brown, this court has decided whose possession it was, and that it was, as a matter of law, the possession of Brown, under facts the same as in this case. Schneller v. Plankinton et al., 12 N. D. 561, 98 N. W. 77. In that case the court said: "Counsel for respondent seek to sustain the validity of the deed by contending 'that the prohibition of sections 7001 and 7002, Rev. Codes 1899, which perpetuate the common-law doctrine, cannot be invoked against the plaintiff's deed because (a) the defendant, Plankinton, is not an adverse possessor; and (b) that, even though he were such, he cannot raise this question for the first time in the Supreme Court.' Neither of these contentions can be sustained. It is true, Plankinton was not personally in possession, but he had color of title, and the possession of Holstrom and Peterson, under their contracts, in law, was his possession. (Citing cases.) The purchaser of real estate entering into possession under executory contract holds under his vendor; and, under statutes relating to adverse possession, it is universally held that the possession of the purchaser is, in legal effect, the possession of his vendor." This decision, it seems to us, settles this controversy so far as the possession of the land at the time the Walters deed was given is concerned. The possession was beyond question that of Brown. We do not think it is necessary to cite further cases on this point, but there are many. See, also, Coates v. Cleaves et al., 92 Cal. 427, 28 Pac. 580; Harral v. Leverty et al., 50 Conn. 46, 47 Am. Rep. 608; Curran v. Banks, 123 Mich. 594, 82 N. W. 247; Greeno v. Munson et al., 9 Vt. 37, 31 Am. Dec. 605.

In the Matter of Department of Parks, 73 N. Y. 560, the court said: "But Dally entered into possession under Harris. Whatever he possessed was clearly under his parol agreement of purchase. He did not claim the land in hostility to Harris, but all he claimed, and all he could claim, was such right as his agreement gave him. It is too well settled to be disputed that one who enters upon land under a mere agreement to purchase does not hold the land adversely as against the vendor until his agreement has been fully performed, so that he has become entitled to a conveyance." Authorities holding that the possession of the vendee is under the vendor in such contracts, and what constitutes adverse possession un-

der champerty statutes, are collected in volume 4, American Digest, Decennial Edition, under the title "Champerty and Maintenance."

Another contention is that Brown was unable to give a good title to this land and could not, therefore, comply with the terms of the contract, and that this amounted to a constructive eviction of Scharf from the premises, and, having been thus constructively evicted, he had a right to buy the outstanding title to said land from Deutz; in other words, it is contended that, in the suit which was pending between Deutz as plaintiff, and Brown, Scharf, and others, as defendants, Deutz must inevitably have judgment for the ownership and possession of the land, and that Brown and Scharf would be ousted from the possession of this land under the Deutz deed. This does not at all follow. The Deutz deed was procured through Walters, and the deed from Blass to Walters was void on account of adverse possession of Brown and Scharf. It follows from this that there was no title in Deutz, inasmuch as the title to this land had previously been conveyed to Brown by a valid deed from Blass, and the Deutz deed was therefore a nullity. If the Deutz suit had proceeded to judgment in the place of having been dismissed, there is no room for the statement that Deutz would have prevailed in the litigation. Furthermore, it is undisputed that Brown, in order to avoid the possibility of a decision that the Blass deed was void as to him, had procured a deed directly from Blass to Scharf, which would have been turned over to Scharf if he had not taken a deed from Deutz. By repudiating the contract with Brown and taking a void conveyance from Deutz, he acted at his own risk, and is not entitled to any equitable consideration by reason of the fact that he secured no rights to this land from Deutz. As already shown, the contention that Brown could not give a good title fails, inasmuch as the Blass deed made Brown's title good in view of his legal possession of the land.

There being no constructive eviction, and Scharf's possession not being adverse to Brown, but being legally Brown's possession, defendant, being in possession under his contract only, could not buy or take Walters' title as long as the contract with Brown was in force, and the Walters deed would have been unavailing to Scharf, but would have inured to Brown's benefit if it had been a valid deed. Some cases seem to distinguish between adverse possession rendering conveyance by those out of possession champertous and adverse possession for a period sufficient to give title by

prescription (Barrett v. Coburn, 3 Metc. [Ky.] 510; Moore v. Baker, 92 Ky. 518, 18 S. W. 363); but, conceding that there is a distinction as to what is sufficient possession, it has no materiality in this case. There is no escape from the conclusion that Scharf's possession was under the Brown contract only, and title by adverse possession could not ever be claimed by Scharf until that contract was repudiated and surrendered, or until circumstances arose entitling Scharf to buy an outstanding title under some one of the exceptions to the general rule stated. The possession of the vendee under such contracts is analogous to the possession of a lessee under leases of real property. Although such vendees are not strictly tenants, it is generally held that there is a similarity in the relation so far as possession is concerned. The lessee is permitted only in certain excepted cases to deny his landlord's title while he is in possession under his lease. See volume 4, American Digest, supra.

The defendant earnestly contends for a disaffirmance and reversal of Galbraith v. Payne, supra. That decision is criticized as recognizing a rule that has become obsolete and not now within the reason of the rule as existing when adopted. If we could concede all that is contended for by the appellant, our duty would be clear to uphold the Galbraith decision. Not only do we deem the rule binding under existing conditions, but it is well sustained by the opinion in the case. That decision has done much towards permanently quieting titles of those in possession under technically defective titles as against conveyances of a technically legal title by those out of possession. That case has been repeatedly cited in subsequent cases in this court, and has become a rule of procedure in respect to the property rights that should not be changed without some reason other than that a different rule is preferred. Unless shown to be wrong, stability in decisions should be adhered to, or chaos must inevitably follow in decisions of courts, in view of changes always certain to come in the membership of courts. However, if we were to concede all that is said against that decision, the appeal for another rule should be made to the legislature and not to the courts. Three sessions of the legislature have passed since that decision, without even an attempt to change the rule as to the effect of selling pretended titles as against those in possession. We are satisfied with the decision in that case, and do not deem it necessary to say anything further in its favor.

It follows that the plaintiff is the owner of the land in question, and entitled to its possession as against Scharf.

The judgment is affirmed.

ELLSWORTH and SPALDING, JJ., concur.

FISK, J. (dissenting). I am firm in the conviction that the majority opinion is unsound for several reasons and wholly without support in, and contrary to, the authorities. I shall endeavor, as briefly as possible, to prove the correctness of my assertion.

Conceding the correctness of all that is said in the opinion with reference to the case of Galbraith v. Payne, and the rule there announced it is entirely clear to my mind that the majority opinion wholly misapplies such rule. I assert, without fear of successful contradiction, that no court ever before invoked such rule in behalf of a plaintiff to enable him to make out his case as to proof of title for the purpose of quieting such title. That is exactly what is done in the majority opinion as I read it. The paintiff has come into a court of equity alleging title and asking that same be quieted in him. He proves such title only by invoking the rule against champerty, and nevertheless, strange as it may seem, is permitted to recover. Without the aid of such rule he must fail. He cannot recover on the weakness of his adversary's title, but solely on the strength of his own title. If, for any reason, the rule of the Galbraith case cannot be applied in his favor, plaintiff's case must fail, for it is undisputed that Blass' deed to Walters was both delivered and recorded prior to the deed to Brown. There are at least two reasons why the rule of the Galbraith case, conceding, for the purpose of argument, that such rule has not been abrogated in this state, cannot be invoked in plaintiff's favor. First, such rule can never be invoked by a plaintiff; and, second, if it could, still plaintiff is not in a position to invoke it as he was not, at the time the deed from Blass to Walters was delivered, in the actual adverse possession of the land within such rule. After an exhaustive research I can find no authority permitting a plaintiff to invoke such rule. On the contrary the universal holding of the courts, as far as I have been enabled to discover, is to the effect that such rule may be invoked only by a defendant, and by him solely for the purpose of protecting his actual adverse possession. Scharf is the only person who could have invoked such rule. Smith v. Paxton, 4 Dana (Ky.) 391; Kenede v. Gardner, 4 Hill (N. Y.) 469. "The person in possession of land cannot

sustain a bill in equity for the avoidance of a deed executed to another by a person claiming adversely to the tenant, on the ground that the deed is void in consequence of his adverse possession." 6 Cyc. 890.

The case of Smith v. Paxton, 4 Dana (Ky.) 391, is a pioneer case in this country on this point, and its soundness has never been questioned. I quote: "The whole statute contemplates a protection to the occupant, as a defendant, in a controversy with a plaintiff who is seeking, as such, to disturb his possession. * * * While the legislature was vigilant in prescribing the form, and providing the modes by which the defendant, as such—the possessor—might avail himself of the defense afforded by the statute in bar of the suit or action of the adversary claimant, no provision whatever is made to enable him to avail himself of its provisions, in the prosecution of a suit. And none of the guards provided by the statute are made to apply to a plaintiff. And while the fourth section inhibits any right of action or suit in behalf of either of the contracting parties, who have violated the provisions of the second section, no restriction is imposed upon him as defendant, and no penalty denounced against his rights of defense. * * * It clearly points to the protection of the occupant only. And the provisions in the foregoing as well as the following sections of the statute were intended to throw around him such guards as would enable him successfully to defend his occupancy from outstanding adversary claims. We are therefore clearly of opinion that the forfeiture in the second section was intended as a shield to the possession, and not as a sword; as a weapon of defense, and not of offense; as a protection against the remedy sought by a plaintiff, and not as an instrument wherewith to assail the possession of others." In the majority opinion the plaintiff is permitted to invoke such rule affirmatively—not defensively—in order to establish his title, and for the sole purpose of obtaining the affirmative equitable relief of quieting such title. Not only this, but what is still more erroneous, he is permitted to do this as against the actual occupant of the land. With due deference to the majority of the court, I most emphatically protest against such a misapplication of the rule. In the Galbraith Case, and the subsequent cases in this court adhering to the rule there announced, such rule was correctly applied in so far as the proposition here under consideration is concerned.

But plaintiff cannot invoke such rule for the further reason that his grantor, Brown, was not in the actual possession of the real property at the date of the Blass deed to Walters. Defendant, Scharf, was the actual occupant under the contract of purchase, having been put into such actual possession by Brown under the contract, which possession defendant has ever since retained. I do not understand it to be defendant's contention, as stated in the majority opinion, that the deed from Blass to Brown is void under the provisions of section 8733, Rev. Codes 1905, because of defendant's actual possession at the date such deed was delivered; but his contention is that such deed conveyed nothing to Brown for the reason that Blass had previously conveyed the land to Walters. It is plaintiff who invokes the rule of the statute to defeat defendant's title. Defendant does not invoke such rule to defeat plaintiff's title, or at all. The majority opinion apparently concedes the rule to be that a person cannot urge the champerty or maintenance statute to destroy a deed by a third person out of possession unless the person thus urging such statute is himself in the actual possession of the land. It then proceeds to hold that at the date of the Walters deed Brown, through his vendee, Scharf, was in such actual possession, and in support thereof the following cases are relied on: Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77; Coates v. Cleaves, 92 Cal. 427, 28 Pac. 580; Harral v. Leverty, 50 Conn. 46, 47 Am. Rep. 608; Curran v. Banks, 123 Mich. 594, 82 N. W. 247; Greeno v. Munson, 9 Vt. 36; and in the Matter of Department of Parks, 73 N. Y. 560. I have examined each of these authorities and, with the exception of Schneller v. Plankinton, they are not in point. They simply go to the general proposition, which is conceded, that a person in possession under a contract of purchase does not hold adversely to his vendor, and is estopped to deny his vendor's title. The authorities may be said to be unanimous in their holding upon these questions. But this court in the case of Schneller v. Plankinton held that a person who has placed another in actual possession under a contract of purchase is still in the actual possession within the rule as to champerty and maintenance, and may urge such rule as a defense against the plaintiff's title obtained through a deed executed by a person out of possession. I maintain that such decision stands alone in the jurisprudence of this country and should be overruled as unsound. Numerous authorities are cited in such opinion, none of which

support the opinion. They are all cases supporting the general doctrine that the possession of the vendee under a contract of purchase will be considered the possession of the vendor within the limitation statute relating to the acquirement of title through lapse of time by one in adverse possession. No doubt Brown was in the adverse possession within the meaning of such rule, but it by no means follows that he was in the actual possession within the meaning of the champerty and maintenance statute.

Aside from the foregoing opinion of this court the authorities are all to the contrary, as far as I can discover. I here cite a few of them: Heard v. Phillips, 101 Ga. 691, 31 S. E. 216, 44 L. R. A. 369; Slatton v. Tenn. C. I., etc., Co., 109 Tenn. 415, 75 S. W. 926; Boone v. Chiles 10 Pet. 177, 9 L. Ed. 388; 1 Warvelle on Vendors, pp. 201-202. In Boone v. Chiles, supra, the Supreme Court of the United States, in speaking of the legal relations between a vendor and a vendee under a contract for a deed, said: "Equity makes the vendor without deed a trustee to the vendee for the conveyance of the title. The vendee is a trustee for the payment of the purchase money, and the performance of the terms of the purchase. But a vendee is in no sense the trustee of the vendor as to the possession of the property sold. The vendee claims and holds it in his own right, for his own benefit, subject to no right of the vendor, save the terms which the contract imposes. His possession is therefore, adverse as to the property, but friendly as to the performance of the conditions of purchase. In virtue of his legal title, the vendor has a legal right of possession, but equity will not permit him to assert it unless the vendee has violated the contract. He will be enjoined if the vendee performs it." In Heard v. Phillips, supra, the Georgia court said: "It has several times been ruled by this court that the possession of one holding under a bond for titles to land is not adverse to the obligor of the bond, or the representatives upon his estate, in the sense that such possession may be the foundation of a prescription as against such obligor of his estate. Hines v. Rutherford, 67 Ga. 606; Allen v. Napier, 75 Ga. 275; Hawkins v. Dearing, 93 Ga. 108 (19 S. E. 717). Indeed, a vendee under a bond or contract for conveyance, though placed in possession by the vendor, does not hold adversely to the latter. By the very fact of taking under a bond or contract for a deed to be thereafter executed by the vendor, a purchaser recognizes the title of the vendor, and acknowledges himself

as holding in subordination, and not in antagonism, to it. It must be understood, however, that the obligor or his personal representative is not at liberty to treat the obligee as holding in subordination to the title of the obligor for all purposes. The doctrine is well settled, and has been announced in strong terms by the federal courts, that while the vendor without deed is a trustee of the vendee for the conveyance of the title, and the vendee in turn a trustee for the payment of the purchase money, yet that the vendee is in no sense a trustee of the vendor as to the possession of the property sold; that the vendee claims and holds it in his own right, for his own benefit, subject to no right of the vendor save the terms which the contract imposes; and that his possession is therefore adverse as to the property, but friendly as to the performance of the conditions of the purchase. We are clearly of the opinion, therefore, that while the obligee in the bond from Swift and La Mar had, as to the latter, no such adverse possession of the premises as would enable him to acquire a prescriptive title thereunder, yet such possession was, within the meaning of our statute, adverse in the sense that a sale of any portion of the property by the administrator upon the estate of one of the obligors, pending such possession, and without first having recovered the possession as required by the statute, was void." The latter case is a direct authority to the effect that Scharf, within the champerty statute, was in the actual adverse possession of this land. I do not wish to be understood as holding that Scharf's actual adverse possession would operate to defeat a transfer by his vendor to a third party or vice versa; but my position is that Brown, not being in the actual adverse possesion, cannot, as against Scharf, urge the champerty statute to defeat the title acquired by him through the Walters deed. He might, if he saw fit, treat such deed as inuring to his benefit, but this he does not seek to do. Having placed Scharf in the actual possession under the contract, Brown became, in effect, merely an equitable mortgagee. Whatever title he may have had he held as trustee for Scharf. The latter was given the actual possession, and was entitled to receive from Brown the full legal title u on compliance with the contract. When it became known that such title was outstanding in and being asserted by a third person, is it possible that Scharf was powerless to protect himself by purchasing the same? Clearly not. Such a rule would be abhorrent to all principles of equity, and

might possibly result in Scharf's eviction from and total loss of the land as well as all payments made under the contract. Brown having refused to procure such title, must Scharf sit back and rely wholly upon Brown's ability to respond to him in damages for a breach of the contract? This is the inevitable logic of the majority opinion, yet the books are full of cases upholding Scharf's right to purchase such outstanding title. It is an entirely different proposition to say that he may assert such title in hostility to the rights of his vendor in a possessory action by the latter to recover the land. This I do not contend he can do. The case of Dever v. Hagerty, 169 N. Y. 481, 62 N. E. 586, cited in the majority opinion, is not in point, as, concededly, Hagerty, who stands in the place of Brown in the case at bar, was the actual occupant of the land at the date of the delivery of the deeds.

It is in effect asserted in the majority opinion that by entering into the contract of purchase from Brown, and by going into possession under such contract, defendant is estopped to question plaintiff's title. I do not think the doctrine of estoppel can be extended to such length; if it can, the plaintiff, by mere force of an estoppel, would acquire a fee interest in the property, something which he did not theretofore possess. There is no legal reason why defendant's good faith conduct in entering into the contract upon the assumption that Brown had the title and right to sell should operate to confer upon Brown an advantage not theretofore possessed by him. It is no doubt true that plaintiff's rights as a mortgagee should remain intact. Blass held subject to such rights, and defendant, through the Deutz deed, merely succeeded to Blass' title. The authorities cited by respondent's counsel in support of their contention that defendant will not be permitted to purchase an outstanding title and assert the same in hostility to the title of his vendor are, with a few exceptions, ejectment cases, and hence not in point. Of course, in such an action the defendant, who has gone into possession under plaintiff's title and in recognition thereof, is estopped to deny such title in an action involving merely the right to possession. In such an action the vendee is estopped under the same principles that a tenant is estopped to deny his landlord's title. If plaintiff had sued for the possession merely, his right to recover would have been clear, but instead of doing so he brought an action to determine adverse claims in which he asks that his alleged title be quieted, and that defendant be

adjudged to have no right, title, or interest in the premises. The correct rule regarding the doctrine of estoppel under the facts here involved may be found in the following authorities: 1 Warvelle on Vendors (2d Ed.) section 186; Smith v. Babcock, 36 N. Y. 167, 93 Am. Dec. 498; 29 Am. & Eng. Enc. Law (2d Ed.) 706; Bertram v. Cook, 44 Mich. 396, 6 N. W. 868; Jochen v. Tibbels, 50 Mich. 33, 14 N. W. 690; Shaw v. Hill, 83 Mich. 322, 47 N. W. 247 21 Am. St. Rep. 607; Young v. Severy, 5 Okl. 630, 49 Pac. 1024; Franklin v. Merida, 35 Cal. 558, 95 Am. Dec. 129; McKie v. Anderson, 78 Tex. 207, 14 S. W. 576. In the latter case it was held that the rule that a tenant cannot deny his landlord's title is limited to suits for possession only, and does not apply in an action of trespass to try title and for partition, in which the title itself is put in issue. In Bertram v. Cook, supra, it was held, Cooley, J., writing the opinion, that a ruling that the estoppel against defendant was equivalent to an admission of title in fee in plaintiff was erroneous; and in the later case of Jochen v. Tibbels the same court, among other things, said: "We have no doubt but that, in the first case tried upon appeal in the circuit, that the ruling of the court in excluding the deeds was correct. The action was to recover possession of the premises, and in such an action the tenant could not, nor could those claiming under him, deny the landlord's possessory right to the premises. * * * In the ejectment case the same rule would apply to the same extent. In that case, however, the plaintiff went further. She claimed and recovered a judgment giving her the premises in fee. Where the landlord seeks to recover the possession he can do so under the lease; but if he goes further, and claims the premises in fee, the tenant is not estopped from denying any right claimed by the plaintiff further or greater than that of possession. This fully protects the landlord, who regains his possession, and, the tenant having gained no advantage by taking a lease, the parties then are in proper position to litigate the title should they desire to do so. If the plaintiff's position is correct, a judgment in fee may be obtained by estoppel against the tenant, and thus the landlord has acquired an advantage which he would not be entitled to."

If plaintiff had sued merely for possession, defendant would have been estopped to deny his title, but he goes much further, and asks that defendant be required to set forth all his adverse claims to the property, "and that the validity, superiority and priority thereof

be determined; that the same be adjudged null and void, and that he be decreed to have no estate or interest in, or lien or incumbrance upon, said property; that his title be quieted as to such claim, and that defendant be forever debarred and enjoined from further asserting the same." It would, indeed, be a strange rule that would estop defendant in such an action from asserting a perfectly good title in himself as a defense. In such an action plaintiff must recover, if at all, upon the strength of his own title, and it is always a good defense in such an action to show that plaintiff has no title. Thus far I have assumed that the champerty statute has not been abrogated in this state as was held in the Galbraith case. Notwithstanding what is said in the majority opinion regarding our duty to uphold such decision, I am firmly convinced that such decision is radically erroneous, and the retention of the rule there announced will serve no useful purpose. The reason for the rule does not exist, and its retention and enforcement is the height of absurdity, as it accomplishes nothing except to perpetuate a mere technicality and legal monstrosity. Why should the rule exist when the reason for the rule has no existence?

In the opinion in the Galbraith case, among other things, it is said: "An examination of the authorities will show that, while a deed of a disseisee conveys no title which can be enforced in the name of the grantee against the disseisor or his privies, they go no further. It is now held that such deed is good against the grantor, and that it entitles the grantee to an action to recover the land, in the name of the grantor, but to his own use, even against the disseisor. * * * By executing and delivering the deed the grantor impliedly authorizes the grantee to use his name in an action to recover the land, and for that purpose the grantor is a real party in interest, within the meaning of the statute requiring every action to be prosecuted in the name of the real party in interest. * * * It is true the common-law doctrine and statutes declaratory thereof seem to be in increasing disfavor in a number of states, on account of the embarrassing restrictions placed upon the right of free alienation."

If the common-law doctrine is still in force here, the above statement of the law is, no doubt, strictly correct, although its effect is to recognize what must to every legal mind be deemed extremely technical rules. To say that a grantor's deed, whose property is adversely held, is perfectly valid as between him and his grantee and

all other persons, except the adverse possessor, and yet the grantor is the real party in interest in an action to recover the land, and, what is still more grotesque, that the grantor, at the same time, is merely a nominal party plaintiff as he has no real interest in the controversy and his grantee has the implied right to use his name as plaintiff and to prosecute the suit to his (the grantee's) own use, constitutes, to my mind, an exceedingly strange and anomalous condition of our law, and ought not to be continued in force unless the legislative will clearly demands it. If the grantee who has, by the conveyance, acquired the title as against all the world, except the adverse possessor, may, in the name of the grantor, recover everything which he might recover in his own name if the property was not adversely held, why should he not be permitted to recover in his own name? What good purpose is subserved by such a rule? The adverse possessor is neither benefited nor the grantee injured because of the rule requiring the latter to proceed in the name of a nominal plaintiff rather than in his own name. Public policy does not demand its retention, as absolutely nothing is gained thereby.

But it is said in the Galbraith case that this common-law doctrine was not abrogated by the Revised Codes adopted in 1895, and that the rule is still in force in this state. The opinion speaks of the "omission" from the Codes of 1895 of sections 3303, 4870, Comp. Laws of the territory (being section 681, Civ. Code, and section 74, Code Civ. Proc. 1877), and then proceeds to hold that said sections were merely declaratory of the common law, and hence their "omission" from the Codes "did not affect the law as it theretofore existed." These sections were not only omitted in the 1895 Codes but were expressly repealed thereby (see page 1517, Rev. Codes 1895), and if we are to credit the legislative assembly with any purpose whatever in repealing said sections, we must credit it with an intent, at least, to change the rule of the common law which, up to that time, had been perpetuated in force here by virtue of said sections, and which was so palpably unreasonable and useless, As argued by appellant's counsel, "it is absurd to say that the legislature was engaged in the repeal of these statutes for the purpose of perpetuating the same rule of law which they enunciated. It would convict the legislative body of imbecility to say that they were repealing statutes simply that the same law might be perpetuated." The express repeal of a law indicates an

intent to abrogate the rule thereby established or recognized. The statutes thus expressly repealed in 1895 were as follows:

Section 3303 (section 681, Civ. Code 1877): "Every grant of real property, * * * is void, if at the time of the delivery thereof, such real property is in the actual possession of a person claiming under a title adverse to that of the grantor."

Section 4870 (section 74, Civ. Proc. 1877): "Every action must be prosecuted in the name of the real party in interest. * * * But an action may be maintained by a grantee of land in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision."

How could the legislative purpose to abrogate such rule be made more manifest than by the express repeal of such sections, where nothing of a similar nature was enacted to take their place? With due deference to the ability of the distinguished members of the court as constituted at the time Galbraith v. Payne was decided, I disagree with the views therein announced. Such decision does not constitute a rule of property, as it merely relates to remedial rights. It relates simply to a rule of practice as to the person in whose name the action to recover the land or to quiet title shall be prosecuted. As before stated the decision recognizes the fact that the deed is valid as between the grantor and grantee and operates to convey title, but that an action against the adverse holder must be brought and prosecuted in the grantor's name, and that the successful assertion of title by the grantee in the grantor's name at once inures to the benefit of the grantee. As directly in point, holding that it relates merely to the remedy, see Campbell v. Eq. Loan & Trust Co., 17 S. D. 31, 94 N. W. 401, and cases cited.

We, then, have this situation: The legislature in 1895 (Rev. Codes 1895, page 1517, sections 2, 3) expressly repealed and abrogated section 681, Civ. Code, and section 74, Code Civ. Proc. 1877; but continued without change section 189 of the Penal Code as section 7002, Rev. Codes 1895. By section 7738 of the Revised Codes of 1895 it is provided: "The provisions of this Code so far as they are the same as existing statutes, must be construed as continuations thereof, and not as new enactments." The

question therefore, arises, Did the mere continuation of the penal section have the effect of nullifying the express abrogation of the other sections? If so, or if the reasoning in the Galbraith opinion be sound, to the effect that by the omission of said sections from the Code of 1895, the common-law rule became in force, the legislative act expressly abrogating these sections accomplished naught. I am unable to agree to such a conclusion. By the enactment of said sections the common-law rule upon the subject therein covered was in effect thereby continued, and by repealing such sections, which were merely declaratory of the rule of the common law, the legislative intent to abrogate such rule is too clear for discussion, and such intent should be given effect. It is no doubt the general rule that the common law is restored when a statute changing it is repealed. Mathewson v. Phoenix Iron Foundry (C. C.) 20 Fed. 281; State v. Rollins, 8 N. H. 550; Ins. Co. v. Barley, 16 Grat. (Pa.) 363; but, as holding contra, see State v. Slaughter, 70 Mo. 484. But when a statute merely affirms the rule of the common law, its repeal abolishes the rule of the common law. Sedgwick v. Stanton, 14 N. Y. 289. See, also, Robins v. McClure, 100 N. Y. 328, 3 N. E. 663, 53 Am. Rep. 184. The opinion of Selden J., in Sedgwick v. Stanton is very interesting, reviewing, as it does, the history of the doctrine of maintenance at common law, and upon the question here involved I quote from the opinion as follows: "The Code, by abrogating this technical rule of the common law, has manifested the same hostility to the principles of champerty and maintenance which has been before so often exhibited. Notwithstanding the truth of what is urged by Chancellor Walworth, in Small v. Mott, 22 Wend. (N. Y.) 403, that these, being offenses at common law, were not necessarily abrogated by the repeal of the statute (1 R. L. 172), which was, in the main, simply declaratory, I still think, in view of the manifest tendency of modern judicial opinion, as well as of the plain scope and intent of our legislation on the subject, that not a vestige of the law of maintenance, including that of champerty, now remains in this state, except what is contained in the Revised Statutes."

Construing section 8733, Rev. Codes 1905, in the light of the express repeal of the other sections and the evident intent of the legislature in thus abrogating the old rule, making such conveyances void and requiring the grantee to sue in the grantor's name,

I am convinced that the only result of a violation of such penal section is to subject the offender to a conviction for a misdemeanor, the deed being perfectly valid as to all persons, including the adverse possessor, and that the grantee may, in fact must, assert his rights thereunder in his own name as the real party in interest. Only by adopting this construction are we enabled to give effect to the clear intent of the legislature.

In my opinion the situation of the parties and their respective rights are as follows: Plaintiff is merely a mortgagee and, as such, is entitled to the possession which defendant obtained from Brown under the contract. Defendant took from Deutz subject to such mortgage, and is not entitled to any affirmative equitable relief without offering to do equity. Tracy v. Wheeler, 15 N. D. 248, 107 N. W. 68, 6 L. R. A. (N. S.) 516. He makes no such offer but relies wholly upon his rights under the deed. What are his rights thereunder? Blass held the legal title, but the same was held subject to such mortgage indebtedness. Having surrendered the possession to the mortgagee, Blass' legal title merely conferred upon him and his grantee a right of redemption. Defendant agreed to purchase, and Brown agreed to sell, the land for the consideration of $1,600. Plaintiff purchased from Brown subject to such contract, and therefore, if such contract had not been forfeited, plaintiff, as such mortgagee, would be entitled to receive from defendant only this sum with interest, less the payments made. It is clear, however, that such contract has been terminated by a valid forfeiture, hence defendant is entitled to no affirmative relief in this action. His remedy is an action to redeem from the Howard mortgage by paying the plaintiff the amount justly due him thereon. Appellant's counsel do not contend that such contract is still in force. In fact, their entire printed brief and argument is directed to the proposition that appellant had a right to and did, in fact, acquire the title to the land in dispute, and that Brown had no title thereto, but merely a mortgage lien thereon. The attitude of the appellant at all times since he received the deed from Deutz has been that of utter hostility to the contract. He concededly has at all times since then wholly ignored such contract and the right of Brown or plaintiff thereunder, having at no time shown a desire or willingness to make good his defaults. Plaintiff acted strictly within his rights in declaring the forfeiture and defendant has no just cause for complaint.

He was given a reasonable time in which to make good the defaults, and was notified that if he failed to do so the contract would be declared forfeited. This was sufficient.

My conclusion, therefore, is that plaintiff, having no title, cannot maintain this action to quiet title, and that although defendant has the title he holds the same subject to the Howard mortgage and to plaintiff's right as mortgagee to the possession of the land, and is not entitled to the equitable relief prayed for in his answer, or to any equitable relief in this action, having failed to tender or offer to do equity by satisfying such mortgage indebtedness. The judgment should accordingly be reversed and the action dismissed.

CARMODY, J. I concur in the views of Judge Fisk upon the first point, but choose to express no opinion upon the other questions involved. I think, however, that plaintiff should in this action, be restored to the possession as mortgagee, and the judgment appealed from modified in this respect.

(124 N. W. 79.)

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## THE STATE OF NORTH DAKOTA v. C. H. STEVENS.

Opinion filed December 7, 1909.

**Constitutional Law — Right to Raise Constitutional Point.**

1. Under section 9368, Rev. Codes 1905, the state's attorney of Nelson county issued his subpoena requiring one L., a witness, to appear before him for the purpose of giving testimony relative to any violations of the prohibition laws. Pursuant thereto L. appeared and gave testimony, which was reduced to narative form and was subscribed and sworn to before the state's attorney. Such testimony tended to disclose that defendant had maintained a liquor nuisance, whereupon the state's attorney, pursuant to law, filed such testimony, together with his formal information, charging the defendant with the commission of such offense with a police magistrate who ieeued a warrant for defendant's arrest. A preliminary examination resulted in holding defendant to answer such charge in the district court, in which latter court he was convicted and sentenced accordingly. It is contended that such section 9368 attempts to confer judicial powers upon the state's attorney, and hence contravenes the provisions of section 85 of the Constitution of North Dakota.

*Held*, for reasons more fully stated in the opinion, that such question is not properly before us, as the witness L. does not, and defendant cannot, raise the same.

**Intoxicating Liquors — Deposition of Witnesses — Narrative Form.**

2. The testimony of the witness L. was taken in the form of a deposition, and the fact that it was in the narrative, and not by questions and answers, does not render the same ineffective.

**Criminal Law — Intoxicating Liquors — Sufficiency of Information on Preliminary Examination.**

3. The information filed with the committing magistrate examined and *held* sufficient to state an offense when tested by the liberal rule governing complaints before such magistrates, following State v. Barnes, 3 N. D. 131, 54 N. W. 541, which decision is held applicable and controlling in the case at bar.

**Criminal Law — Intoxicating Liquors — Sufficiency of Deposition as Foundation for Complaint.**

4. The deposition of the witness L. is held to be a substantial compliance with the statute, although, if considered as a complaint or information, it would be insufficient. Such deposition is no part of the information and whether it states or shows an offense is immaterial.

**Criminal Law — Sufficiency of Complaint — Continuing Offense — Time.**

5. The information under which defendant was convicted in the district court charged in effect that continuously between certain designated dates defendant kept and maintained a place (particularly describing it) where intoxicating liquors were continuously sold, bartered and given away, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, etc.

*Held*, that such information is sufficiently specific as to the time of the commission of the offense, as the same states that such nuisance was kept and maintained continuously on each of the intervening days between the dates mentioned.

**Criminal Law — Continuance — Sufficiency of Affidavit.**

6. The defendant's motion for a continuance was properly denied. The affidavit upon which such motion was based made no showing as to the probability of procuring the testimony of the absent witness in the event of a continuance; nor does it show or state that the facts sought to be proved by such witnese were true, nor defendant's inability to establish such facts by others.

**Criminal Law — Remarks of State's Attorney — Appeal and Error — Discretion.**

7. The state's attorney made certain remarks in his argument to the jury wherein he referred to the defendant as "one of the most arrogant, defiant, outspoken violators of the prohibtion law that I believe there is in the county of Nelson," and also containing the statement, "We have brought into this court upon this charge the

prince of blind piggers of Nelson county." *Held,* the evidence not being before us, that it cannot be said that the trial court abused its discretion in overruling defendant's objection to such remarks.

**Criminal Law — Reduction of Sentence on Appeal — Imprisonment for Time.**

8. The judgment, in addition to providing for imprisonment in the county jail, imposed a fine and costs amounting to $587.95, and adjudges that in default of the payment thereof that defendant be imprisoned for the additional period of 294 days. This was erroneous. Under section 9379, Rev. Codes 1905, the limit of imprisonment for nonpayment of fine and costs is six months. Following State v. Wisnewski, 13 N. D. 649, 102 N. W. 883, the judgment is modified accordingly.

Appeal from District Court, Nelson county; *Templeton,* J.

C. H. Stevens was convicted of maintaining a liquor nuisance, and he appeals.

Modified and affirmed.

*Frich & Kelly,* for appellant.

Failure to preserve and file testimony as the foundation for an information under the prohibition law is fatal to jurisdiction. Ex parte Doherty, 32 N. Brunsw. 479; State v. Braithwaite, 27 Pac. 731; People v. Chapman, 62 Mich. 280, 28 N. W. 896; People v. Brock, 31 N. W. 585; People v. Restell, 3 Hill, 289; 12 Cyc. 310-11, and cases cited.

Setting the time of an offense "between the 1st day of October, 1908, and 22nd day of April, 1909," is insufficient. State v. Brown, 14 N. D. 529, 104 N. W. 1112; Storey v. Chandler, 15 Atl. 223; State v. O'Donnell, 17 Atl. 66; State v. Beaton, 9 Atl. 728; State v. Small, 14 Atl. 942; Wells v. Commowealth, 12 Gray, 326; 22 Cyc. 319, and cases cited; 23 Cyc. 227, and cases cited.

Incompetent and insufficient testimony taken as preliminary to a charge of offense, will not sustain an information. Royce v. Territory, 47 Pac. 1083; State v. Fellows, 1 N. C. 340; U. S. v. Farrington, 5 Fed. 343; State v. Cole, 47 S. W. 895; People v. Restenblatt, 1 Abb. Pr. 268; People v. Moore, 65 How. Pr. 177.

It is error for prosecuting attorney to express opinion as to accused's guilt, unless stated to be on the evidence. 12 Cyc. 580; People v. Quick, 25 N. W. 302; Reed v. State, 92 N. W. 321; Hardtke v. State, 30 N. W. 723; People v. Weber, 86 Pac. 671; Jones v. State, 51 S. E. 312.

*Andrew Miller,* Attorney General, *Alfred Zuger* and *C. L. Young,* Assistant Attorneys General, and *M. A. Shirley,* State's Attorney, for the State.

Ex parte depositions may be in narrative form. Weeks. The Law of Deposition, section 434; Pralus v. Pacific Gold, etc., Co., 35 Cal. 30; In re Thomas, 35 Fed. 822; Grissen v. Southworth, 64 Hun. 488.

Acts constituting different stages of an offense, although each is a distinct crime may be joined in one count. State v. John Nolan, 15 Rhode Island, 529, 10 Atl. 481; State v. Burns, 44 Conn. 149, 11 Enc. Pl. & Pr. 524; State v. Lang, 63 Me. 215; State v. Kerr, 3 N. D. 523, 58 N. W. 27.

Remarks of prosecutor, called forth by challenge of defendant, are not the subject of complaint. 2 Enc. of Pl. & Pr. 731; King v. Rea, 13 Col. 69.

Such remarks are largely regulated by the discretion of the court. 2 Enc. of Pl. & Pr. page 727; State v. Kennedy, 19 Tex. App. 618; 2 Enc. of Pl. and Pr. 752.

FISK, J. Appellant was convicted in the district court of Nelson county of the crime of keeping and maintaining a liquor nuisance in violation of the prohibition law, and from a judgment sentencing him to imprisonment for the period of ninety days, and adjudging that he pay a fine of $300 and the costs taxed at $287.95, and in default in the payment of such fine and costs that he be imprisoned for the additional period of one day for each $2 of such fine and costs, he has appealed to this court.

The assignments of error are five in number and are as follows: First. The court committed manifest error in overruling the defendant's motion to quash the information filed against him in the above-named court by the state's attorney of Nelson county, N. D. Second. The court erred in overruling the defendant's demurrer to the said information. Third. The court erred in denying and overruling the said defendant's motion for a postponement and continuace of the said trial upon the said information and in thereby compelling the said defendant to go to trial upon the accusation contained in said information at the July term of said court without allowing the said defendant time in which to procure the attendance of witnesses in his behalf and of making preparation for said trial. Fourth. The court erred in overruling the said defendant's objections to the remarks of the state's attor-

ney made in his arguments to the jury, and each of same, which remarks are made part of and included in the statement of the case. Fifth. The court erred in rendering and causing to be entered the judgment appealed from herein.

These assignments will be noticed in the order presented. For the purpose of laying a foundation for the institution of criminal proceedings against the appellant, the state's attorney, pursuant to the provisions of section 9368, Rev. Codes 1905, issued his subpœna to one Lee, commanding him to appear before him at a designated time and place then and there to testify concerning any violation of the so-called prohibition law; and such witness, after being duly sworn, testified as follows: "I am a resident of the city of Aneta in Neson county; was a resident for the last year past; I know the defendant, C. H. Stevens; I have seen him at his place of business; he conducted a hotel and has conducted a hotel in said city of Aneta for the last year past; the hotel he conducted is known as the Manhattan Hotel in said city. I have been at his place of business on several occasions between the 1st day of October, 1908, and the 22d day of April, 1909. At the time I was at his place of business I bought intoxicating liquor and drank it on said premises, and saw others drinking intoxicating liquors on said premises. The property I bought, saw sold, and drank on said premises is more fully described as follows, to wit: Beer." Such testimony was subscribed by the said witness and the usual jurat of the officer endorsed.

It is appellant's first contention that the statute aforesaid violates section 85 of the Constitution of this state because it attempts to confer upon an executive officer judicial, not administrative, duties and powers. The section under consideration in substance provides that whenever the state's attorney shall be cognizant of any violation of the prohibitory law he may issue his subpœna commanding the appearance before him of witnesses and shall take their testimony in the form of depositions, and that if such testimony shall disclose that an offense has been committed in violation of the prohibition law, he is required to file such deposition or depositions in some court of competent jurisdiction, together with his information charging the particular offense which is shown to have been committed. Thereupon a warrant shall issue for the arrest of the person accused.

We are not required to pass upon the constitutional question urged by appellant's counsel, for, conceding all that is claimed by them as to the unconstitutionality of this statute, we are agreed that appellant cannot urge such defense. The witness Lee no doubt might have done so had he desired, but, so far as the record discloses, he in no manner questions the authority of the state's attorney in the premises. He did not object to the giving of his deposition and in no manner challenges the validity of the statute. In so far as appellant is concerned, his legal rights are no different than they would have been if the witness Lee had voluntarily appeared before the state's attorney and made his affidavit embracing the facts stated in his deposition. The section aforesaid was borrowed from the state of Kansas, being section 8, chapter 149, page 241, Laws of 1885, of that state. Prior to its adoption here it had received a construction by the Kansas court. In the case of State v. Whisner, 35 Kan. 271, 10 Pac. 852, in speaking upon the point here under consideration, that court, through its chief justice, said: "An attempt is made to question the constitutionality of section 8 of said chapter 149, giving county attorneys power to subpoena and examine witnesses concerning violations of that act. From the record, however, this question is not before us for decision. None of the witnesses who were subpoenaed and examined before the county attorney of Linn county on July 13, 1885, concerning the violations of the provisions of the prohibitory liquor law by the defendant, are here complaining, and the defendant has no right to complain for them. He stands before the court in reference to such matter as if all the parties to the statements filed with the information had voluntarily appeared before the county attorney, and had made before him, at their own instance, the statements."

Under a familiar rule of statutory construction the adoption of the Kansas statute carried with it by implication the adoption of the construction previously given such statute by the court of last resort in that state; but aside from this, we are in full accord with the reasoning and conclusion of the Kansas court as above quoted. The case In re Sims, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. Rep. 261, cited and relied upon by appellant's counsel, is not in point. In that case the validity of the statute was questioned by the witness, not the defendant, and such statute was held unconstitutional so far as it attempts to confer on the public

prosecutor the power to commit witnesses for contempt for refusal to be sworn or to testify as provided in such section. As before stated the facts here presented do not call for a consideration of this question.

It is next contended that the provisions of said statute were not complied with by the state's attorney in that the testimony of the witness Lee was not taken in the form of a deposition but merely in narrative form and hence amounts to nothing more than an affidavit, and they argue that the committing magistrate therefore acquired no jurisdiction, and consequently that all subsequent proceedings are a nullity. Such contention is highly technical and wholly without merit. It is well settled that the testimony contained in depositions taken ex parte may be in narrative form. Weeks on Depositions, section 434; Pralus v. Pac. Gold, etc., Co., 35 Cal. 30; In re Thomas (D. C.) 35 Fed. 822; Grissen v. Southworth, 64 Hun. 488, 19 N. Y. Supp. 437. The statute in question does not contemplate that such depositions shall be taken on notice. The case of State v. Braithwaite, 3 Idaho (Hasb.) 119, 27 Pac. 731, particularly relied on by appellant's counsel, we do not deem in point. The decision in that case is based upon a statute differing radically from any statute existing here, as an examination thereof will disclose. We think the same may be said of the other authorities cited. It is also urged in support of appellant's first assignment of errors that the information filed by the state's attorney before the police magistrate does not state an offense, and is not sufficient to authorize the issuance of a criminal warrant. The information, omitting formal parts, is as follows: "To the Hon. M. E. Sperry, Police Magistrate, in and for the City of Aneta, in Nelson county, North Dakota: It appearing to me, from testimony introduced at an examination held before me at my office, in the city of Aneta, in the county and state aforesaid, on the 22d day of July, 1909, that the defendant, C. H. Stevens, between the 1st day of October, 1908, and the 22d day of April, 1909, did commit a crime of keeping a common nuisance, committed as follows, to-wit: That at said time and place the said defendant, then and there being, did in said city and county and state as aforesaid, in a certain building known as the Manhattan Hotel, situate in said city of Aneta, maintain a place where intoxicating liquors were sold bartered and given away, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a

beverage, and where intoxicating liquors were kept for sale, barter, and delivery, contrary to the statute in such case made and provided, and against the peace and dignity of the state. Now, therefore, the undersigned state's attorney in and for said county, in and by the authority of the state of North Dakota, gives this court to understand and be informed that heretofore, to-wit, at the time and place aforesaid, and herein before set forth, the above-named C. H. Stevens did commit the crime of selling and keeping for sale intoxicating liquors and for other unlawful purpose, the said C. H. Stevens did keep intoxicating liquors then and there. This contrary to the statute in such case made and provided, and against the peace and dignity of the state." Such information merely takes the place of a complaint ordinarily used in criminal cases before committing magistrates. In view of this its sufficiency will be tested by the same liberal rule adopted in this state for testing the sufficiency of such complaints. For a statement of such rule see State v. Barnes, 3 N. D. 131, 54 N. W. 541. The fact that such information was prepared by the public prosecuting officer should not, in our judgment, form any exception to the rule. There should be one uniform rule of practice governing the sufficiency of such preliminary pleadings. Tested by the rule announced in State v. Barnes, we entertain no doubt as to the sufficiency of the information. Nor do we think the objection that the same is duplicitous is well taken. State v. Lang, 63 Me. 215; State v. Nolan, 15 R. I. 529, 10 Atl. 481; State v. Burns, 44 Conn. 149; 11 Enc. Pl. & Pr. 524. The information, when considered as a whole, as it must be, is not vulnerable to either of the objections urged against it.

It is further contended by appellant's counsel that the state's attorney should be held to a strict compliance with all the statutory requirements in the institution of such cases, and that the affidavit of the witness Lee is insufficient upon which to base the subsequent proceedings. They then proceed to point out alleged defects in such affidavit. We shall not take the time necessary to notice these in detail. Suffice it to say that if considered as a complaint or information it would, no doubt, be lacking in several particulars. Such, however, is not its purpose, nor is it any part of the information upon which the defendant was prosecuted or held to the district court. It was a substantial compliance with the statute, and this is sufficient. As said by the Kansas court in con-

struing a like statute: "It makes no difference whether the affidavits filed with the information show an offense or not, for they are no part of the information."

Appellant's second assignment of error challenges the sufficiency of the information upon which appellant was tried and convicted in the district court. The objection is "that no time is stated when the alleged offense was committed." Such objection is not tenable. The charging part of the information is as follows: "That heretofore, to-wit: Between the 1st day of October, 1908, and the 22d day of April, 1909, continuously at the county of Nelson in said state of North Dakota, one C. H. Stevens * * * did commit continuously the crime of keeping and maintaining a common niusance, committed as follows, to-wit: That at said time and place the defendant * * * did keep and maintain a place, in a building known as the Manhattan Hotel situate in Block 13, in the original townsite of the city of Aneta in said county and state, where intoxicating liquors were continuously sold, bartered, and given away and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage and where intoxicating liquors were kept for sale, barter, and delivery in violation of chapter 65 of the Penal Code of North Dakota." It is clear from the language employed in such information that it is charged that a continuing liquor nuisance was kept and maintained by defendant during each day between the dates mentioned. This is sufficiently specific as to time, and it was not error to overrule defendant's demurrer to such information.

Assignment No. 3 challenges the correctness of the trial court's ruling in denying the defendant's motion for a continuance. There was no error in such ruling. The affidavit upon which such motion was based is wholly insufficient. It does not show that if such continuance had been granted the presence of the witness could probably have been procured; nor does it state that the matters sought to be proved by such witness are true, nor defendant's inability to prove them by other witnesses. State v. Murphy, 9 N. D. 175, 82 N. W. 738; 9 Cyc. 138 et seq., and notes; 4 Enc. of Pl. & Pr. 881, and cases cited.

The next assignment is predicated upon the ruling of the trial judge on defendant's objections to certain statements made by the state's attorney during the argument of the case to the jury, and

his failure to admonish the jury to disregard such statements. The remarks complained of (so far as noticed in appellant's brief) are the following: "Now, gentlemen of the jury, I want to state to you in conclusion, on the question of a search warrant, why, gentlemen of the jury, we didn't want a search warrant. In order that a search warrant can be issued out of this court there must be some person willing to make an affidavit that this beer and stuff is being drank, and that this place is being used as a common nuisance. They must make an affidavit. The state's attorney must get some person to make an affidavit, and that is a hard matter to do, I want to tell you, gentlemen of the jury. So there is nothing in that. The state's attorney, gentlemen of the jury, used his best judgment in this matter. He has prosecuted this case in good faith. He has attempted diligently and in accordance with his oath of office to bring to the bar of justice one of the most arrogant, defiant, outspoken violators of the prohibition law that I believe there is in the county of Nelson. And, gentlemen of the jury, when he was arrested and brought into this court to answer to this charge, I want to tell you that we have brought into this court upon this charge the prince of blind piggers of Nelson county."

The foregoing statement was evidently called forth by certain remarks of defendant's counsel and apparently in reply to a challenge from such counsel asking him to explain why a search warrant was not issued in the case. The evidence not being before us, we are unable to say that such remarks were not fully justified by the testimony in the case. Furthermore, it is well settled that trial courts are vested with a wide discretion in the matter of controlling arguments of counsel and we are not willing to say that the learned trial court abused such discretion in overruling the objection to the remarks complained of.

The last assignment of error challenges that portion of the judgment wherein it is adjudged that in default of the payment of the fine and costs amounting to $587.95 that defendant be imprisoned in the county jail for the further period of 294 days. In this, counsel are correct in their contention. Such provision, no doubt, was inserted in the judgment through an oversight. Rev. Codes 1905, section 9379, limits the imprisonment for nonpayment of fines and costs to a period not exceeding six months.

Under the authority of State v. Wisnewski, 13 N. D. 649, 102 N. W. 883, the judgment is modified by reducing the additional im-

prisonment to the period of six months, and, as thus modified, the judgment appealed from is affirmed. All concur.

(123 N. W. 888.)

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MICHAEL HANSON v. MARI FRANKLIN, D. S. B. JOHNSON LAND AND MORTGAGE COMPANY, A CORPORATION, ELIZABETH A. MATTHEWS AND HENRY N. MATTHEWS, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE L. MATTHEWS, DECEASED, AND THE COUNTY OF GRAND FORKS, NORTH DAKOTA, A MUNICIPAL CORPORATION, AND THE STATE OF NORTH DAKOTA.

Opinion filed October 21, 1909.

**Taxation — Tax Judgment — Limitation of Actions.**

1. Tax judgments obtained under the provisions of section 57, chapter 132, page 398, Laws 1890, are not ordinary money judgments, and do not expire by the statute of limitations.

**Same — Statutary Construction — Retrospective Operation.**

2. Section 57, chapter 132, page 398, Laws 1890, being purely remedial, and merely giving a remedy to enforce existing rights and obligations, is to be construed as applying to taxes levied (but not collected) prior to its passage as well as to those levied thereafter.

**Partnership — Proof of Partnership.**

3. The evidence sufficiently shows that John A. Johnson was a member of the firm of Johnson & Gregerson.

**Judgment — Defective Return of Process — Collateral Attack.**

4. The return of the service of the citation issued for the taxes of 1891 sufficiently shows service on John A. Johnson. The inserting of the name "John O. Fadden," in said return, was a clerical mistake, and will not vitiate the judgment. Defects in the proof of service of a process must be taken advantage of in a direct proceeding, and will not furnish grounds for a collateral attack on the judgment.

**Taxation — Proceedings to Collect — Statutory Provision — Mandatory and Directory.**

5. The provisions of chapter 132, page 376, Laws 1890, with reference to the filing of the tax list with the county auditor, the delivery of such list to the board of county commissioners, and the filing of a copy thereof with the clerk of the district court, are not mandatory, but directory.

**Pleading — Amendment to Conform to Proof.**

6. The judgment and the taxes on which they were rendered, were liens on the real estate in controversy. Hence appellant was not prejudiced by the allowance of the amended answer, setting up the taxes as additional liens on the said real estate.

**Evidence — Taxation — Citation as Proof of Legal Tax.**

7. Citations issued for the taxes of each year were introduced in evidence, and were prima facie evidence of the legality of the taxes assessed for these years.

**Same — Tax Liens — Effect of Repeal of Statute Creating.**

8. Where judgments were obtained and docketed for personal property taxes pursuant to the provisions of chapter 132, page 306, laws 1890, and became liens upon the real property in question, such liens continued, notwithstanding the repeal of the law under which the liens were acquired.

Appeal from District Court, Grand Forks county; *Templeton*, J.

Action by Michael Hanson against Mari Franklin and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

*W. J. Mayer* (*Bangs, Cooley & Hamilton*, of Counsel), for appellant.

After ten years a judgment is dead for all purposes. Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244; Ruth v. Wells, 83 N. W. 568.

Amendment must not change substantially the claim or cause of action. Mares v. Wormington, 8 N. D. 329, 79 N. W. 441; Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811; Murphy v. Plankinton Bank, 100 N. W. 614.

Judgment is void where lack of service appears on face of record, Laney v. Garbee, 24 Am. St. 391; Hyde v. Redding, 16 Pac. 380; Harris v. Sargent, 60 Pac. 608.

Lien of personal property tax prior to 1890 was surrendered by the State. Gull River Lumber Co. v. Lee, 7 N. D. 135, 73 N. W. 430.

*J. B. Wineman*, for respondents.

As a condition of relief in equity, applicant must pay or tender just taxes chargeable against his property. State Finance Co. v. Mather, 109 N. W. 350, 15 N. D. 386; Beggs v. Paine, 109 N. W. 323, 15 N. D. 436; Nind v. Myers & Beck, 109 N. W. 335, 15 N. D. 400; State Finance Co. v. Beck, 109 N. W. 357, 15 N. D. 374;

State Finance Co. v. Trimble, 112 N. W. 984, 16 N. D. 199; Tracy v. Wheeler, 107 N. W. 68, 15 N. D. 248.

Tax judgment is different from ordinary money judgment. Nichols v. Disler, 31 N. J. L. 461; Nind v. Myers, supra; Danforth v. McCook County, 76 N. W. 940.

Tax lien does not merge into a judgment rendered in an action to enforce it. Boyd v. Ellis, 18 S. W. 29; Beard v. Allen, 39 N. E. 665; Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241.

Statute of limitations do not apply to proceedings to collect taxes. The Iowa Land Co. v. Douglas County, 67 N. W. 52; Merriwether v. Garnett & Sons, 26 L. Ed. 197; Lane County v. Oregon, 7 Wall 71; City of Augusta v. North, 57 Maine 392; City of Camden v. Allen, 26 N. J. L. 398.

Chap. 123 Laws of 1890 is both prospective and retrospective in its operation. Re Taxes, Hennepin County v. Baldwin, 65 N. W. 80; Galusha v. Wendt, 87 N. W. 512; State v. Pors, 83 N. W. 706; State v. Myers, 52 Wis. 628, 9 N. W. 777; Gager v. Prout, 26 N. E. 1013; Sellars v. Barrett, 57 N. E. 422; Biggins v. People, 106 Ill 270; Beresheim v. Arnd, 90 N. W. 506.

Clerical error in substituting name of officers for name of party served will not vitiate. Gibbs v. Southern, 116 Mo. 204; 19 Enc. Pl. & Pr. 707.

Tax judgment cannot be impeached collaterally. Poirier Mfg. Co. v. Kitts, 120 N. W. 558; McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243; Van Gordon v. Goldamer, 16 N. D. 323, 113 N. W. 609.

Under Chap. 132 p. 376, Laws of 1890 as to filing of tax list, and its delivery to County Commissioners etc., are directory merely. Wells County v. McHenry, supra; Beard v. Allen, supra; Danforth v. McCook, 76 N. W. 940; In Re Taxes, Hennepin County v. Baldwin, supra; Iowa Land Co. v. Douglas County, supra; Calusha v. Wendt, supra; State Finance Co. v. Mather, supra; Beggs v. Paine, supra; Nind v. Myers, supra.

CARMODY, J. Plaintiff, claiming to be the owner in fee of the two quarter sections of land in controversy, situated in Grand Forks county, brought this action to determine adverse claims. The complaint is in the statutory form provided by section 7522, Rev. Codes 1905. The defendants, the state of North Dakota and the county of Grand Forks answered, setting up and claiming as liens adverse to plaintiff's title certain personal tax judgments rendered June 17, 1893, against John A. Johnson, a former owner of the land describ-

ed in the complaint, for personal taxes claimed to be due from said John A. Johnson for the years 1884, 1885, 1887, 1888, 1890, and 1891, also claiming a lien for real estate taxes for the year 1907. Before the entry of judgment in this action, the real estate taxes were paid, and do not enter into this controversy. The proceedings resuulting in these tax judgments were had under the authority of section 57, c. 132, p. 398. Laws 1890. Upon these issues the case came on for trial before the court without a jury. Several weeks after the case was closed, but before the findings had been made by the court, the answering defendants, over plaintiff's objection, were permitted to amend their answer to conform to the proof, setting up as an additional defense the liens of the personal taxes upon which the judgments had been rendered. Thereafter, and upon the findings and order for judgment made by the court, judgment was entered in favor of the answering defendants and against the plaintiff, dismissing plaintiff's cause of action, and adjudging each and all of the judgments to be liens on the said real estate, and further adjudging that, independent of the judgments, the personal taxes of the several years were themselves liens on said real estate. The plaintiff appealed from the judgment, and desires a review of the entire case in this court. Proceedings were instituted against John A. Johnson and Johnson & Gregerson under the provisions of section 57, c. 132, p. 398, Laws 1890. Seven citations were issued and personal services obtained on John A. Johnson, and on June 17, 1893, judgment by default was taken in each case in the district court of Grand Forks county for the taxes, with interest, penalties, and costs. The judgments were duly docketed on July 3, 1893.

Appellant contends, first, that the lien of the tax judgments expired by lapse of time before the commencement of this action; second, as regards the taxes of 1884, 1885, 1887 and 1888, the court was wholly without jurisdiction of the subject-matter, that chapter 132, p. 376, Laws 1890, was clearly prospective in its operation; third, that two of the tax judgments, one for 1887 and one for 1888, were rendered against a co-partnership in the firm name of Johnson & Gregerson, and that there is no evidence to show that John A. Johnson was a member of the copartnership; fourth that there was no service of the citation upon John A. Johnson for the taxes of 1891; fifth that the proceedings which resulted in the judgments for the taxes of 1890 and 1891 were had in total disregard of the provisions of sections 55, 56, 57, c. 132, Laws 1890; sixth, that the court

exceeded its authority in permitting the answering defendants to amend their answer as hereinbefore stated; seventh, that there is no competent evidence of the existence of any taxes or tax liens; eighth that there can be no lien for the taxes of 1884, 1885, 1887, and 1888 for the further reason that section 1239 of the Revised Codes of 1895, being the same as section 1612 of the Complied Laws of 1887, was expressly repealed by section 110, c. 126, p. 297, Laws 1897, without any saving clause. We shall dispose of these propositions in the order in which they are stated.

Appellant's contention that the lien of the tax judgments expired by lapse of time, the judgments having been rendered more than 10 years before the commencement of this action, and that after 10 years a judgment is dead for all purposes, must be overruled. The proceeding by which a tax judgment under the provisions of section 57, c. 132, Laws 1890, is obtained, is a statutory proceeding instituted by the state against delinquent taxpayers to aid in the collection of delinquent personal property taxes. We do not regard such judgments as ordinary judgments for money. A tax judgment is but a means provided by revenue statutes for the collection of taxes. The personal taxes for the years 1884, 1885, 1887, and 1888 were levied and assessed under the provisions of the revenue laws of the territory of Dakota, and were by such laws made a lien upon real property owned by the person against whom the taxes were assessed, or to which he might acquire title. As to these taxes the judgments did not creat new liens, but were a means to enforce the state's liens created by law, and not to create new liens. The personal taxes for 1890 and 1891 became liens on real property from the date of docketing the judgments obtained for such taxes. A tax judgment not being a judgment in a civil action, and not being an ordinary judgment for money, does not expire by the statute of limitations. Succession of Armand Mercier on Opposition of the City of New Orleans, 42 La. Ann. 1135, 8 South. 732, 11 L. R. A. 817. In addition to the said tax judgments being liens upon said real estate, the taxes for which the judgments were obtained are liens on the said real estate. Taxes are generallly defined as burdens or charges imposed by legislative authority on person or property to raise money for public purposes, or more briefly, an imposition for the supply of the public treasury. 27 Am. & Eng. Enc. of Law (2d Ed.) p. 578. A tax in its essential characteristics is almost universally held not to be a debt or in the nature of a debt. The

distinction between a debt and a tax is that one rests on contract; the other does not. A debt is a sum of money due by contract. express or implied; while a tax is a charge on person or property to raise money for public purposes, and operates in invitum. Unless it is so provided by statute, taxes do not bear interest, and cannot be enforced by means of an action of debt. 27 Am. & Eng. Enc. of Law (2d Ed.) 580-581, and cases there cited. Merriweather v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Iowa Land Co. v. Douglas County, 8 S. D. 491, 67 N. W. 52; Greenwood v. Town of La Salle, 137 Ill. 225, 26 N. E. 1089; Beard v. Allen, 141 Ind. 243, 39 N. E. 665, 40 N. E. 654; Danforth v. McCook, 11 S. D. 258, 76 N. W. 940, 74 Am. St Rep. 808; City of Augusta v. North, 57 Me. 392, 2 Am. Rep. 55; City of Camden v. Allen, 26 N. J. Law, 398. In Danforth v. McCook, the Supreme Court of South Dakota says: "A tax is not a debt in the ordinary sense in which that term is used, but is a charge or burden imposed on property for the benefit of the public." It is within the constitutional power of the Legislature to make the tax a lien superior to any other security, incumbrance, or lien arising either before or after the assessment of the tax. The taxes for the years 1884, 1885, 1887, and 1888 were levied and assessed under the provision of the revenue laws of the territory of Dakota, and were by such laws made liens upon real property owned by the person against whom the taxes were assessed, or to which he might acquire title. The personal taxes for 1890 and 1891 became liens on real property from the date of docketing judgments obtained for such taxes. It is well settled that, when a judgment is recovered for back taxes, the lien of the taxes will not be merged in the judgment. 27 Am. & Eng. Enc. Law (2d Ed.) 743, and cases cited; Beard v. Allen, 141 Ind. 243, 39 N. E. 665, 40 N. E. 654; Greenwood v. Town of La Salle, 137 Ill. 225, 26 N. E. 1089; Boyd v. Ellis, 107 Mo. 394, 18 S. W. 29.

We do not think that chapter 132, Laws 1890, was only prospective in its operation. It is true that in Wells County v. McHenry, 7 N. D. 246, 266, 74 N. W. 241, 248, Chief Justice Corliss, in delivering the opinion of the court, uses this language, which is found on p. 266: "As the act of 1890 is clearly prospective in its operation, there is nothing in its provisions inconsistent with the continued existence of the old statutes regulating interest on delinquent taxes." While the language might indicate that the court held that law prospective in its operation, it was only referring to the penalty and in-

terest on delinquent taxes. Chaper 132 of the Laws of 1890 amended that part of the revenue law relating to penalty and interest on delinquent taxes, and, of course, could apply only to taxes assessed and becoming delinquent after the time said chaper 132 went into effect, but it surely was not prospective so far as it affected the collection of delinquent taxes, and applied as well to taxes that were assessed and became delinquent before its passage as to taxes assessed and becoming delinquent thereafter. In Re Taxes Hennepin County v. Baldwin, 62 Minn. 518, 65 N. W. 80, the Supreme Court of. Minnesota, in construing a similar statute, says: "The statute in question does not impair any vested right, or create any new right, or impose any new obligation. It is purely remedial, and merely gives a remedy for enforcing existing rights and obligations. Such statutes are to be liberally construed in order to accomplish the beneficent purpose for which they were enacted; and, unless a different legislative intent is expressed or clearly implied, they will generally be construed to apply to rights and obligations that accrued before enactment, as well as to those to accrue thereafter." We think the same construction should be given to the statute under consideration. A careful reading of section 57 of chapter 132 convinces us that the Legislature intended it to be retroactive. So far as the act simply affords a remedy, it may be used or employed to enforce a pre-existing right as well as one subsequently accruing. It makes no difference when the cause of action arose. The remedy, when given, may be availed of. The general purpose of legislation of this class, namely, to provide means for enforcing the obligation of each individual to contribute to the expenses of the government according to the taxable property owned by him, whenever he shall have escaped or evaded that obligation, has many times received the commendation of the courts. Galusha v. Wendt, 114 Iowa, 597, 87 N. W. 512; State v. Pors, 107 Wis., 420, 83 N. W. 706, 51 L. R. A. 917; State v. Myers, 52 Wis. 628, 9 N. W. 777; State v. Baldwin 62 Minn., 518, 65 N. W. 80; Gager v. Prout, 48 Ohio St. 89, 26 N. E. 1013; Sellars v. Barrett, 185 Ill. 466, 57 N. E. 422; Biggins v. People of Illinois, 106 Ill. 270; Beresheim v. Arnd, 117 Iowa 83, 90 N. W. 506.

We think the evidence sufficiently shows that John A. Johnson was a member of the firm of Johnson & Gregerson. The copy of the revised list of delinquent personal property taxes filed in the clerk's office February 20, 1893, certified to by the county auditor,

shows that personal property taxes were assessed against John A. Johnson and J. C. Gregerson for the years 1887 and 1888. The return of the sheriff of Grand Forks county shows that he served the citations issued against Johnson & Gregerson for such delinquent personal property taxes, one of them on John A. Johnson a member of the firm of Johnson & Gregerson, the other on J. A. Johnson, a member of said firm, both served on the same day. Taxes assessed on the personal property of a firm are a lien on the land of a partner. Bibbins v. Clark, 90 Iowa, 230, 57 N. W. 884, 59 N. W. 290 29 L. R. A. 278.

It is claimed by appellant that the return of the officer shows that there was no service of the citation upon John A. Johnson for the taxes of 1891. The return is as follows: "The within citation came to my hand on the 23rd of February, A. D. 1893, and I hereby certify that I served the same by delivering to and leaving with said John O. Fadden personally, a true, full and correct copy. Returned April 1st, A. D. 1893. John O. Fadden, Sheriff of Grand Forks County, N. D." It appears from the records in this case that John O. Fadden was sheriff of Grand Forks County at that time; that he served seven citations on John A. Johnson on the same day. The citation in question was entitled: "The State of North Dakota, plaintiff, v. John A. Johnson, defendant." The citation ran: "The State of North Dakota to John A. Johnson, the defendant herein." It is clear to us that the inserting of the name "John O. Fadden" was a clerical mistake, and will not vitiate the judgment. Gibbs v. Southern, 116 Mo. 204, 22 S. W. 713. Defects in the proof of service of a process must be taken advantage of in direct proceedings, and will not furnish grounds for a collateral attack on the judgment. 19 Enc. of Pleading & Practice, p. 707. A tax judgment cannot be impeached collaterally. Gribble v. Livermore, 64 Minn., 396, 67 N. W. 213. As far as the record shows, no objection to the service was taken in the trial court. Objections not raised in the trial court will not be considered by this court. Poirier Mfg. Co. v. Kitts, 120 N. W. 558; McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243; Van Gorden v. Goldamer, 16 N. D. 323, 113 N. W. 609.

Sections 55, 56, and 57 of chapter 132 of the Laws of 1890, as far as material here, are, in substance, as follows: Section 55 provides that all unpaid personal property taxes shall be deemed delinquent on the 1st day of March next after they become due; that

after the 1st day of March in each and every year, the county treasurer shall immediately proceed to collect all delinquent personal property taxes, and, if not paid on demand, he shall distrain the goods and chattels of the person charged with such taxes. Section 56 provides that, if the county treasurer is unable for want of goods whereupon to levy to collect by distress or otherwise the taxes, or any part thereof which may have been assessed upon the personal property of any person or corporation, or any executor or administrator, guardian, receiver or accounting officer, agent, or factor, such treasurer shall file with the county auditor on the 1st of June following a list of such taxes, and that the county auditor shall deliver such list to the board of county commissioners at their first session thereafter. Section 57 provides that, within 10 days after the adjournment of the board, the auditor shall file a copy of such list with the clerk of the district court, and that within 10 days thereafter the clerk shall issue and deliver to the sheriff for service a citation to each defendant named on the list. Appellant contends that the proceedings which resulted in the judgments for the taxes of 1890 and 1891 were had in total disregard of the foregoing provisions; that the citations show upon their face that the list was not delivered to the clerk until February 20, 1893; and that the court was without jurisdiction to proceed upon the citations issued in February, 1893. He cites no authority to sustain his contention, and we believe none can be found. The rights of John A. Johnson were not prejudiced by the delay. We think the provisions of the law with reference to the filing of the list with the county auditor, the delivery of such list to the board of county commissioners, and the filing of the copy of the same with the clerk of the district court are not mandatory, but directory, and that the court had jurisdiction to render the judgments. The appellant was not prejudiced by the allowance of the amended answer. The judgments were liens on the land, and so were the taxes. The taxes for the years 1884, 1885, 1887, and 1888 were liens on the real estate under the Compiled Laws of the territory. The taxes assessed for the years 1890 and 1891 were liens on the real estate from the time the judgments were rendered and docketed. The citations introduced in evidence were sufficient proof of the existence of valid and legal taxes. The amendment allowed conformed to the proof.

The appellant contends that there is no competent evidence of the existence of any taxes or tax liens. In this he is mistaken. Sections

57 of chaper 132 of the laws of 1890 provides as follows: "The citation herein provided for shall be prima facie evidence that all of the provisions of law in relation to the assessment and levy of taxes have been complied with, and no omission of any of the things by law provided in relation to such assessment or levy, or of anything required by any officer or officers to be done prior to the issuance of such citation, shall be a defense or objection to such taxes, unless it be made to appear that such omission has resulted to the prejudice of the party objecting, and that such taxes have been unfairly or unequally assessed, and in such case, but in no other, the court may reduce the amount of such taxes and give judgment accordingly." Citations issued for the taxes of each year were introduced in evidence, and were prima facie evidence of the legality of the taxes assessed for those years. See, also, Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241.

Plaintiff's last contention is that there cannot be any lien for the taxes of the years 1884, 1885, 1887 and 1888, assessed under the Compiled Laws of the territory, claiming that section 1239 of the Revised Codes of 1895, being the same as section 1612 of the Compiled Laws of 1887 was repealed by section 110, chapter 126, Laws 1897, without any saving clause, and that the repeal of that law destroyed the lien. In this we think he is in error. The taxes were levied and the judgments entered and docketed while the 1890 revenue law was in force. A lien was thereby fastened upon the land, and was not affected by the repeal of the law under which it had been acquired. True, the taxes for the years 1884, 1885, 1887, and 1888 were not assessed under the 1890 revenue law, but the judgments were entered under that law. Hagler v. Kelly, 14 N. D. 218, 103 N. W. 629.

Finding no error in the record, the judgment appealed from is affirmed. All concur, except MORGAN, C. J., not participating.

(123 N. W. 386).

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STATE OF NORTH DAKOTA v. W. E. LONGSTRETH.

Opinion filed June 11, 1909.

**Criminal Law — Demurrer — Indictment and Information — Definiteness.**

1. A demurrer to an information in a criminal action upon the ground stated in subdivision 2, section 9900, Rev. Codes 1905, as follows, "That it does not substantially conform to the requirements of

this Code," is too indefinite. The pleader should specify wherein such information fails to conform to the requirements of the Code of Criminal Procedure so as to apprise the court of the precise point of the objection.

**Same — Abortion — Alleging Means — Accomplishment.**

2. An information charging the offense of procuring an abortion need not specifically describe the drug or medicine administered, nor the kind or character of instrument or instruments used, or the manner of such use, where such information alleges that the kind and character of such instrument and the manner of its use are unknown.

**Same— Code Provisions — Abolish Common Law — Form of Pleading.**

3. The strict rules of the common law regarding criminal pleadings have been expressly abolished in this state, and under section 9856, Rev. Codes 1905, the information or indictment is sufficiently definite if the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repitition, and in such manner as to enable a person of common understanding to know what is intended. * The information or indictment is sufficient if the act or omission is charged with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case.

**Indictment and Information — Motion to Quash — Statutory Grounds — Code Provisions Exclusive.**

4. Section 9891, Rev. Codes 1905, enumerates the grounds upon which a motion to quash an information or an indictment may be made, and this action is exclusive. * Following State v. Tough, 12 N. D. 425, 96 N. W. 1025, and State v. Foster, 14 N. D. 561, 105 N. W. 938.

**Same — Preliminary Examination — Knowledge of Complaining Witness — Practice.**

5. The fact that the complaining witness, at the time he instituted the criminal proceedings before the committing magistrate, did not possess actual, personal knowledge of the facts constituting the offense, is not a sufficient ground for quashing the information based upon the preliminary examination before such magistrate. The allegations in the criminal complaint before the magistrate were positive, and not on information and belief, and such complaint was sworn to positively. Hence it was improper practice for the district court to permit defendant to examine the complaining witness for the purpose of proving a lack of personal knowledge on his part of the facts at the time he instituted the proceedings before the committing magistrate. The motion to quash the information was properly overruled, not only for the foregoing reasons, but on the further ground that the record discloses that such complaining witness did

not act on hearsay evidence in making the complaint, as the defendant, prior to the institution of the prosecution, made a full admission to him of the facts tending to show his guilt.

**Witnesses — Cross-Examination — Discretion of Court.**

6. The latitude and extent of the cross-examination necessarily must rest largely in the discretion of the trial judge, and it is only in case of clear abuse of such discretion, resulting in manifest prejudice to the complaining party, that this court will interfere. Tested by this rule, it is held that the cross-examination of the complaining witness was not erroneously restricted.

**Criminal Law — Evidence — Admissions — Stenographic Notes as Proof of.**

7. The state, over defendant's objection, was permitted to prove by the witness Olsen, who was the official court stenographer, certain admissions made by defendant while testifying at a previous trial of a civil action wherein he was defendant, which testimony was relevant and material, and for such purpose the witness was permitted to refer to and read from a transcript of his stenographic notes after laying a proper foundation by showing that such notes were correctly taken and transcribed. *Held,* not error, as proof of such prior admissions was clearly proper. (Ellsworth, J., dissenting.)

**Criminal Law — Abortion — Necessary to Save Woman's Life — Verdict — Sufficiency of Evidence.**

8. Defendant's contention that the evidence is insufficient to support the verdict of guilty, upon the ground that the state failed to prove that the abortion was not necessary to preserve the life of the woman, was properly overruled, as the facts and circumstances sufficiently established at least a prima facie case in favor of the state on such issue. (Ellsworth, J., dissenting.)

**Same — Evidence — Presumption and Burden of Proof.**

9. The state must both allege and prove such negative, but whether in the first instance the state must furnish direct affirmative proof of such negative fact, or whether, in the absence of any such proof, the presumption that it was not necessary suffices to establish a prima facie case is not determined, as the evidence, both direct and circumstantial, clearly establishes a prima facie case in behalf of the state without the aid of such presumption. (Ellsworth, J., dissenting.)

Appeal from District Court, Stutsman County; BURKE, J.

W. E. Longstreth was convicted of procuring an abortion, and, from an order denying a new trial, he appeals.

Affirmed.

*Lee Combs,* for appellant.

Information for committing the crime of abortion must allege the means of its accomplishment. Cochran v. People, 51 N. E. 845; Rhodes v. State, 27 N. E. 866; Com. v. Corkin, 136 Mass., 429; 1 Cyc. 728.

Complainant must state the facts constituting a crime upon his positive knowledge. State Ex Rel. Poul v. McLain, 102 N. W. 407; People v. Heffron, 19 N. W. 170; Blodgett v. Race, 18 Hun, 132; In Re Blum, 9 Misc. Rep. 571, 30 N. Y. Supp. 396; State v. Good, 77 Tenn., 240; Butler v. State, 30 So. 338.

Stenographer's notes are not competent evidence. State v. Foulk, 45 Pac., 603; Cerrusite Min. Co., v. Steele, 70 Pac. 1091; Smith v. State, 60 N. W. 585; Jordan v. Howe, 95 N. W. 853.

State must prove that alleged abortion was not necessary to save prosecutrix's life. Moody v. State, 17 Ohio St. 110; State v. Clements, 14 Pac. 410; State v. Glass, 5 Ore., 73.

*Andrew Miller,* attorney general; *Alfred Zuger,* assistant attorney general, and *George W. Thorp,* for the state.

Demurrer to criminal information must specify objection. Benham v. State, 1 Iowa, 542; State v. Groom, 10 Iowa, 308; Flohr et al., v. Territory, 78 Pac. 565; People v. Crane, 87 Pac. 239; Com. v Smith, 27 S. W. 810; People v. Hill, 3 Pac. 75.

Stenographer's notes are competentt to prove statements of a witness. People v. Mitchell, 29 Pac. 1106; People v. Butler et al., 69 N. W. 734.

Sworn testimony of a party as a witness in a former proceding is competent to show an admission or confession. Dickerson v. State of Wisconsin, 4 N. W. 321; States v. Hopkins, 42 Pac. 627; Hendrickson v. People, 10 N. Y. 13; Com. v. Reynolds, 122 Mass., 454; U. S. v. Kirkwood, 13 Pac. 234; State v. Carroll, 51 N. W. 1159; 3 Enc. Evidence 340; 1 Enc. Evidence, 481; Buddee v. Spangler, 20 Pac. 760; Clayton v. Clayton, 4 Colo., 410, 417; Maxwell v. Harrison, 52 Am. Dec. 385; 1 Enc. Evidence, 482, 483, 484, 485; People v. Gallagher, 42 N. W. 1063; Wigmore on Evidence, Vol. 4, section 2363; Wigmore on Evidence, Vol. 2, section 1048; Wigmore on Evidence, Vol. 2, section 1051; Elliott on Evidence, Vol. 1, sections 238-239 and cases there cited.

The state's burden to show that the production of a miscarriage was not necessary to save complainant's life, is complied with, in the absence of proof to the contrary, by the presumption that it was so

necessary. 1 Cyc. 188; State v. Scheurman, 70 Mo., App. 518; State v. Lee, 69 Conn. 186, 37 Atl. 75; Hatchard v. State, 48 N. W. 380; Ellliott on Evidence, Vol. 4, section 2771 and cases cited; State v. Meek, 70 Mo., 355; State v. Owens, 22 Minn., 238; State v. Crowell, 25 Me., 173; Hinckley v. Penobscot, 42 Me. 89; State v. Whittler 21 Me., 341.

It may be shown by circumstantial evidence. Howard v. People, 57, N. E. 441; Bardford v. People, 20 Hun 309; 1 Cyc. 190 and cases cited; State v. Montgomery, 33 N. W. 143; State v. McLeod, 37 S. W. 828; Moore v. State, 40 S. W. 287; State v. Lilly, 35 S. E. 837; Diehl v. State, 62 N. E. 51; Com. v. Drake, 124 Mass., 21; Underhill on Crim. Evidence, sections 347-349; People v. McGonegal, 17 N. Y., Supp. 147; State v. Watson, 1 Pac. 770.

FISK, J. Appellant was convicted in the district court of Stutsman county of the crime of procuring an abortion, as defined in section 8912, Rev. Codes 1905, and from an order denying his motion for a new trial he appealed to this court. He was assigned 13 alleged errors, which are grouped into five subdivisions of his printed brief. These will be considered in the order presented.

1. The court below overruled his demurrer to the information, and the correctness of this ruling is first challenged; the ground being that such information fails to state the means or manner of the use of the instrument or instruments upon and in the body of the female. The statute defining the offense of which appellant was convicted is as follows: "Every person who administers to any pregnant woman, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument or any means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable," etc. The charging part of the information is as follows: "That at the said time and place the above-named defendant, W. E. Longstreth, then and there being, did administer to, and prescribe for, one Ida Wagner, then and there being pregnant with child and did then and there advise and procure said Ida Wagner to take certain medicines, drugs, and substances, the names of said medicine, drugs, and substances being to this informant unknown, and did then and there use and employ in and upon the body of said Ida Wagner certain instruments and other means unknown to this informant all with the intent then and there and thereby to procure the miscar-

riage of the said Ida Wagner; said miscarriage then and there not being necessary to preserve the life of the said Ida Wagner."

It will be noticed from a reading of the above statute that the offense consists in the use of any of the means therein mentioned, upon a pregnant woman, with the intent to procure her miscarriage, unless the same is necessary to preserve her life. The offense defined by the statute is complete by the use of such means with the intent aforesaid, regardless of whether the miscarriage is in fact consummated or not. The grounds of the demurrer are: "(1) The said information does not substantially conform to the Code of Criminal Procedure of the state of North Dakota. (2) More than one offense is charged therein. (3) The facts stated in said information do not constitute a public offense." There are at least two answers to appellant's contention, each of which are conclusive against him: First, the demurrer is too indefinite to raise the objection in question; and, second, even if properly raised, there is no merit in the objection.

The first ground is relied on as sufficient to raise the objection above stated. In this we are clear that counsel are mistaken. Such ground is couched in substantially the language of the statute relating to a demurrer in a criminal action. Rev. Codes 1905, section 9900. This was not sufficient. People v. Hill, 3 Utah, 334, 3 Pac. 75; Flohr v. Territory, 14 Okl., 477, 78 Pac. 565. As said by the court in the Utah case: "It will not do to demur in the language of subdivision 2 of section 192 Code Proc., and stop at that. The precise grounds must be pointed out." The reason for this is obvious. The information may, in many respects, fail substantially to conform to the requirements of the Code of Criminal Procedure, and hence the court is entitled to have such objection specifically pointed out; but, if we assume that the demurrer is sufficiently definite to raise such objection, it is entirely clear that the demurrer was properly overruled upon the merits. The authorities are practically unanimous in holding that it is unnecessary to specifically describe the medicine or drug administered to the female by defendant, or which he advised or procured her to take, and that an indictment or information charging the use of an instrument with intent to procure an abortion need not describe the character or kind or instrument used, if it alleges that the same is unknown, and this rule also obtains with reference to alleging the manner of the use of such instruments. In a very recent case in Minnesota, an indict-

ment in almost the identical language of this one was sustained; the court saying: "That it (the indictment) does not sufficiently notify the offender of the nature of the charges to enable him to prepare for trial has no reasonable foundation. That his defense could possibly turn or depend upon the exact instrument or method of operation is not within the realm of possibility." State v. Bly, 99 Minn., 74, 108 N. W. 833. We deem it unnecessary to cite at length the other authorities bearing upon this phase of the case. Many of them are collated in a valuable note in 11 Am. & Eng. Ann. Cases, p. 221. See, also, Eggart v. State, 40 Fla. 527, 25 South, 144; State v. Quinn, 2 Pennewill (Del.) 339 45 Atl. 544. The cases cited by appellant's counsel arose in states where the strict common law rules governing criminal pleadings are still in force. In this as well as in many other states, the Legislature has expressly abolished such rules. See Rev. Codes 1905 sections 9846-9857, inclusive. We quote from the statute as follows:

"Sec. 9846. All the forms of pleading in criminal actions, and rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code."

"Sec. 9856. The information or indictment is sufficient if it can be understood therefrom: * * * (6) That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. (7) That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

In this connection, see State v. Holong, 38 Minn., 368, 37 N. W. 587, and State v. Lewis, 13 S. D. 166, 82 N. W. 406. The opinion in the Minnesota case is particularly applicable here. We quote: "That the old form of pleading in criminal actions has been abolished, and the rules by which the sufficiency of such pleadings is to be determined, are those prescribed by the statute. That an indictment is sufficient if it can be understood therefrom that the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case. That it was the intent of the Legislature to free criminal pleading from the technical rules (many of which are senseless) which had grown up on the subject. That,

where the criminal character of the act is as strongly stated in the words used in the indictment as those given in the statute, they are the words used in the statute defining the offense, and mean as much in the indictment as in the statute, and in either they describe the offense."

The second and third grounds of the demurrer need not be noticed, as they are not discussed in appellant's brief, and are therefore presumably abandoned.

2. The next assignment of error is predicated upon the ruling of the trial court in denying appellant's motion to quash the information; the particular point relied on being that Warner, the complaining witness, in fact possessed no personal knowledge of the facts stated in the complaint before the committing magistrate. Hence it is argued that he could not properly make such complaint, and therefore the information filed in the district court could not be based on a preliminary examination held thereunder. Such contention is wholly devoid of merit. It was a most unusual and unheard of practice to permit the defendant, in aid of his motion to quash, to examine this witness for the purpose of showing that he verified such complaint without having personal knowledge of the facts therein positively alleged. If such practice should be tolerated, many guilty persons would go unpunished. No authority for such practice has been cited and we believe none exists. Cases where the complaint alleging facts merely on information and belief, or where such complaint is verified merely on information and belief, are not in point. Here the facts were positively alleged and positively verified. This was sufficient under all the authorities. State v. Collins, 8 Kan. App. 398, 57 Pac. 38; Alderman v. State, 24 Neb. 97, 38 N. W. 36; State v. Stoffel, 48 Kan. 364, 29 Pac. 685; People v. Staples, 91 Cal. 23, 27 Pac. 523; Com. v. Mallini 214 Pa. 50, 63 Atl. 414; State v. Etzel, 2 Kan. App, 673 43 Pac. 798.

Another and complete answer to such contention is the fact that no such ground for quashing the information is mentioned in the Code. Section 9891 Rev. Codes 1905, states the grounds upon which such motion may be made, and this section is exclusive. State v. Tough, 12 N. D. 425, 96 N. W. 425; State v. Foster, 14 N. D. 561, 105 N. W. 938. Furthermore, the record discloses that Warner, the complaining witness, did not act on hearsay evidence, as the defendant prior to the institution of the prosecution made a full ad-

mission to him of the facts showing his guilt. The motion was properly overruled.

3. The third ground assigned as a reason why a new trial should be granted is that the trial court erroneously restricted the cross-examination of the witness Warner. We have carefully examined the record in connection with this assignment, and we are entirely convinced from such examination that the trial court accorded to defendant his full right of cross examination. At least it cannot be said that the trial court abused its discretion in limiting such cross-examination. It is well settled that the latitude and extent of a cross-examination rest largely in the discretion of the trial judge, and it is only in cases of a clear abuse of such discretion, resulting in manifest prejudice to the complaining party, that this court will interfere. State v. Foster, 14 N. D. 561, 105 N. W. 938. Counsel for appellant cites and relies upon several prior decisions of this court in support of his contention on this point, and especially the case of State v. Malmberg, 14 N. D. 523, 105 N. W 614; but we fail to find anything therein to warrant such contention under the state of the record in the case at bar, and we leave this branch of the case without further comment.

4. It is next contended that it was reversible error to permit the witness Olsen, who was the official court stenographer, to read from his stenographic minutes certain testimony given by defendant in a breach of promise suit theretofore tried in said court, wherein Ida Wagner was plaintiff and appellant was defendant. We fail to discover any prejudical error in the admission of such testimony. The record discloses that Olsen was first sworn as a witness, and testified that he took and correctly transcribed defendant's testimony on such prior trial, and he was asked and permitted to state the exact testimony of appellant upon such trial, and to do so it was necessary to refresh his memory by referring to such testimony as transcribed by him. This was eminently proper and it is apparent that in no other manner would it be possible for him to narrate such testimony exactly as given on the former trial. This testimony was clearly competent and very relevant and material, as it tended to prove a prior admission by defendant of the facts thus testified to by him. Proof of such admissions was undoubtedly proper. Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312; People v. Mitchell, 94 Cal. 550, 29 Pac. 1106; People v. Butler et al., 111 Mich. 483, 69 N. W. 734; State v. Hopkins, 13 Wash. 5, 42 Pac. 627; Com. v. Reynolds, 122

Mass., 454; State v. Carroll, 85 Iowa, 1, 51 N. W. 1159; People v. Gallagher 75 Mich. 512, 42 N. W. 1063; 1 Bishop's New Crim, Pro., section 1255; 3 Enc. Evidence (Camp) page 340, and cases cited; 1 Enc. Evidence 482, 483, 484, 485; 2 Wigmore on Evidence, sections 1048-1051; 1 Elliott on Evidence sections 238, 239 and cases cited. Counsel for appellant cites and relies upon the cases of State v. Foulk, 57 Kan. 255, 45 Pac. 603, Cerrusite Min. Co. v. Steele, 18 Colo., App. 216, 70 Pac. 1091, Smith v. State, 42 Neb. 356, 60 N. W. 585, and Jordan v. Howe, 4 Neb (Unoff) 667 N. W. 853 in support of his contention that such testimony was inadmissible; but, clearly, none of these cases are in point. They either involve rulings permitting similar proof of the former testimony of mere witnesses, not parties to the action, or were cases in which a certified transcript of the reporter's notes was offered in evidence as independent proof. Of course, this would be prejudicial error. The distinction between these cases and the case at bar is at once manifest.

5. But one other point requires consideration. It is contended that the evidence is insufficient to support the verdict, because, as alleged, the state failed to prove that the abortion was not necessary to preserve the life of this woman. This is the sole attack upon the verdict in so far as the sufficiency of the evidence is concerned. By the great weight of authority the state must both allege and prove such negative; but the decisions of the various courts which have had occasion to pass on the question are in irreconcilable conflict as to whether, in the absence of testimony to the contrary, the state is required to affirmatively establish such negative by direct proof, 1 Enc. of Evidence, page 56, and cases cited; 4 Elliott on Evidence, section 2771; Bishop on Statutory Crime (3d Ed.) section 762 and cases cited. Mr. Bishop, in speaking on the subject, says: "Under a statute which makes it an element of the offense that the abortion was not necessary, some courts hold that, though this want of necessity must be averred in the indictment, it need not be proved; but the burden is on the defendant to show a necessity. This is a sort of question on which judicial opinions differ." In the following cases it was held that the presumption obtains that it was not necessary that the abortion should be procured in order to preserve the life of the female, and that such presumption, in the absence of proof rebutting the same, aids the state in its proof by making out a prima facie case; State v. Lee, 69 Conn., 186, 37 Atl. 75; State v. Schuerman, 70 Mo. App. 518; 1 Cyc. p. 188. See, also, Hatchard

v. State, 79 Wis., 357, 48 N. W. 380. The following cases are to the contrary: State v. Clements, 15 Or. 237, 14 Pac. 410; State v. Aiken, 109 Iowa, 643, 80 N. W. 1073.

Under the record in this case we are not required to adopt either rule, as a consideration of the testimony serves to convince us that, without the aid of such presumption, the state has sufficiently established at least a prima facie case on this issue. The evidence establishes beyond any reasonable doubt the following facts: At the time the abortion was committed on her, Ida Wagner was a single person only 22 years of age, and was a strong, healthy, working girl. Prior thereto she had never had any ailments. For about ten months prior thereto defendant had kept company with and had promised to marry her. They repeatedly, since June, 1905, had sexual intercourse together, which resulted in her pregnancy, and defendant, who was a physician, administered to her drugs and medicines for the purpose of procuring her miscarriage, and on two separate occasions used an instrument in and upon her by inserting the same into her womb with the like object and intent. She testified that he never informed her until after the abortion had taken place what his purpose was in administering medicine and in performing the operations, and he never told her that an abortion was necessary to preserve her life; nor is there a scintilla of evidence tending to show such to be a fact. After the abortive agencies had taken effect, he left her alone in her room unattended, in a semiconscious condition, apparently attempting to keep such abortion a secret, and leaving this woman to take care of herself as best she could. When she thereafter found in her bed, in a bloody condition, portions of a partially matured child, he first explained to her the full import of the transaction. Defendant admitted to the witness Warner that he had had sexual intercourse with this woman, and that she was pregnant as a result thereof, and also that he had promised to marry her, but could not do so, giving as a reason that he did not love her. These facts, as well as all the other testimony and circumstances, furnish an adequate motive for his criminal conduct, and, to the extent that they furnish such motive, they also tend to disprove the necessity for procuring such abortion in order to preserve the woman's life. The circumstances all point to the conclusion that what defendant did was not so much to save the girl's life, but rather to shield himself from the resulting obligations consequent

upon his illicit relations with her. That circumstantial evidence is competent to prove the absence of a necessity for the abortion in order to preserve the woman's life is amply supported by authority. 1 Cyc. p. 190, citing Howard v. People, 185 Ill. 552, 57 N. E. 441; State v. Aiken, 109 Iowa, 643, 80 N. W. 1073; Bradford v. People, 20 Hun. (N. Y.) 309.

We believe no reported case can be found holding that, under similar facts to those in the case at bar, the state has not established at least a prima facie case on this issue. It will be found that in most, if not all, the cases holding that the presumption that it was not necessary to abort the woman in order to save her life is not sufficient to establish a prima facie case on such negative issue in favor of the state, that there was no such strong circumstantial evidence tending to prove such negative as the record in this case discloses, but such presumption was relied on practically alone to establish such negative fact. This is especially true of the case of State v. Aiken, 109 Iowa, 643, 80 N. W. 1073, in which, among other things, the court said: "All that is disclosed by the evidence on this point is that the woman on whom the operation was performed went with her mother to the office of the defendant, who is a doctor, and requested her to perform an abortion. The woman was advanced in pregnancy from five to six months, and the operation was successfully performed. There is no evidence of illicit intercourse, no showing as to whether she was married or unmarried, and nothing to indicate the condition of her health, except that she walked to the office of defendant two or three times. Surely this does not prove beyond a reasonable doubt that the miscarriage was necessary to save the life of the mother. And we are of the opinion that it does not make out even a prima facie case."

It can be said of the testimony in the case at bar, as was said by the Wisconsin court in Hatchard v. State, supra: "The irresistible inference from the testimony is that it was not necessary to destroy the child to preserve the life of the mother."

Finding no prejudicial error in the record, the order appealed from is affirmed.

MORGAN, C. J., not participating. SPALDING and CARMODY, JJ., concur.

ELLSWORTH, J. (dissenting). I dissent from the holdings of the majority of this court upon the two points last considered in their

opinion, and believe that error of the district court appears upon the record of a nature so serious and prejudicial to the rights of the defendant as to require the judgment of conviction in this case to be reversed and a new trial ordered.

A fair consideration of the testimony of the witness Olsen, as received upon the trial, discloses a disregard of elementary rules governing the introduction of evidence, with resultant prejudice to the rights of the defendant so great as of itself to warrant the reversal by this court of the judgment rendered. In a criminal prosecution of the gravity of that presented by this appeal, irregularities that would not be tolerated even in an action tried under the more flexible and elastic principles of civil procedure should not be treated as of little moment. The witness Olsen testified, in effect: That he was the official stenographer of the district court, and had taken in shorthand the testimony of the defendant, Longstreth, in a case in which the prosecutrix, Ida Wagner, was plaintiff, and said Longstreth defendant, tried in the district court at a former term; that he had his shorthand notes with him, and by refering to those notes could give Longstreth's testimony in that action; that he had correctly transcribed the testimony of Longstreth, and had heard it all; but that he could not give all the testimony of Longstreth independent of his notes. He thereupon produced his shorthand notes, and the state's attorney, without offering the same or a certified transcript thereof in evidence, asked the witness: "Q. I will ask you to refer to your notes in reference to said case tried at said time and place and read therefrom the testimony of Dr. W. E. Longstreth given in relation to his treatment of Ida Wagner on or about the 29th day of March, 1906, and especially with reference to his having performed an operation on her, and with reference to his having relieved her of a fetus," etc. Counsel for defendant objected to the question on the ground that the evidence called for was incompetent, irrelevant and immaterial, which objection the court overruled, and the witness then proceeded to read from his notes a mass of matter, proceeding by question and answer, at length so great as to cover two pages or more of the printed record, all of which referred to conversations and transactions between the defendant and prosecutrix during a period of several months, including the particulars of certain medical treatment of the prosecutrix, and the assertion that he had during the month of March,

1906, "relieved her of a fetal mass of the uterus." That the evidence thus introduced was of a character highly prejudicial to the defendant cannot be questioned, and the only theory upon which it could be held admissible was that it was in form and substance clearly competent and relevant under well-settled rules of evidence.

The stenographer of a district court of this state is not a public agent, and his shorthand minutes of a civil trial, however authenticated, do not become a public record. The district court, in criminal trials, may order, upon a certain showing, the preparation and certification of a transcript of these notes, and the filing thereof in the office of the clerk of the district court. This transcript is so filed and preserved, however, not for the benefit or information of the public generally, but only for that of the parties to the action or proceeding in which the notes were taken. "The information which they impart is not intrusted to the public, but aside from the prosecuting attorney, is confined to the parties directly interested." Smith v. State, 42 Neb. 356, 60 N. W. 585. It is therefore apparent beyond all question that neither under rules making competent a public record, or on any other principle, can the shorthand notes or a certified or authenticated transcript of the same be received as original evidence of any facts narrated therein. The majority opinion recognized and announced the true rule in this regard in the words: "If a certified transcript of the reporter's notes were offered in evidence as independent proof, of course, this would be prejudicial error." If neither the shorthand notes themselves nor a certified or authenticated transcript could be received or considered as independent proof of any fact, I cannot conceive or understand how these notes could be read before the jury by the reporter, or any one else, and their contents received as competent evidence. To allow this to be done is to so misapply a proper and salutary rule of evidence as to permit, in most objectionable form, the very mischief it is intended to prevent; nor is it clear how Olsen's statements preliminary to the reading of his notes in any manner rendered this method of proof more tolerable. It is possible that in those states in which, by statute, a stenographer's notes are considered a public record, his statements, made under oath that the notes were correctly taken, might be considered a sufficient authentication to warrant his reading them before the jury. Even in such a case, however, a much more certain and satisfactory way of introducing the evidence

would be by the preparation and offer of a certified transcript. This, when properly received, might then be read by the stenographer or by any other person who could read; or it could have been submitted to the jury and taken with them upon their retirement that they might read it themselves. It is conceded, however, that such use of a certified transcript would have been highly prejudicial to the rights of the defendant, and could not have been resorted to under any practice known to the courts of this state.

There is nothing in the record to warrant the assertion that Olsen "was asked and permitted to state the exact testimony of appellant upon such trial, and to do so it was necessary to refresh his memory by referring to such testimony as transcribed by him." This testimony had not been "transcribed" by him at all, and he was not asked to state "the exact testimony of appellant," but simply to read or translate a portion of his notes. Not even by inference can it be claimed that in reading these notes Olsen was stating, according to his best recollection, the exact statements made by the defendant, in his hearing, on the former trial. He had testified that he could not recollect these admissions entire as made by the defendant. It is the theory of counsel for the state that Olsen used the notes simply for the purpose of refreshing his memory; but he was neither asked to state nor stated that he so used them, and there is no basis other than conjecture for believing that he did. The substance of Olsen's testimony as given and received was simply that he had made shorthand notes of testimony given by the defendant upon the former trial, and that by "referring to" or in other words looking at these notes he received certain mental impressions which he translated into words. The superlatively important point of whether these words, when put together, reproduced correctly the admissions claimed to have been made by the defendant, was wholly ignored. Under such a method of proof, the penalties of perjury would not operate as a safeguard to the rights of the defendant against the damaging effect of a variance from the admissions actually made by him on the former trial of the statements read by Olsen from the notes. In translating his notes, Olsen became no more responsible for the truth of the statements read, as a faithful reproduction of the testimony of defendant, than would another witness, with skill to read his notes, who had not even been present at the former trial. Upon any view of his testimony, his statements in reference to

the defendant's admissions lack the positive directness that should characterize the sworn declarations of a witness who gives evidence so damaging against a party accused of crime.

A still more serious question is presented upon the point raised by appellant that the evidence offered by the state is insufficient to sustain a conviction. The case was tried on the theory that the state, in order to warrant a conviction of the defendant, must establish beyond a reasonable doubt three elements of the offense charged, to-wit: (1) That at the time the offense was committed the prosecutrix was pregnant with child; (2) that the defendant administered to her certain drugs, or used upon her body certain instruments, with intent to procure an abortion; and (3) that such abortion was not necessary to preserve the life of the prosecutrix. The district judge gave an instruction in these words: "The burden of proof rests upon the state to show that the production of the miscarriage, if any, was not necessary for the purpose of saving the mother's life, and this must be done beyond a reasonable doubt to your satisfaction. Such burden remains to the state, although no evidence is introduced to the contrary." There is no contention that this instruction was more favorable to the defendant than he was entitled to receive. On the other hand, it is apparent that throughout the trial the state assumed the burden of proving beyond a reasonable doubt, as an essential element of the offense charged, that the operation resulting in abortion was not necessary to save the life of the woman upon which it was performed. There is no doubt that in this instruction the district court announced the true rule of law in this behalf. Abortion in this state is purely a statutory crime, and prosecutions therefore must be brought strictly within the terms of the statute. The fact that the operation producing it is not necessary to save the life of the mother is an element as necessary to the proof of the offense as that the woman is pregnant, or that a miscarriage was produced by or through the procurement of the defendant. Each of these points, as every material element of a criminal charge, must be proved to the satisfaction of the jury beyond a reasonable doubt.

It appears from the evidence in this case that the defendant, Longstreth, at the time the crime is alleged to have been committed, was a physician in regular practice. It also appears that the prosecutrix stood in the relation of patient to him, and that he was treating her, at her request and with her consent, for some bodily

ailment. Therefore, in addition to the general presumption of innocence of the crime charged against him, there arises in his favor the further presumption that, if in his treatment of the woman, he caused an abortion, it was done in an honest effort on his part, as her physician, to preserve her life. "The experience of mankind shows that cases have often arisen in which such treatment has necessarily been resorted to, and in the absence of other proof the law, in its benignity, would presume that it was performed in good faith ,and for a legitimate purpose." State v. Clements, 15 Or. 237, 14 Pac. 410. I do not think that it is seriously urged that these two strong presumptions can be overborne by the counter-presumption that, the woman being in apparent health shortly before the time the abortion was performed, the operation was not necessary to preserve her life.

In the opinion of my associates the record does not present an entire absence of proof to support the allegation of the information that the operation was not necessary to preserve the life of the woman; and a number of facts are referred to, as, in their opinion, supplying prima facie proof upon this point. After the most careful examination of the entire record, however, with particular attention to the facts referred to in the majority opinion, I fail to find even the slightest evidence upon this point. In my view, unless proof of the fact may be supplied by presumption, there is an entire absence of proof. I cannot believe that it will ever be accepted as a holding of this court that a material element in a serious criminal charge can be supplied by presumption. If there was even slight evidence upon this point, or in fact any competent evidence on which a verdict of conviction may rest, I would feel that the conviction should be sustained as upon other material elements; the evidence whereof, while not wholly satisfying, being, I think, sufficient to sustain the verdict. But on the point that the operation was necessary to preserve the life of the woman, there is an utter and complete absence of evidence. The facts referred to in the majority opinion cannot, under the utmost stretch of legitimate construction, be said to even touch upon this point. The fact that the woman was unmarried, and that defendant had held illicit intercourse with her, may furnish evidence of a motive both on his part and hers for procuring an abortion. But that there may have been some evidence of a motive for causing an abortion does not supply even for slightest proof that such abortion was

not necessary to save the life of the woman; while in support of the contrary proposition stands the double presumption that the defendant was not wilfully guilty of a crime, and that his professional acts were directed to a legitimate purpose.

It cannot be said that knowledge of the facts constituting this element of the offense are peculiarly within the mind of the defendant. The state, by means that will readily suggest themselves to the mind of any skillful attorney, can as readily and as conveniently prove that the operation was not necessary to preserve the life of the woman as it can establish any other element of the offense. "The circumstances attending the procurement of an abortion, tending to prove that it was unnecessary for the purpose of preserving the life of the mother, ordinarily can be shown quite as easily on the part of the prosecution as it can be proved by the defendant that it was necessary for that purpose." Moody v. State, 17 Ohio St. 110. The supreme Court of Iowa has held that evidence much stronger upon the point in question than that introduced in this case "does not make out a prima facie case" of statutory abortion. Under the evidence in case the prosecutrix walked repeatedly to the office of the physician in order to have the operation performed. The court says: "It is a matter of common knowledge that many persons walk to hospitals and to offices to have operations performed that are necessary to save life. Every presumption is in favor of defendant's innocence, and, if the facts shown are capable of explanation on any reasonable hypothesis in favor of innocence, there can be no rightful conviction." State v. Aitken, 109 Iowa, 643, 80 N. W. 1073. In this case the prosecutrix, at the time the abortion is supposed to have been performed, was confined to her bed and sent a friend to the physician, asking him to come to her room. The fact that the person performing the operation in the Iowa case might not have had the same motive for procuring an abortion as the defendant does not, in my opinion of this case, differentiate it in any degree whatever upon the point of the necessity for the operation. The ruling in the Iowa case is supported by a very respectable array of authority. State v. Schuerman, 70 Mo. App. 518; State v. Clements, 15 Or. 237, 14 Pac. 410; State v. Moody, 17 Ohio. St. 110. When, therefore, it is established "that by the great weight of authority the state must both allege and prove such negative," as stated in the major-

ity opinion, I cannot understand how in this case it can be said to have relieved itself of that burden. .

I do not feel, in view of the serious irregularities occurring upon this trial, that the proof necessary to conviction should receive support from any "irresistible inference from the testimony" on the part of this court, in substantiation of any or all of the elements of the offense charged. The crucial question that should be given the undivided attention of this court is whether or not the defendant has been accorded his constitutional right of a fair and impartial trial; and, if he has not, a new trial should be ordered even though incidentally, in the course of the investigation, each member of this court has received impressions so strong as to satisfy his mind of defendant's guilt. Such fair and impartial trial, according to the rules of criminal procedure, in my mind the defendant has not had; and in this view of the case it would be idle to theorize upon the point of the abstract justice of his conviction.

(121 N. .W 1114.)

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STATE OF NORTH DAKOTA EX. REL. DON MCDONALD v. H. L. HOLMES, AUDITOR OF THE STATE OF NORTH DAKOTA.

Opinion filed December 28, 1909.

**Preliminary Questions — Lack of Merit.**

1. Certain preliminary question *held* without merit.

**Mandamus — Remedy at Law.**

2. The more adequate and speedy remedy which a suitor must possess to defeat his right to a mandamus is a legal remedy rather than a physical one.

**Appropriations — Limitations.**

3. It is essential, to constitute a legislative "appropriation," that the act of the legislature, attempting to make such an appropriation, limit the amount of the state's funds which may be applied to the purpose contemplated by the act, as otherwise the officials of the state would have no means of determining the amount of tax to be levied to meet the demands of claimants, and the revenues of the state might be exhausted without the legislature intending to appropriate them wholly to the subjects covered by such acts.

**Constitutional Law — Appropriations — General and Specific Appropriation.**

4. The last sentence of section 62 of the Constitution, which reads: "All other appropriations shall be made by special bills, each em-

bracing but one subject"—is equivalent to requiring a specific appropriation for each subject other than those embraced in the general appropriation bill.

**Constitutional Law — Appropriations.**

5. To constitute an appropriation under the provisions of the Constitution of this state, quoted in the opinion, an act must set apart from the public revenue a definite sum of money for the specific object in such a manner that the state officials are authorized to use the amount so set apart, and no more, for that object.

**Appropriations — Limitation of Amount.**

6. Chapter 139, page 185, Laws 1903, providing for the payment of a reward to persons who shall secure the arrest and conviction of violators of chapter 63 of the Penal Code of 1899, known as the "Prohibition Law," while creating an obligation on the part of the state to pay the rewards earned under the terms of that chapter, is inadequate as an appropriation, and does not authorize the auditor to draw his warrant on the state treasurer for the sums so earned, for the reason that the act does not limit the total amount which may be paid as such rewards in any year.

Appeal from District Court, Grand Forks county; *Templeton*, J.

Mandamus by the State, on relation of Don McDonald, against H. L. Holmes, as State Auditor. From a judgment awarding a peremptory writ, defendant appeals.

Reversed.

*Thomas F. McCue* and *Andrew Miller*, Attorneys General, and *Alfred Zuger* and *C. L. Young*, Assistant Attorneys General, for appellant.

*J. B. Wineman*, for respondent.

SPALDING, J. This is an appeal from an order and judgment of the district court of Grand Forks county, directing the auditor of the state of North Dakota to forthwith attest, issue and deliver a warrant in the sum of $100 to the treasurer of the state, to be by such treasurer credited to the county of Grand Forks in his settlement with the treasurer of that county, as provided by chapter 139, page 185, of the Laws of 1903. An alternative writ of mandamus was first issued by that court, and to it the appellant demurred. The judgment awarding the peremptory writ of mandamus resulted from an order of the district court overruling such demurrer. The first objection is that, inasmuch as the state auditor's official residence is in Bismarck, in the Sixth judicial district, the district court of the First judicial district had no jurisdiction

to mandamus that official. The record fails to disclose any objection in district court, and no demand was made that the proceeding be transferred to the district court of Burleigh county in the Sixth district, and the subject, while pointed out, is not discussed in the brief of the appellant. It is objected in the second place that McDonald, the county treasurer of Grand Forks county, on whose relation the proceeding was instituted, is not shown to have such an interest in the proceeding as to authorize him to bring the same, either in person or in the name of the state. The treasurer being liable to the county on his bond for the proper accounting for the funds belonging to the county, and having paid the money from the treasury, is beneficially interested, and may properly act as relator. No authorities are cited by appellant on this point. It is next contended that the relator had a more adequate and speedy remedy by means of withholding the money so paid out in his settlement with the state treasurer. It is self-evident that, if he had no right to withhold it, the ability or opportunity to do so does not furnish a remedy which can be considered in a legal proceeding. The remedy, in the eyes of the law, which defeats the right to mandamus, is a legal remedy rather than a physical one.

The main contention, as we are advised, in the district court, and the one on which its judgment was rendered, was to the effect that chapter 139, p. 185, Laws 1903, had been repealed by chapter 187, p. 303, Laws 1907, known as the "Temperance Commissioner Law." This contention is abandoned in this court, and, were this the only question involved, the order and judgment of the district court would undoubtedly be affirmed. Other questions have been discussed here of such a nature that, even though not called to the attention of the trial court, they must be considered by this court. Chapter 139, p. 185, Laws 1903, omitting the title, reads as follows:

"1. The sum of fifty dollars shall be paid to any person or persons for the arrest and conviction of each and every person who violates any of the provisions of chapter 63 of the Penal Code of the state of North Dakota, which amount shall be paid to the person or persons entitled thereto, on the presentation of a certificate issued as hereinafter provided from the state's attorney of the county where such conviction was had setting forth the object for which the same was issued to the treasurer of the proper county; and said treasurer shall take a receipt for the same, setting forth

the object for which it was paid, which certificate and receipt shall be forwarded to the state auditor, who shall, at the next settlement, place a warrant for such amount in the hands of the state treasurer to be credited on the settlement with said county treasurer.

"2. Any person or persons claiming such reward shall, within twenty days after the conviction of the criminal, apply to the state's attorney of the county wherein such conviction was had, who shall thereupon issue to such claimant the certificate provided for in section 1 hereof."

Section 62 of the Constitution reads: "The general appropriation bill shall embrace nothing but appropriations for the expense of the executive, legislative and judicial departments of the state, the interest on the public debt and for public schools. All other appropriation shall be made by special bills, each embracing but one subject." Section 186 of the Constitution provides that no money shall be paid out of the state treasury except on appropriation by law and on warrant drawn by the proper officer. The Constitution (section 174) requires the legislature to provide for raising revenue sufficient to defray the expenses of the state for each year, not to exceed in any one year four mills on the dollar of the assessed valuation of the taxable property in the state, and also a sufficient sum to pay the interest on the state debt.

The important question to be determined on this appeal is, Does chapter 139, page 185, Laws 1903, constitute a valid appropriation of the revenues of the state? Courts have furnished numerous and varying definitions of the word "appropriation," when applied to a legislative act. But it is clear to us that no legal definition of the word can be given applicable to all states; that the provisions of the constitution of the state whose law is being construed must be taken into consideration. Under the terms of some constitutions provisions made by the legislature for the payment of obligations of the state may be appropriations which, under the terms of others, would be inadequate, and would furnish no warrant for the payment of money by the state officials. Section 62 seems to contemplate that each legislative assembly shall, in one act, make appropriations for the various purposes or subjects enumerated therein, and that it shall be known as the "General Appropriation Act," and that out of the appropriations made by that act the disbursements coming within the terms of section 62, or belong-

ing to the departments, or intended for the purposes therein named, shall be paid. To our surprise we find, on an examination of the appropriation acts since statehood, that no such law has been enacted, although there are continuing appropriations for many of the objects and purposes covered by that provision, such as salaries of state officers and the like. That section also seems to contemplate a separate act appropriating money specifically for each purpose and object not included in its terms. We find, from examining the authorities, a difference in the corresponding provisions of other constitutions, some using the word "specific" in reference to the payment of money on appropriations requiring a specific appropriation. We are of the opinion that the last sentence of section 62, requiring all other appropriations to be by special bills embracing but one subject, is equivalent to the use of the word "specific." Chapter 139, page 185, Laws 1903, unquestionably comes within the terms of the latter clause of section 62 if it contains all the elements necessary to constitute an appropriation, keeping in view the limitations of the various sections quoted from the constitution. It sets apart the sum of $50 in each case, for the purpose of paying the reward offered in that case or to that person, and provides for making the payment by means of and through the settlement between the respective county treasurers and the state treasurer, but it lacks one element, which, in the light of the provisions referred to, is necessary to constitute or make a valid appropriation. The act nowhere limits the amount which may be drawn from the state treasury in payment of such rewards. It fixes the amount of each reward, but, as it is self-evident that the number of rewards to which persons may be entitled is unknown, the amount which may be demanded of the treasury for that purpose cannot be ascertained and provided for. The revenues of the state are limited by section 174 to four mills on the dollar. The debt limit is fixed by the constitution at $200.000. If the chapter in question is adequate as an appropriation, and as there is no limit to the number of such acts the legislature may pass, or the number of rewards or similar demands which may be made on the treasury cannot be foretold, the entire revenues of the state might readily be exhausted in their payment. The amount accruing to claimants may, and naturally will, far exceed the anticipations of the legislators, and no check be furnished upon the officials or protection given the treasury. The purpose of limit-

ing by law the amount which may be expended for a definite purpose, and requiring that it be stated in the act relating to the particular subject, is to enable the Legislature and state officials to approximate in advance the total amount of appropriations made so they may be kept within the power of the state to pay. Under the provisions of our Constitution we are forced to conclude, particularly to prevent the practical nullification of section 174 of the Constitution, that a legislative act, in order to constitute an appropriation authorizing the payment of funds or the drawing of a warrant, must fix a limit on the amount which may be paid out under the subject covered by the act. Had the Legislature used language in addition to the terms of chaper 139, p. 185, Laws 1903, which placed a limitation upon the total amount which might be paid to claimants as rewards, the objection would doubtless be obviated, but, as it stands, chapter 139, p. 185, Laws 1903, while creating an obligation on the part of the state to pay, does not authorize payment. The act does not set apart any definite or ascertainable sum for the purpose of paying these rewards, nor fix any limit above which payments cannot be made. From a careful consideration of the authorities on the subject and of the terms of our Constitution, we think an appropriation, in the sense that that word is used in our Constitution, is the setting apart from the public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for that object. Many authorities are found on the subject of "appropriations," but only a few of them are applicable to the question here being considered. A great number relate to the subject of salaries of state officials where fixed either by the Legislature or in the Constitution. Generally, the fixing of a salary of a state official is held to be an appropriation, but authorities on that subject do not meet the question before us. Section 22 of article 4 of the Constitution of California is like section 186 of the Constitution of this state. The Legislature of California passed an act giving a bounty of $5 out of the general fund of the treasury for each coyote killed or destroyed by any person. St. 1891, p. 280, c. 198. The act contained no limit to the number of bounties which might be applied for or paid, nor upon the amount of money which might be expended in payment of such bounties. In Ingram v. Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 191, 46 Am. St. Rep. 221,

this act was passed upon by the Supreme Court of California, which held that it did not constitute an appropriation. That court uses this language: "The fund from which the bounties are to be paid is explicitly designated, but the amount of money in the general fund devoted to the payment of these bounties is not specified. The language lacks the first essential to an effective appropriation. There is no designated amount, and, consequently, there is no specific appropriation to be exhausted, unless it can be said that the whole general fund is set aside as a specific appropriation to the end in view—a proposition not seriously to be considered." In Institute of Education v. Henderson, 18 Colo., 105, 31 Pac. 714, 18 L. R. A. 398, the Supreme Court of that state says: "To permit the disbursement of an indefinite amount of money as these bounty acts contemplate is to introduce an element of uncertainty into these calculations that will seriously embarrass both the Legislature and the departments in giving effect to our state Constitution with relation to the levying of taxes to meet appropriations. If the Legislature desires to pay bounties it may do so for all proper purposes by making the necessary appropriations therefor." The latter case related to the validity of bounty acts which contained no provision limiting the amount which might be expended under them. The court held that the limit of appropriations for any year being fixed by the amount of revenue which might be raised by taxation prevented this act from being operative. In State v. Moore, 50 Neb. 88, 69 N. W. 373, 61 Am. St. Rep. 538, the court had under consideration an act of the Legislature of that state providing for the payment of a bounty to the manufacturers of beet and other sugar, in the sum of five-eighths of one cent per pound. The act provided that when any claim arose thereunder and was filed and verified, and approved by the Secretary of State as therein provided, it should be certified to the Auditor of the State, who should draw a warrant upon the Treasurer for the amount due thereon, payable to the parties named. Section 22, art. 3, of the Constitution of that State, provides that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon. The court held that such an act, if held to be an appropriation, might in itself appropriate more than the entire revenue of the state, and that it could not be held to be an appropriation because not certain and limited in

its amount. That court made a careful investigation of authorities, and, after reviewing them, it says: "In no case, however, which we have been able to discover under any constitutional provision, has it been held that an appropriation is valid when it is uncertain in its amount, and that uncertainty arises with regard to the extent of the demands or claims which the recipients of the fund may present against it, on the other hand, in nearly all the cases cited, and in many more which might be cited * * * certainty in amount is treated as an essential requisite of a valid appropriation." We think the cases from which we have quoted are directly in point, and state sound reasons for holding that, in the absence of an ascertainable limit to the amount of money which may be devoted to the object contemplated, no appropriation is made. We shall not take the time to review other authorities or the history and the principles underlying the subject of appropriations. The history of the subject and of the various restrictions upon legislative bodies, provided for the protection of the public, is an extremely interesting study. Some of the authorities cited briefly outline it, and a learned discussion will be found in Ristine v. State, 20 Ind. 328. A distinction exists between an appropriation and a fund. The state does not maintain that it is necessary to set apart or designate a fund to make the act in question operative, if it is necessary to place a limit upon the amount which may be paid out of the general fund under the act. It only contends that, when no such limit is placed, a fund must be named from which to make the payments; hence, we do not consider the question of the designation of the fund, which at one time was suggested, as necessary.

The order and judgment of the district court are reversed. All concur.

(123 N. W. 884.)

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## CITY OF GRAND FORKS v. B. O. PAULSNESS.

Opinion filed December 2, 1909.

**Municipal Corporations — Streets — Injuries — Indemnity by Wrongdoer.**

1. A party who for his own benefit or convenience, or under license from a city of this state, places upon a public thoroughfare a structure, which from its nature or from a failure to properly guard it or keep it in repair, is or may become dangerous, is under an implied contract with the city that while such structure is main-

tained upon the street he will exercise ordinary care to protect the public from danger and the city from loss; and in case of injury to one using the street by reason of such structure or the manner in which it is kept, the party who thus rendered the street unsafe will be regarded as the real wrongdoer, and if the city sustains loss through payment of damages to the person injured, he will be held to be an indemnitor of the city.

**Municipal Corporations — Conclusiveness of Judgment Against Indemnitee.**

2. In a case where a city, having paid a judgment obtained by a person injured upon its streets in an action predicated upon an alleged failure of the city to keep its streets in safe condition, brings suit against the party who under license express or implied from the city placed on the street the structure or obstruction by which the injury was caused, the defendant, if he has been given reasonable notice and opportunity to defend upon the trial of the original action is concluded as to all matters of fact necessary to establish a liability from the city to the person injured, and as to any matter which might have been urged as a defense by the city against such liability. Unless, however, it appears that evidence showing the liability of the alleged indemnitor was necessarily involved in the determination of the original action and passed upon by the trial court in rendering judgment, the defendant is not concluded upon the point that notwithstanding the liability of the city he was not at fault and has not failed in any duty which he owed to the city or to the person injured, and may plead and show such facts as a defense upon the trial.

**Same — Street Obstruction by Private Parties — Extent of Liability.**

3. A person placing a structure upon a street for his own benefit or convenience, under his implied contract with the city to protect the public from danger and the city from loss, is required to maintain such structure in safe condition, and to supervise the same for the purpose of keeping it in repair and free from any changes or additions which he in the exercise of reasonable care has cause to anticipate will be made or placed there. Such supervision does not, however, extend to changes or additions which the original structure from its nature or the manner of its construction does not invite or induce or which were not within the reasonable contemplation of the party at the time he placed it there.

**Negligence — Proximate Cause — Question for Court.**

4. In an action in negligence the question whether the alleged fault of the defendant, or failure on his part to perform a legal duty, was the proximate cause of the injury, is one of law for the court, to be determined upon the material facts presented, with such inferences as may be properly drawn therefrom.

**Same — Street Obstruction — Indemnity — Proximate Cause.**

5. In the state of fact assumed to exist, a party under license from a city placed upon a principal street a one-inch water pipe and fastened down to the pavement on either side of it a two-inch plank for the purpose of protecting the pipe from injury and from being shifted from its place upon the street. Afterward, without his knowledge, by some unknown agency and for a purpose that is not shown, manure was placed upon the pipe and upon the planks placed to guard it, and a third plank was placed on top of the manure. This third plank was not attached either to the pavement of the street or to the planks placed to guard the water pipe, but was loose and movable. It was so placed upon the manure that pedestrians stepping on one end at times caused the other end to be raised a distance of from five to ten inches from the street. While in this position a person using the street, in stepping over the loose plank caught his foot upon it and was thrown violently upon the pavement, sustaining injuries for which he brought an action in damages against the city and recovered a judgment which the city paid. The city then proceeded against the party placing the water pipe and the planks guarding it on the street, as an indemnitor, alleging that the accident resulted from a failure on his part to keep safe the structure so placed by him.

*Held*, that the party placing the water pipe and the two planks to guard it could not be said, in the exercise of ordinary care, to have in contemplation that some other person would change and add to the structure placed and maintained by him by putting manure on top of it and placing a loose plank on top of the manure that would rise to such height from the street when stepped upon as to cause an accident such as this, and that the accident did not result proximately from the act of defendant in placing the original structure or the failure to perform any duty imposed upon him thereby to keep the street safe.

Appeal from District Court, Grand Forks county; *Templeton*, J.

Action by the City of Grand Forks against B. O. Paulsness. Judgment for plaintiff, and defendant appeals.

Reversed and dismissed.

*George A. Bangs*, for appellant.

Although notified to defend the suit against the city, indemnitor in an action against him, may show his non-liability. 2 Dillon on Mun. Corp. (4th Ed.) section 1035; 5 Thompson on Neg., section 6362; Robbins v. Chicago, 4 Wallace, 657; City v. Worthington, 10 Gray, 496; Faith v Atlanta, 78 Ga. 779, 4 S. E. 3; City v. Detroit L. & N. R. Co., 89 N. W. 54; Rochester v. Montgomery, 72 N. Y. 65.

Where the city's officers direct the indemnitor's men in placing the obstructions in the street, indemnitor is not liable. 1 Cooley on

Torts, page 254; Buffalo v. Holloway, 7 N. Y. 493; Silver v. Nerdlinger, 30 Ind. 53; Fulton v. Tucker, 3 Hun. 529; Rochester v. Campbell, 123 N. Y. 405, 25 N. E. 937; Moore v. Gadsden, 93 N. Y. 12.

Where the indemnitor placed obstructions in the streets whether such act was negligent or not, if a third party added thereto something that directly caused the injury, the former is not liable. Sherman and Redfield on Neg. (5th Ed.) section 25; Leeds v. New York Telephone Co., 178 N. Y. 118, 70 N. E. 219; In re Mich., 133 Fed. 577; Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325; Kinsel v. Andrews, 114 Ga. 390, 40 S. E. 300; Fowles v. Briggs, 74 N. W. 1046; Claypool v. Wigmore, 34 Ind. App. 35; M. P. R. Co. v. Columbia, 65 Kan. 390, 69 Pac. 338; Marsh v. Giles, 60 Atl. 315; Co. v. Hodges, 70 S. W. 616, 97 A. S. R. 844; Winfree v. Jones, 104 Va. 39, 51 S. E. 153; Land v. So. Ry., 45 S. E. 203; Saxton v. Co., 98 Mo. App. 494, 72 S. W. 717; Daniels v. New York, N. H. & H. R. Co., 183 Mass. 393, 67 N. E. 424; McGahan v. Indianapolis Natural Gas Co., 140 Ind. 335, 37 N. E. 601, 29 L. R. A. 355, 49 A. S. R. 199; Co. v. Admr., 80 S. W. 782; T. & P. R. Co. v. Kelly, 78 S. W. 372; Watters y. Waterloo, 126 Iowa, 199, 101 N. W. 871.

*Frank B. Feetham*, for respondent.

Where indemnitor is called upon to defend the action against the city, he is bound by the result therein. Robbins v. Chicago, 18 L. Ed. (U. S.) 427; Lovejoy v. Murray, 18 L. Ed (U. S.) 129.

One who by license, express or implied, from a city, obstructs its streets, is yet bound to prevent injuries to the users of such street. 15 Am. & Eng. Enc. Law, 435; Village of Seneca Falls v. Zalinski, 15 Hun. 573; Village of Port Jarvis v. First National Bank, 96 N. Y. 550; Mairs v. Manhattan Real Estate Association, 89 N. Y. 503; Nelson v. Godfrey, 12 Ill. 23; Sexton v. Zett, 44 N. Y. 430; Creed v. Hartmann, 29 N. Y. 591.

If the original obstruction was safe, and was rendered unsafe by a third person, nevertheless indemnitor who was bound to keep such obstruction safe, is liable for the indemnification of the city. Washington Gas Light Co. v. District of Columbia, 16 L. Ed. 564; 16 Sup. Ct. Rep. 564; Chicago v. Robbins, 4 Wallace (U. S.) 657.

ELLSWORTH, J. The state of fact out of which the cause of action involved in this appeal arises may be stated as follows:

In the months of November and December, 1904, the city of Grand Forks owned and operated a public waterworks plant, and one of the mains thereof extended along De Mers avenue, one of the principal streets of the city, to a point thirty feet or more from the west end of a bridge crossing the Red River of the North to the city of East Grand Forks located on the eastern bank. At this point there was connected with the water main a two-inch pipe intended to provide water service to consumers in East Grand Forks, which pipe, from its junction with the main, extended underground below the western approach to the bridge, and thence to the eastern bank beneath the bed of the river. That part of the west bank of the river under which this service pipe extended was composed of soil, a peculiar quality of which caused it to be constantly sliding or moving toward the bed of the river, and as a result there were frequent breaks in that portion of the pipe which passed beneath it. Such a break occurred during the month of November, 1904, and was the cause of a considerable wastage of water passing through the pipe. The defendant, Paulsness, who was a plumber, holding a license from the city of Grand Forks for that purpose, was notified of this break in the pipe and authorized to take steps for its repair. In order that he might do this, it was necessary to either entirely shut off the water beyond the end of the main in De Mers avenue near the west end of the bridge or to provide other means of conveying it from that point to a point beyond the break in the service pipe to East Grand Forks. This connection was finally made by inserting into the main under the western approach to the bridge a one-inch pipe, leading this pipe up through a manhole in De Mers avenue above the end of the main, and thence over the surface of the street to the side where it passed down the river bank and connected with the service pipe at a point east of where the break had occurred. Employes of Paulsness, under the direction of the superintendent of the waterworks of the city of Grand Forks, placed this pipe upon the surface of the street in the manner described and in order to protect it from injury and from being shifted from side to side by the passing of loaded wagons, placed on either side of it a two-inch plank, which planks were securely spiked down to the cedar block pavement of the street. After that time, at a date which is not shown by the record, some person or persons whose identity and purpose are not disclosed, placed some manure

over the planks and the pipe, filling the crevice between and the space at the side, and covering partially the top of the planks. There was also placed above the water pipe upon the manure, at a date that the record shows obscurely, except that it was probably four or five days prior to December 17, 1904, a plank which was not attached either to the other planks already there or to the cedar block pavement of the street. Neither the manure nor the loose plank was a part of the original pipe guard placed there by the defendant, Paulsness. He did not know of the presence of the loose or "fugitive" plank, and it seems to be conceded that there was no useful purpose in connection with the pipe guard that was or could be served by this plank. The footway upon the bridge from Grand Forks to East Grand Forks did not at this time align with the sidewalk on the north side of De Mers avenue, and it was necessary for pedestrians passing from the bridge to this sidewalk to walk over the pavement of the street for a short distance from the west end of the bridge, and to pass across the pipe that in December, 1904, lay on the surface of the street at this point. On the evening of December 17, 1904, one Allman came over the bridge from East Grand Forks and was proceeding over the paved street at its west end to the sidewalk on the north side of De Mers avenue. At that time the pipe extended from the manhole over the surface of the street, across the footway, the two two-inch planks were fastened down on either side of it, the manure was spread over the top of the planks and the loose or "fugitive" plank was lying on top of the manure. As Allman attempted to step over the loose plank, it was raised five or ten inches from the ground by other pedestrians stepping upon the other end of it, and he caught his foot under the plank and was thrown violently upon the pavement, receiving serious injuries. He presented a claim for damages to the city council of Grand Forks alleging that his injuries had resulted from the negligence of the city in providing for the safety of its streets, and his claims being refused, brought action in the circuit court of the United States for the District of North Dakota, against the city of Grand Forks, based upon this claim. On November 13, 1905, one day before the opening of the term of the circuit court of the United States, at which the case brought by Allman would be tried, the city attorney of Grand Forks prepared and served upon the defendant, Paulsness, a notice to which was attached a copy of

the complaint and the answer of the city, in which it was stated, among other things, that "the condition complained of is attributable to and was created by you and your servants and you are hereby notified that the City of Grand Forks holds you responsible therefor, and to indemnify the city of Grand Forks from any and all damages, detriment, costs or expenses it has been or will be put to by reason of said litigation."

On November 23, 1905, the case came on to trial in the circuit court of the United States before a jury, and evidence was introduced both on behalf of the plaintiff, Allman, and of the defendant, city of Grand Forks. The facts shown by the evidence taken are substantially as hereinbefore narrated. The defendant, Paulsness, was a witness; but neither from his own testimony, nor from that of any of the witnesses examined upon the trial does it appear that he placed or was responsible for the placing of the loose plank by which Allman was injured, upon the street, or that he knew it was there adjacent to the planks fastened to the pavement as a guard to the water pipe. The court, at the close of the trial, instructed the jury in substance that whether or not the city of Grand Forks placed or authorized the placing of the loose or fugitive plank upon the street, if it appeared that the plank had been there and its presence rendered the street at that point unsafe, for such period of time that the city by the exercise of reasonable care in the supervision of its streets would have known of it and did not remove it, the city was liable for such damage as plaintiff had sustained. The court submitted to the jury four special findings, which with the answers thereto returned by the jury, are as follows: "(1) How many planks were used in the structure in question when it was put down on November 24, 1904? Ans. Two. (2) Were such planks spiked down to the pavement? Ans. Spiked down. (3) Was the plank which tripped the plaintiff one that was laid November 24, 1904, or one that was subsequently laid? Ans. Subsequent. (4) If you find in answer to question 3 that the plank which tripped plaintiff was placed subsequently to November 24, 1904, for what time previous to the accident had it been continuously at the point of the accident? Ans. We don't know." The jury also returned a general verdict in favor of the plaintiff for $850, for which sum, together with the costs of the action, a judgment was thereupon rendered and entered in Allman's favor. An appeal from this judgment was tak-

en by the city of Grand Forks to the United States circuit court of appeals for the eighth circuit, which on April 27,1907, affirmed the judgment of the circuit court. City of Grand Forks v. Allman, 153 Fed. 532, 83 C. C. A. 554. Thereafter the city of Grand Forks brought this action against the defendant, Paulsness, alleging as its cause of action that defendant wrongfully obstructed De Mers avenue, at a point near the westerly end of the bridge across the Red River of the North by placing upon and across the traveled portion of this street, "an obstruction consisting of a certain water pipe, certain planks, and certain manure and negligently permitted such obstruction to remain in and upon said traveled portion of said street from on or about November 26, 1904, to January 1, 1905." The complaint further alleges the bringing of the action by Allman in the circuit court of the United States and the recovery by him of a judgment, including damages and costs, amounting to $1,028.60, for damages sustained by him by reason of defendant's negligence during the period the street was so obstructed by him, which judgment was appealed to the United State circuit court of appeals at an expense of the further sum of $400, and by said court affirmed; that defendant was duly notified of the bringing of said action and that he might appear and defend the same; and that the city would look to him for reimbursement in the event of a recovery by Allman; that the city had paid the judgment recovered by Allman and by reason of the premises alleged now looks to the defendant, Paulsness, for reimbursement, and asks that said defendant be held liable to the plaintiff for the sum of money so expended.

This action, being the one in which this appeal is taken, came on for trial before the district court of the First judicial district of North Dakota on March 5, 1908, and, at the conclusion of the evidenced introduced by both parties showing facts substantially as hereinbefore narrated, the plaintiff moved the court to instruct the jury to return a verdict in its favor upon the ground that "the case conclusively establishes the legal liability of the defendant." The defendant also moved that the jury be directed to return a verdict in his favor upon the ground (1) that the evidence failed to show that a demand was made upon the defendant to defend the suit brought by Allman, and a reasonable time allowed him by such notice to prepare for and make such defense; and (2) that it did not appear that under the facts shown, the structure placed

by defendant Paulsness upon the street was dangerous or out of repair or that there was any duty on the part of Paulsness to remove the obstruction which caused the injury. The court denied the motion of defendant and granted the motion of plaintiff and under its direction a verdict in plaintiff's favor was rendered by the jury.

Thereafter, in denying a motion for a new trial made by plaintiff upon the ground, among others, of the insufficiency of the evidence to justify the verdict, and that the verdict is against the law, the learned trial court filed a memoranda of its reasons, in which it is stated: "At the trial of the present action I followed the ruling of the Supreme Court of the United States in Washington Gas Light Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, in directing a verdict for the plaintiff. It seems to me that the principles announced in the case just cited control the case at bar. * * * The very gist of the original cause of action was the structure or pipe guard which the defendant admits he constructed, but which was subsequently changed by some unknown person by adding the loose plank. It follows, therefore, that the judgment against the plaintiff obtained in the original action 'conclusively established a fact from which as the duty' to keep the pipe guard in the street safe rested on Paulsness, his 'negligence results.'" I cannot see that there is any difference in principle between the case at bar, where the original construction was safe and was rendered unsafe by adding something to it, to-wit: A loose plank, and the Washington Gas Light Company Case, where the original construction which was safe was rendered unsafe by removing something from it, to-wit: the cover of the gas box. If, instead of removing the cover and leaving the gas box open, in the case cited, a cap six or ten inches high had been attached to the box and Mrs. Parker had been injured by tripping over the cap, and recovered judgment against the District of Columbia for the injury, would the gas company have been any the less liable? Clearly not.

Appellant in this court urges as a ground for reversal of the judgment of the district court, that it was error to grant plaintiff's motion and to refuse to grant defendant's motion for a directed verdict, and that if a verdict should not have been directed for the defendant, then the disputed questions of fact with reference to his liability should have been submitted to the jury. A proper

determination of the points presented by this appeal requires that we should consider whether or not, upon the evidence introduced, the plaintiff has shown the necessary elements of a cause of action against Paulsness; and, if so, whether or not upon such showing, as a matter of law, the plaintiff is entitled to recover. The substance of all assignments upon this appeal may be said to be included in these points. It is well settled that a municipal corporation which under a liability resulting from a failure to keep safe its streets for the passage of persons and property, and to abate therefrom all nuisances and remove all obstructions that might prove dangerous, is required to pay damages to a person injured on the streets, has, unless it is also a wrongdoer, a remedy over against the party that is in fault and has so used the streets to produce an injury. Washington Gas Light Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed 712; City of Rochester v. Montgomery, 72 N. Y. 65; City of Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818, and Chicago v. Robbins, 67 U S. (2 Black) 418-429, 17 L. Ed. 298. Such right of action proceeds upon the principle that in the case of joint tortfeasors in which the parties are not equally culpable, the principal may be held responsible to his codelinquent for damages incurred by their joint offense. A party who for his own benefit or convenience or under license from a city is permitted to place upon a public street a structure which from its nature or from a failure to guard it, or keep it in repair is or may become dangerous, is held to be under an implied contract with the city that in so doing he will exercise ordinary care to protect the public from danger and the city from loss; so that, in case of injury to one using the street and consequent loss to the city resulting from such structure or the manner in which it is kept, the city may be regarded as in nominal fault only while the party who rendered the street unsafe will be held to be the real wrongdoer and an indemnitor of the city against loss. Chicago v. Robbins, supra; Village of Port Jervis v. Bank, 96 N. Y. 550.

The defendant, Paulsness, vigorously contends that the one-inch pipe was laid from the manhole to the side of the street and the two planks placed on either side of it not by him or under his direction but by the city whose superintendent of waterworks interfered at a time when his workmen were about to proceed to repair the pipe by another method which would not have caused

any obstruction whatever of the street; and that he was not responsible for any obstruction to or unsafe condition of the street caused thereby. In our view of the case, however, this point has no materiality. If it appeared that the injury to Allman and the consequent liability of the city had resulted directly from the laying of the pipe or the placing of the two planks beside it as a guard, this question would be one of controlling importance and on its determination would depend the liability of Paulsness. It appears, however, that the cause of the injury was neither the pipe nor the planks placed beside it as a guard, but a third plank which drifted there through some agency not accounted for and remained for several days without permanent attachment either to the pavement or the structure guarding the water pipe. In this state of fact, we believe that the point decisive of the case will be reached more speedily and determined more clearly by assuming in accordance with the contention of the plaintiff that whether or not the pipe was placed on the surface of the street and the two planks placed beside it as a guard by Paulsness or under his direction, he had by his acquiescense and subsequent conduct adopted both this method of conveying water beyond the break and the structure necessary to protect it and was liable for any damages which resulted from a failure to use ordinary care to keep such structure reasonably safe. We will also assume, without deciding, that the notice served by the city upon the defendant prior to the trial of the action brought by Allman was sufficient in substance and in time of service to enable him to prepare a defense to and to defend the action had he desired to do so.

On a state of facts such as is here assumed, the plaintiff contends, and the trial court seems to have held, that the judgment in favor of Allman conclusively established as a fact that it was the duty of Paulsness to keep safe the water pipe with the two planks guarding it upon the street, and that his failure to do so resulted in the injury to Allman and consequent loss to the city. So far as the duty of Paulsness is concerned, this contention will be regarded as correct, and if it can be truly said that the evidence taken in this case conclusively shows, or that the rendition of the judgment in Allman's favor necessarily included, a finding that the injury was caused by a failure to keep safe the water pipe laid in the street or the structure guarding it, there is little question but that Paulsness is liable as an indemnitor to the city. It appears,

however, from the evidence taken and from an express finding of the jury, on whose verdict the judgment was rendered, and in fact seems to be conceded on all hands, that the injury to Allman did not proceed from any danger inherent in the pipe or the planks guarding it or from any failure of Paulsness to properly maintain the structure or keep it in repair, but, as before stated, from a loose plank, not a part of the original structure, subsequently placed on the street without his knowledge or authority.

Appellant, if liable as an indemnitor of the city, and if given notice of an opportunity to defend against the judgment obtained by Allman, is concluded as to all matters necessary to establish a liability from the city to Allman and as to any matter which might have been urged as a defense by the city against such liability. City of Rochester v. Montgomery, supra. It cannot be said, however, that the liability of Paulsness is coextensive with that of the city. The city was liable for a failure to use ordinary care to keep its streets safe, whether the obstruction which rendered it dangerous was placed there by the city itself, by Paulsness, or by some other party. Paulsness was liable only in case the injury was produced by an obstruction which he had placed upon the street and failed to use reasonable care to keep in safe condition. Notwithstanding the payment by the city of a judgment resulting from the injury to Allman, and all legal conclusions arising out of the trial of the action brought by him, Paulsness was not "estopped from showing that he was under no obligation to keep the street in a safe condition and that it was not through his fault that the accident happened." City of Chicago v. Robbins, supra.

Any liability of Paulsness in this action, therefore, "is predicated upon the negligent character of the act which caused the injury and the general principle of law which makes a party responsible for the consequences of his own wrongful conduct." Village of Port Jervis v. Bank, 96 N. Y. 550. His relation to the city and his conduct with reference to the obstruction of the street which caused the injury will be measured by the rules of the law of negligence. Whether or not the proximate cause of the injury to Allman was a failure of defendant to perform a legal duty or arose through his fault, in this as in other cases charging negligence, is a question of law for the court, to be determined upon the material facts

with such inferences as may be properly drawn therefrom. Glassey v. St. Ry. Co., 185 Mass. 315, 70 N. E. 199.

Assuming, therefore, that Paulsness was responsible for placing the water pipe across the street and the two planks, one on either side, for the purpose of guarding it, did the placing of such obstruction or the failure on the part of Paulsness to exercise ordinary care to protect the public from damage, result directly and proximately in the injury to Allman? The trial court held that a liability of Paulsness follows when the fact is established that he constructed the original pipe guard upon the principle, evidently, that having created an obstruction in the street it was his duty to prevent or remove any additions thereto by persons known or unknown which rendered it unsafe. It is true that defendant, having placed the original structure in the street, would be held to exercise a certain supervision over it for the purpose of keeping it in safe condition; and if at the time he placed it there he had cause to reasonably anticipate that, from the nature of the structure itself or from the use for which it was intended in the ordinary course of human events, additions would be placed thereon which might render it unsafe and dangerous, this supervision must extend to such additions. But unless the additions to or changes in the original structure are such as a prudent man in the exercise of ordinary care may be held to have had in anticipation, he is not liable for a failure to discover or remove them. Glassey v. Street Ry. Co., supra; Kumba v. Gilham, 103 Wis. 312, 79 N. W. 325; Leeds v. Telephone Co., 178 N. Y. 118, 70 N. E. 219; Cuff v. Railway Co., 35 N. J. Law, 17, 10 Am. Rep. 205.

In our view, the facts under which the plaintiff here claims to hold Paulsness liable are quite different, in legal effect, from those announced in the case of Washington Gas Light Company v. District of Columbia, referred to in the memoranda of the district court. In that case the Gas Company who, for its own benefit and convenience, placed an iron box in the sidewalk, would be held to know that such a construction in the course of years, by ordinary usage, wear and deterioration from the elements, would probably lose its cover and through this or other substantial losses become dangerous. Knowing this it was held liable for failure to anticipate and to repair such loss. On the other hand, however, the Gas Company could not be said to have in reasonable anticipation at the time it placed the box there that some unauthorized person

would permanently attach to this cover an additional cap six or ten inches high as conjectured by the trial court, unless the original cap itself was constructed in such a way as to induce or invite such addition and to raise a reasonable expectation that it would be placed there.

The original structure placed by Paulsness was safe at all times before and after the injury to Allman. If one of the two planks guarding the pipe had in the course of time become loose so that it tipped or moved about in such manner as to cause the injury, it is clear that such condition might have been reasonably anticipated by Paulsness and that he would be liable. To hold, however, that in placing the original structure there he must have had reasonably in anticipation that it would be interfered with by some other person who would place manure on top of the planks and the pipe and a loose plank on top of the manure in such a position that pedestrians by stepping on ene end would raise the other so as to render it dangerous to persons using the street at the point, requires, as we view it, an unreasonable assumption that the facts of the case will not sustain.

Paulsness insists that the sole purpose of placing on the street the two planks permanently attached to the pavement was to guard the pipe from injury or displacement; that the structure so made did not contemplate the use of manure or of a third plank for carrying out the purposes for which it was intended; that the manure placed on top of the pipe and the loose plank placed on top of the manure did not in any manner protect the pipe and that the presence of these additions did not make the structure more safe but on the contrary presented in itself a dangerous obstruction for which he was in no way responsible. This contention, in the light of the entire evidence, seems well founded and reasonable. If the city placed the manure or loose plank there in carrying out some plan connected with the supervision of the streets, Paulsness would not be at liberty to remove it. If some third party placed it there he and not Paulsness would be responsible for any injury caused by its making the street unsafe. If, for instance, an electric light company in constructing or repairing its line along the street had placed some of its apparatus upon this structure laid there by Paulsness, and a person using the street had been injured by coming in contact with the apparatus, it is apparent at a glance that the electric light company and not Paulsness would have been liable

for the resulting damage. If a contractor engaged in the construction of a building near at hand, had piled bricks or other building material on the structure and Allman had fallen over this instead of the loose plank it is equally clear that the contractor and not Paulsness would be liable. And yet, on what theory can it be said that the placing of the manure and the third plank on the original structure could have been more naturally or directely in the contemplation of Paulsness than the laying there of electric apparatus or building material?

Assuming to exist, therefore, all facts necessary to establish a liability of the city of Grand Forks to Allman, we are of the opinion that these facts, together with the additional showing made upon the trial of this case, are insufficient to establish a liability against Paulsness. Neither the facts nor any reasonable inferences that can be drawn from them show that it was the duty of Paulsness to remove from the street the obstruction which caused the injury, or that he failed to keep in safe condition the structure placed there by him. In other words, a cause of action in negligence is not shown against Paulsness in that it does not appear that any breach of duty or lack of care on his part was the direct and proximate cause of the injury to Allman. Failing in this, the city fails to show that Paulsness was the real party in fault and cannot hold him as an indemnitor for the loss occasioned by payment of the judgment to Allman. The motion of defendant made at the close of the entire testimony that a verdict be directed in his favor should have been granted.

The judgment of the district court is reversed, and it is directed to dismiss the action. All concur, except MORGAN, C. J., who did not participate.

(123 N. W. 878.)

NOTE—As to liability of cities for defective streets and obstructions thereon, see note by Judge Cochrane to Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427. On sufficiency of presentation of claim to city council, see Coleman v. Fargo, 8 N. D. 69, 76 N. W. 1051. Sufficiency of notice to city council of claim for damage, is question of law for the court. Trost v. Casselton, 8 N. D. 534, 79 N. W. 1071. Such notice is mandatory. Id. Bicycles, in the absence of ordinance prohibiting it, may be lawfully ridden on sidewalk. Gagnier v. Fargo, 11 N. D. 73, 88 N. W. 1030. City is liable for injuries to a bicycle rider if sidewalk is not in a reasonably safe condition. Id. City's duty is fulfilled if sidewalk is in a reasonably safe condition for pedestrians. Id. Claimant for damages against city may present his claim to city auditor with the request that he present

it to the council. Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 174. Notice of claim for damages against a city is sufficient where it describes locality of accident as 30 feet from a point, when in fact it is only 25 feet. Johnson v. Fargo, 15 N. D. 525, 108 N. W. 243. Whether a wire at certain distance from sidewalk, is an obstruction is a question for the jury. Id.

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## OLE B. TUTTLE v. CHARLES A. POLLOCK, DISTRICT JUDGE.

Opinion filed November 19, 1909.

**Appeal and Error — Mandamus to Compel Settlement of Statement of Case.**

1. Mandamus is a proper remedy to compel a trial judge to settle a statement of the case when presented to him in accordance with the facts and in time, and he refuses to settle it.

**Same — Settlement by Supreme Court.**

2. The Supreme Court will settle a statement of the case when the trial judge refuses to settle it in accordance with the facts, under section 7060, Rev. Codes 1905.

**Appeal and Error — Extension of Time to Settle Statement of Case — Discretion.**

3. Trial courts have a wide discretion in granting or refusing extensions of time during which a statement of the case may be presented for settlement, and their action will not be disturbed except in cases of a plain abuse of such discretion.

**Appeal and Error — Statement of Case — Extension of Time — Discretion to Be Exercised upon Facts Connected with the Appeal.**

4. The discretion to be exercised in such cases is in reference to the diligence or delay with which parties have proceeded and other facts pertaining to the conduct of the parties in connection with the appeal.

**Same.**

5. Such discretion is not to be controlled or made to depend on the fact that appellant's conduct has not been conformable to justice or equity or personal duty in respect to matters not connected with the appeal.

**Appeal and Error — Statement of Case — Discretion of Court — Discretion Based on Facts Connected with the Appeal.**

6. On an appeal by a husband from a decree of divorce against him whereby his property was assigned to the wife in lieu of permanent alimony, and he was also decreed to pay fixed sums as costs and attorney's fees on the trial in the district court, it is an abuse of discretion to refuse to settle a statement of the case until the

husband makes provision for the support of his wife and children, pending the appeal, in cases where the trial judge has lost jurisdiction to make an order for support money pending the appeal for the reason that the defendant in that action had perfected an appeal to the Supreme Court.

Original application by Ole B. Tuttle for mandamus to be directed to Charles A. Pollock, Judge of the Third Judicial District.

Writ granted.

*Skulason & Burtness,* and *F. W. Ames,* for plaintiff.

*Turner & Wright* and *Chas. A. Lyche,* for respondent.

MORGAN, C. J. This is an application to this court for a peremptory writ of mandamus compelling the respondent as judge of the district court of the Third judicial district to proceed to settle a statement of the case in an action for a divorce between Martha C. Tuttle, plaintiff, and Ole B. Tuttle, defendant, which was tried before the respondent in the county of Traill, within said district, and is now pending in this court on an appeal by the defendant in that action, which was perfected on September 10, 1909. The application for said writ is brought before this court on notice duly served upon the respondent.

On the 10th day of November, 1909, the parties appeared before this court by their respective attorneys, and the following facts were shown in reference to matters material on the application.

The divorce action between said parties was tried on July 14, 1909, and on July 21st the respondent, as trial judge, made findings of fact and conclusions of law whereby it was found that the plaintiff was entitled to have a divorce from the bonds of matrimony. In the decree of divorce, dated July 26th, based on said findings, it was adjudged that the plaintiff have judgment against the defendant for the sum of $300 as an attorney's fees in said action, and for the costs and disbursement in said action, taxed and allowed at the sum of $104.60. It was further adjudged that said attorney's fees and costs, amounting to $404.60, be made a specific lien upon the defendant's real estate described in the decree, and that said sums should be paid in full on or before November 1, 1909. At the time of the entry of an order for said decree on July 26, 1909, a stay of proceedings for 20 days was granted to the defendant in that action for the purpose of enabling him to take such steps as he should deem necessary in case he desired to appeal said action to the Supreme Court. On the 12th day of

August defendant ordered a transcript of the proceedings at such trial from the official stenographer. The stenographer transcribed same, and expressed them to the defendant's attorneys at Grand Forks, N. D., on the 25th day of August, and it was received by said attorneys on the 26th day of August. The attorneys to whom the transcript was sent were not the attorneys who had tried the case, but they had been retained to investigate whether the grounds for a successful appeal from such judgment to the Supreme Court existed. On the 28th day of August said attorneys informed the defendant that in their judgment an appeal could be successfully prosecuted to the Supreme Court. The defendant had consulted said attorneys very soon after the judgment was entered, and the attorneys had refused to give him an opinion as to the advisability of an appeal until they had examined a transcript of the evidence and proceedings. On the 3d day of September said attorneys applied, by mail, to respondent for an extension of time within which a statement of the case mighᵗ be settled. He was at that time absent from the state, and had requested Judge Burke, of the Fifth judicial district, residing at Valley City, to act for him during his absence. The application was then sent to Judge Burke, which caused some delay, but an order was signed by him extending the time for 30 days from September 9th. This extension was made on ex parte showing based upon an affidavit of B. G. Skulason, one of the attorneys whom said defendant had retained to prosecute the appeal. On the 3d day of September, 1909, the plaintiff in that action, through her attorney, also applied to Judge Burke for an order compelling the defendant in that action to show cause why he should not comply with the terms of the decree of divorce entered on July 26. This order was returnable before the respondent at Fargo on September 14th, and the parties appeared on that day, but the hearing was postponed by consent of the parties to the 18th day of September. While the parties were before the respondent on September 14th, the defendant in that action made an application for an extension of the time during which a statement of the case might be settled, but there was no decision on the application, and, before the 18th day of September, the defendant's attorneys had received the order from Judge Burke extending the time for 30 days during which a statement of the case might be settled.

On September 18th the parties again appeared before the respondent, when the order extending the time by Judge Burke for

30 days was revoked by the respondent. The grounds for revoking it were stated by the defendant at that time as follows: "The court, in view of the entire situation as presented at this time, believing that such order was inadvertently granted, revokes same, and the same is hereby set aside, and all rights thereunder are canceled, subject to the right of renewal of same to this court upon a proper showing, and upon notice to the opposite party. The reason for setting aside this order is as follows: This case having been appealed, this court having lost jurisdiction to require the defendant to pay the alimony and counsel fees, and the former judgment of this court not having been complied with before the appeal of this action, and no proper provision having been made for the support of the plaintiff and her minor children pendente lite, this court believes that the defendant is in no position to ask the court for an extension to settle the statement of the case, and therefore has revoked the foregoing order of Judge Burke, which was made ex parte, and states, further, that until such provision is made for the support and care of said defendant and her minor children that it would be an abuse of discretion for him to grant a stay of proceedings for the purpose of settling the case, and therefore does refuse to settle such statement of the case until such provision is made."

Mr. Skulason then made this statement: "I state now in open court that the defendant will refuse to comply with the judgment as to alimony, or in any manner comply with the conditions proposed by the court as prerequisite to settle the statement of the case." The respondent then stated: "If counsel takes a position by virtue of that statement that he could not do so, and still have the right to appeal, the court adds that outside of that he deems that it is only proper and equitable that this plaintiff and her children be furnished with the necessaries of life during the pendency of the appeal, and it is upon that ground that he refuses to extend the time to settle the statement of the case." The respondent on this application gives as his reason for refusing to settle the statement of the case on the following grounds: "The undersigned further states that, when the attention of the court was called to the fact that it would be hazardous for the defendant to comply with the judgment, he told Mr. Skulason that it was not his purpose to insist upon the payment of the judgment referred to, or in any manner comply with such judgment in any such form as

would prevent their right to appeal, but that all he wanted was that outside of the judgment there should be simply such provision made for the plaintiff and her children during the pendency of the appeal as would be proper and right, and that before he would feel that he, sitting as a court of equity, could deal with the defendant further in the matter justly, the defendant himself must come into the court with clean hands, else this court would be in the attitude of doing the plaintiff a legal wrong, and thereby would be abusing the discretion which the statutes give him to relieve one from his laches in doing any act required of a party in appealing a case to the Supreme Court." After such hearing on the 18th day of September, the plaintiff in that action applied to this court for an order to show cause why this court should not settle the statement of the case in view of the alleged refusal of Judge Pollock to settle said statement in accordance with the facts. After a hearing on the return day of the order to show cause, this court denied the application upon the ground that the defendant had not refused to settle the statement in accordance with the facts, but that he had simply stated that he would refuse to settle the statement upon a ground enirely different from the one referred to in section 7060, Rev. Codes 1905, prescribing when this court may settle a statement where the trial court has refused to settle the same in accordance with the facts. In other words, the application was denied on the ground that the defendant had not invoked the proper remedy under which to secure a statement of the case to be settled. Thereupon the defendant applied to this court for a writ of mandamus to compel the defendant to settle such statement. This remedy we deem to be the proper one under the facts of this case. Section 7060, supra, applies only when there is an actual disagreement between the court and counsel as to what the facts at the trial were. It is not the true construction of said section to say that it means that the Supreme Court will in all cases settle a statement when the trial judge refuses so to do. If such was the intention of the Legislature, the words "in accordance with the facts" would have been omitted. That a writ of mandamus is the proper remedy to compel a trial court to settle a statement when such settlement has been wrongfully refused upon grounds other than mentioned in said section 7060 is well sustained by the authorities. 20 Enc. P. & P. page 578, and cases cited; Merrill on Mandamus, Section 190; People v. Lee, 14 Cal. 510; State ex rel., etc., v. Baxter, 38 Minn., 137,

36 N. W. 108; City of Santa Anna v. Ballard, Judge, 126 Cal. 677, 59 Pac. 133; State ex rel., etc., v. Gibson, 187 Mo., 536, 86 S. W. 177; Hicks v. Masten, Judge, 101 Cal. 651, 36 Pac. 130.

Two questions are presented by this record: (1) Was respondent justified as a matter of law in revoking the extension of time for 30 days which had been granted by Judge Burke? (2) Did he have authority to impose conditions on the defendant to provide for the support of his family before he would settle a statement of the case regular in form when presented? That he has power to set aside such an order in a proper case must be conceded and that he may properly do so in some cases will not be denied. The order is deemed to be of the same import as thought it had been originally made by himself. The ground upon which it was revoked is stated by the respondent to be that it was improvidently issued. There is no specification in the order or in the proceedings stating what the alleged improvidence consisted of. In argument it is stated in this court that Judge Burke was not informed as to the fact that the previous extension of time had expired, nor as to the fact that the appellant had not made provision for the maintenance of his wife and children pending the appeal. It is true that the record does not show that Judge Burke was informed of these facts, nor is there any evidence that he was not fully informed of all the facts. It is, however, immaterial, on this application, whether Judge Burke was aware of either of these facts, and it is immaterial whether the time had actually expired or not; and it is also immaterial whether the defendant in that case had made provision for the support of his family during the appeal. Neither of these matters has any place in determining whether the respondent acted within his discretion in setting the order aside and afterwards refusing to settle a statement of the case upon the alleged ground that the defendant had been guilty of laches or unreasonable delay. The affidavit presented to Judge Burke stated facts that entitled the defendant in that action to further time within which to present a statement of the case for settlement, and it would have been an abuse of discretion for him to have denied that application. The time for settling a statement had just expired when the attorneys advised the defendant in that action that they believed him to have a meritorious ground of appeal. The papers asking for the extension are dated September 3d, being a very few days after an extension of time became necessary. The extension was asked for on the day that

the attorneys were instructed to take the appeal, so far as the preparation and sending of the papers were concerned. The order was not signed until September 9th for reasons already stated. Under the language of section 7058, Rev. Codes 1905, no extension of time is necessary for the settlement of a statement of the case, if the same is regularly done within 30 days after notice of the entry of the judgment.

It is urged that the defendant in that action was guilty of laches in not applying for a transcript of the evidence sooner. He ordered it on August 12th, 17 days after the judgment was entered. He testifies that this was as soon as he could conveniently order the same. Whatever the cause of this delay, we do not think it shows any laches in view of the fact that he had retained other attorneys on the appeal, and we may safely say that this delay would not be deemed a ground for refusing an extension of the time under any ordinary circumstances. There is no serious contention that the defendant was guilty of laches when the parties met at Fargo on September 14th for the hearing of the order to show cause why the terms of the judgment should not be complied with. If no such laches existed on September 14th, it is self-evident that none could be attributed to the defendant on September 18th. On that day the order of Judge Burke was revoked, and the defendant thereby placed in the attitude and considered as being in default by reason of the expiration of the time during which he could procure a settlement of the statement of the case. Whether the defendant's time to settle a statement had actually expired on September 9th is immaterial. Upon a proper showing the time could be enlarged or extended, although it had expired when the application was made, providing good cause be shown (section 7068, Rev. Codes 1905), and, as we have already stated, good cause was shown in this case. This being true, it remains to be determined whether the trial court was justified in imposing terms upon the defendant before a statement would be settled by him. This question should be determined on the assumption that defendant was not in default on September 18th, when the revoking order was made, and when the respondent stated that he would not settle any statement of the case until the defendant had made provision for the support of his family pending the appeal. The trial court erred in our opinion in revoking the existing order, and then imposing terms on the theory that the defendant was guilty of being in default and guilty of

laches. No legal cause is shown for revoking that order, and nothing appears to justify the assertion that it was made inadvertently. It is true that the trial court has wide discretion in respect to the extension of time while appeals are being made effective, and its action will not be disturbed unless there has been a plain abuse of discretion. The respondent made a positive and unequivocal statement that he would not settle any statement until the defendant had made provision for the maintenance of his family pending the appeal. However praiseworthy his intentions in this matter may have been, or however censurable the alleged omission of the defendant may have been deemed, it does not follow that such conditions could be imposed as conditions precedent to settlement of the statement if presented in accordance with statutory regulations.

We see no force in the trial court's position that the defendant must come into court with "clean hands" on matters of personal conduct before he would be entitled to a settlement of his statement, providing same was presented in time, and in accordance with the facts. It would be an abuse of discretion to refuse to settle the statement on such ground on an application in regular form. The attitude of the appellant and his attorneys on September 18th was not rightfully subject to such adverse criticism or such extraordinary terms. The attorneys offered to agree to a stipulation to pay any reasonable sums for the support of defendant's family pending the appeal. In this court it is not seriously disputed that a reasonable offer was made, but the precise sum to be paid could not be agreed upon.

It is contended that defendant's attorney stated that he would not comply with any order that the trial court would make in reference to the payment of support money, and that this statement forecloses him from all rights to any equitable or discretionary considerations. We do not think the contention a reasonable one. The statement of the attorneys means, we think, that any order made by the trial court without jurisdiction would not be obeyed, but corrected in a legal manner if possible. The trial court did not suggest any amount that should be paid, and, if a reasonable amount had been suggested by the trial court, we are satisfied that the sum would have been paid from what had transpired on that day during the conferences between the respective attorneys. In any event, however, we think that the imposition of such a condition by the trial court to the making of an extension order or to the

settlement of the statement of the case was without authority after the appeal had been perfected. The plaintiff's attorneys in the divorce case did not make an application during the pendency of the action in the district court for an allowance for the maintenance of the family, so far as this record shows. After the appeal, the fact of the defendant's failure to provide support for his family is urged as a ground for defeating his right to an appeal. The respondent did not have jurisdiction to make an order for the support of the plaintiff and family pending the appeal after the appeal had been perfected, and it was an abuse of discretion to urge that fact as a reason why a statement of the case would not be settled. Although the district court had lost jurisdiction to make that order, it is an easy and inexpensive procedure to secure an order for that purpose from this court after an appeal. If the respondent had not imposed such terms, it would have been very easy for the plaintiff to have secured an order from this court which would have secured to the plaintiff support without depriving the defendant of his appeal The omission of the defendant, whether excusable or willful, to do what the law imposes upon him as a duty in regard to the support of his family, should not, however, be brought forward to defeat his appeal under any circumstances, as an order could be secured from this court for such support after the appeal had been perfected.

The relief asked for on this application is that an order be issued commanding the respondent to proceed to settle the statement as prescribed by the statutes. This court would not have power to go further at this time, as no statement has yet been presented to him for settlement. It will be the duty of the respondent to settle the same if presented in accordance with the facts, notwithstanding that the time for such settlement has now expired through an erroneous order made by him. The rights of appeal in the divorce action are here determined as they existed on September 18th, when the order of extension was revoked. It is not the intention of this court to order the respondent to sign any statement that may be presented to him, but, if one is presented that is truly conformable to the record, then the duty is imposed on him to sign it without conditions or terms. In other words, if an appellant presents a statement within time, and in all things conformable to the truth, a trial court cannot refuse its settlement upon grounds extrinsic to the question as to whether it is presented in time and in form. Mer-

rill on Mandamus, Section 32; People v. Holdlom, 193 Ill., 319, 61 N. E. 1014; People ex rel., etc., v. Chetlain, 219 Ill., 248, 76 N. E. 364.

Writ granted.

MORGAN, FISK, and CARMODY, JJ., concur.

SPAULDING, J. Without assenting to all that is said in the foregoing opinion, I concur in the granting of the writ for this reason: An appeal having been perfected from the judgment of the district court, that court had lost jurisdiction of the subject of suit money and alimony, and could make no valid order allowing any. If it had lost jurisdiction of the subject, and could not grant relief directly, it had no power to do it indirectly by making a condition to an order on another subject.

ELLSWORTH, J. I concur in the result and in the opinion generally, except upon the holding that mandamus is the only proper remedy to compel a trial court to settle a statement of the case when it wrongfully refuses so to do. On this point I am of the opinion that mandamus, while proper, is not under our statutes the exclusive, remedy.

(123 N. W. 399.)

NOTE—Supreme Court may compel a district judge to settle a statement of the case according to law. Kaeppler v. Pollock, 8 N. D. 59. Supreme Court can settle a statement of the case when the trial court refuses to "in accordance with facts." Taylor v. Miller, 10 N. D. 361, 87 N. W. 597. Until such refusal Supreme Court is without authority. Id.

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## JAKOB SOCKMAN v. JOHN P. KEIM AND PHILLIP KEIM.

Opinion filed December 10, 1909.

**Sales — Warranty — Fraud and Deceit.**

1. Respondent purchased two mares from appellants. The evidence shows that one of them had the glanders at the time of the purchase, and had knots on her head and neck. In response to a question by respondent, as to what caused the knots, appellant Philip Keim said she had a cold, and also said: "For all that I know, she is just as sound as the other." The other mare was sound. *Held*, not a warranty. *Held*, further, that, if respondent is entitled to recover at all under the complaint and evidence in this case, it is for fraud and deceit.

**Sale of Personal Property — Fraud — Concealment of Defects.**

2. Fraud or deceit in the sale of personal property may be perpetrated either by false representations, or by concealment of unsoundness in the article sold.

**Appeal and Error — Necessity of Showing Error.**

3. The party alleging error must show it affirmatively on the record.

Appeal from District Court, McLean County; *Winchester,* J.

Action by Jakob Sockman against John P. Keim and Phillip Keim. Judgment for plaintiff, and defendants appeal.

Reversed.

*Hyland* & *Nuessle,* for appellants.

Where a pleading presents a cause of action, that may be ex contractu or ex delicto, pleader must elect on which he will stand. Connell v. McNett, 67 N. W. 344; Marsh v. Webber, 13 Minn, 101; Reynolds v. LaCrosse Packet Co., 10 Minn. 178; Gailbraith v. Carmode, 86 Pac. 624; Davis v. Tubbs, 64 N. W. 534; Anderson v. Case, 26 Wis., 506; Pierce v. Carey, 37 Wis. 232; Wirth v. Bartell, 54 N. W. 399; Harvey v. Southern Pac. Co., 80 Pac. 1061. Seller's statement of opinion and belief is not warranty. White v. Shelloh, 43 N. W. 99; Tenney v. Cowles, 31 N.. W 221; Austin v. Nickerson, 21 Wis. 549; Lindsey v. Davis, 30 Mo., 406; Erwin v. Maxwell, 7 N. C. 242.

Express warranty excludes all others. Thomas v. Thomas, 41 So. 141; Reynolds v. General Electric Co., 141 Fed. 551; J. I. Case Plow Works v. Niles & Scott Co., 63 N. W. 1013. Inspection excludes implied warranty. Deming v. Foster, 42 N. H. 165;; Becker v. Browner, 18 Ill. App. 39; Rayner v. Ress, 58 Ill. App. 292.

*F. J .Newman* and *Newton* & *Dullam* for respondent.

Recovery may be had upon false warranty or deceit, where both are involved in the pleading. Cunningham v. Smith, 10 Grat. 255; Frenzel v. Miller, 37 Ind. 1; Stitt v. Little, 63 N. Y. 427; Brown v. Castles, 11 Cush., 348; Stone v. Covell, 29 Mich. 360; Shippen v. Bowen, 122 U. S. 575, 30 L. Ed. 1172; Carter v. Glass, 44 Mich. 154, 6 N. W. 200; Schuchardt v. Allen, 1 Wall, 359; 17 L. Ed. 642; Hudnutt v. Gardner, 59 Mich. 341, 26 N. W. 502; Cowley v. Smyth, 46 N. J. L. 380; Hill v. North, 34 Vt. 604; Pinney v. Andrus 41 Vt. 631; Wheeler v. Wheelock, 33 Vt. 144; Beeman v. Buck, 3 Vt., 53; Vail v. Strong, 10 Vt. 457; Goodenough v. Snow, 27 Vt. 320.

Counts for deceit may be joined and recovery had on false warranty or deceit. Schuchardt v. Allens, supra; Shippen v. Bowen, 30 L. Ed. 1172; Beeman v. Bucky, 3 Vt. 53; Vail v. Strong, supra; Goodenough v. Snow, supra; Pinney v. Adams, 41 Vt. 631.

CARMODY, J. This is an action for damages for breach of warranty of soundness and for fraudlent representations on the sale of a team of mares by the defendants to plaintiff. The complaint charges: That the defendants warranted and represented to the plaintiff that said mares and each of them were in all respects sound and well. That plaintiff relied upon said warranty and representations, and purchased said team of mares from the defendants for the sum of $275. That at the time of said warranty, representations, and sale the said mares were not sound and well, but one of them was suffering from a dangerous and equine disease known as "glanders," which fact defendants well knew, or had reason to know, at the time they so sold and warranted said mares, and said warranty and representations were false and were made with the intention of deceiving said plaintiff and to induce him to purchase said mares, and he was deceived and defrauded because of the falsity of said warranty and representations. That said mare infected four other of plaintiff's horses with said disease; said four other horses being of the value of $550. That plaintiff was forced to kill said mare and said four other horses because of said disease. The plaintiff asked judgment for one-half the price paid for said team, $137.50, for $550 the value of the four other horses killed, and for $150 for labor and expense in the care of said horses. The defendants, each by separate answer, denied each and every allegation and each and every portion of said complaint. At the commencement of the trial, defendants objected to the introduction of any evidence for the reason that the complaint did not state facts sufficient to constitute a cause of action, which objection was overruled. Defendants then made a motion that the plaintiff elect which cause of action he would stand on, whether for breach of warranty or false representations; one being ex contractu and the other ex delicto. The motion was denied, and the defendant excepted. On the trial of the case it was shown without evidence to the contrary that respondent purchased the team of mares for $275 on the 12th day of January, 1904.

Respondent testified that on the 11th day of January, 1904, he and one Gottlieb Filler, desiring to buy horses and while driving in company with one Peter Schauer, met defendant Philip Keim, who, in answer to a question by Schauer, said he had horses to sell. They then drove to Philip Keim's place, and reached there about 4 o'clock in the afternoon, and looked at the horses. Respondent found two

that he thought suited him—one gray and one brown. They came to an understanding as to the price of the two mares, $275. Defendants were to bring the horses to Turtle Lake the next morning, and, if they suited respondent, he would buy them and make the papers. Defendants brought the horses to Turtle Lake the next morning, and said to respondent in the presence of Gottlieb Filler, Andreas Bossert, and his boy: "Here are the horses. If they suit you, you can take them." Plaintiff and the parties with him examined the horses, found that the gray mare had little knots around the head and neck. The knots were a little larger than wheat kernels. Plaintiff asked Keim what was the matter with the gray mare that she had these knots. Keim said that she had a little cold, and then said, "For all that I know, the mare is just as healthy as the others." The other mare that plaintiff was about to buy from Keim was healthy, and has been well and all right ever since. Plaintiff believed what Keim stated to him in regard to the gray mare being, for all Keim knew, as well and healthy as the others; did not know what was the trouble with the gray mare. Plaintiff gave Keim Bros. a note for $275, payable in the fall, secured by a mortgage. Plaintiff took the team home. The bunches on the mare's head and neck became larger, broke open, and never healed. He thought the mare had a cold; did not know anything of glanders at that time. Later he found that it was glanders. About a week after he purchased the team, he had Schafer, a neighbor, come and look at a lame horse. Plaintiff worked the mare a little in the spring. On May 10th she had a colt, which lived about a week. In the spring on 1904 he saw the defendants Keim in Ram's store in Turtle Lake, and told them that Schaefer said the mare was glandered. Defendant said: "If Schaefer says that, he says that out of envy to us. He is envious of us." Both defendants were there in the store. Plaintiff told them at that time that, if the mare was glandered, he would bring her back. They said the mare was not glandered; it was only a cold. Then he let the matter rest and went home. On May 15, 1905, he shot her. That, if the mare had been sound and well when he bought her, she would have been worth $150. That the mare communicated the glanders to four other horses of the value of $600, which four horses had to be killed. That the work and expense of taking care of the glandered horses was $300. That Dr. Robinson, a veterinary surgeon, district veterinarian for that district, ordered him to kill three of the horses.

The other two he killed without the doctor's orders. John Keim came to Philip's place on the evening of January 11th and brought the brown mare, knew at the time where John Keim lived. Philip Keim's hired man brought the brown mare. It was dark on the evening of January 11th when they were at Philip Keim's place. Schaefer told plaintiff, when at his place looking at a lame horse, that the gray mare had glanders, but plaintiff did not believe him, because the defendants said it was not glanders. Jacob Bossert testified for plaintiff that he was present in Turtle Lake on January 12, 1904, saw that the gray mare had knots or lumps on the neck and head. Plaintiff asked Keim what she had. Keim said she had taken cold. Plaintiff said he did not know, did not think it was a cold, thought the mare was sick. Keim said: "No, sir; I know the mare is just as sound as the other one." Plaintiff then believed him. Gottlieb Filler testified that he was present at Turtle Lake on January 12, 1904, when plaintiff purchased the team of horses from the defendants. Witness saw the team and looked at them closely. The gray mare had sores and knots on the head. Plaintiff asked what was the matter with the head of the mare. Philip Keim answered that it was a cold. Plaintiff asked whether that would not harm the mare, and Philip Keim said, "I know the mare is just as sound as the other two." Then they made the papers. Emanuel Hoffer, who had considerable experience with horses, testified as to the gray mare and the other horses that were killed, having glanders.

Karl Schaefer testified to the same thing.

Andreas Knobloch testified: That he was working for Philip Keim on January 11, 1904, knew the gray and brown mares in question. That Philip Keim sent the witness into the barn to bring out the gray mare at that time. He loosened her from the manger. Keim then took her away, and said she had knots; that he did not have her very long and she was spoiled already. He said if Sockman saw the knots he would not buy her, and that he did not care if Sockman would not buy her. He could leave her.

John W. Robinson, a veterinary surgeon of Coal Harbor, testified that he was called to respondent's place during the summer of 1905, found glanders there, ordered plaintiff to kill two horses that he found affected with glanders, and afterwards ordered another one killed. He was the district veterinarian for that district.

On the part of the defendants Philip Keim testified that he sold the horses to the plaintiff; that his brother John owned the brown mare; that he went good to John for the price of the mare; and that John had nothing to do with plaintiff. Defendants took the team to Turtle Lake, where they found the plaintiff, who said to make out the papers. Witness told the plaintiff to look at the horses once more. They went into the barn, looked at the horses. Plaintiff was well pleased with the team, was going to pay for them in the fall. Witness said plaintiff could have three or five or maybe ten days to try the team, and, if they did not suit him he could bring them back. Plaintiff said that was satisfactory, and they made the papers. Jacob Keim, defendant's brother, made them out. Witness told plaintiff that he knew nothing wrong with the gray mare, denied that there was any talk of lumps, and denied that the mare showed any; said that he had been trading in horses for about seven years; had never had any experience with glandered horses up to the time that he sold the gray mare; owned her about six days; bought her from his brother Jacob who owned her for nine or ten months, had one mare who was supposed to have glanders, shot in June, 1906; had some conversation with plaintiff during the year 1904; offered him in the fall of 1904 $105 for the gray mare on the credit of the note. He only owned the horse that he had killed in June, 1906, one week. His brother John had some killed at the same time. The note was made payable to Keim Bros. because witness owed defendant John for the brown mare. John Keim testiged practically the same as his brother Philip. Peter Schauer testified that he was at Philip Keim's place on January 11, 1904, heard plaintiff tell Philip that the gray mare suited him, but that he wanted another. Philip told him that his brother John had a brown mare that he thought would satisfy him.

Jacob Keim testified: That he owned the gray mare for nine or ten months. That she had neither glanders nor bunches. That he sold her to his brother Philip six days before the deal with plaintiff. That he heard the conversation between plaintiff and Philip on January 12,. 1904. That nothing was said about the appearance of the gray mare, or that she was sick or had lumps on her head. That John and Philip Keim said to plaintiff: "Here are the horses. If they suit you, take them; and, if they don't suit you, don't take them, rather leave them here as take them." Plaintiff said: "The horses suit me, and I will take them." Philip told

plaintiff he could take the horses home, drive them, and work them three, four, five, or ten days, and if they suited him, all right; if not, he could bring them back. Plaintiff did not say anything after that. He was pleased and signed the papers.

Chas. F. Billows testified that he saw the mare in June, 1904, at Sockman's; that she appeared to be sick, but that nothing was said about glanders.

At the close of plaintiff's case, defendants moved the court to direct a verdict in their favor and in favor of each of them, "for the reason that the plaintiff has failed to make out a prima facie case, and plaintiff has failed to prove any warranty as alleged in this action or otherwise; that he has failed to prove that any representations were made by the defendants or any of them; that he has failed to show that the defendants or either of them knew the horse was diseased at the time of the alleged sale; that plaintiff has failed to show that at the time of the purchase he relied on any of the statements made by the defendants or either of them; that he has failed to show that the defendants or either of them made any representations to induce the plaintiff to make the purchase; that he has failed to show any fraud or deceit; and that it shows from the evidence that the plaintiff himself was negligent, and it shows from the evidence also that the term of caveat emptor applies." Defendant John Keim also moved the court that the case be dismissed as to him, as there was no evidence in the record to show that John Keim at any time owned the horse or had anything to do with the sale of her. Both motions were denied and exceptions taken by the defendants. At the close of all the testimony, defendants renewed both motions, which were denied and exceptions taken. Defendants moved the court to direct the jury to bring in a special verdict and submitted 23 questions to the court to be submitted to the jury. Plaintiff objected on the ground that it was too late. The court sustained the objection, and denied the motion of the defendants, to which they excepted. The jury returned a verdict in favor of plaintiff and against both defendants for the sum of $837.50.

Judgment was entered on the verdict. After the entry of judgment, defendants, on a settled statement of the case, made a motion for judgment notwithstanding the verdict, or for a new trial, which motion was denied. Defendants appealed from the judgment, assigning numerous errors. As most of the errors complained of are

not likely to arise on a new trial, it will be necessary to notice only a few of them. This case was submitted to the jury and a verdict returned upon the theory that the defendants warranted the mare to be perfectly sound and free from any disease. There is abundant evidence to show that she had the glanders at the time of the purchase. In our opinion there is not sufficient evidence of a warranty. The plaintiff testified as follows: "When they brought the mares there, they said, 'Here are the horses. If they suit you, you can take them.' We examined the horses at that time, and found that the gray mare had little knots around on the head. I didn't know what the knots were. I asked Keim about it. They were on the cheeks and neck. The knots were a little larger than wheat kernels. I asked Keim what is the matter with the gray mare that she had these knots. Keim said that she had a little cold, and then he said: 'For all that I know, the mare is just as healthy as the others.' I saw nothing on the other mare that I was about to buy from him. That one was healthy, and that one I have yet. She has been well and all right all the time since I purchased her." This evidence, it seems to us, is far from establishing a warranty. If plaintiff is entitled to recover at all under the complaint and evidence in this case, it is for fraud and deceit. The complaint contains all the elements of a complaint for a fraud. While it contains all that is necessary to authorize a recovery upon contract, it contains much more. That plaintiff claims there was a warranty as well as false representations, or that both are alleged, does not alter the case. Fraud may be based upon a warranty or upon representations, or upon both together. They may exist severally or together and either or both may be the subject of fraud and of an action for damages for fraud.

Fraud or deceit in the sale of personal property may be perpetrated either by false representations or by a concealment of unsoundness in the article sold. When the action is brought for a deceit by false representations, three circumstances must combine: (1) That the representation was false; (2) the party making it knew it was false; and (3) that it was the false representation which induced the contracting party to purchase. But, when there are no representations made by the vendor, a deceit may equally be practiced by his silence, but in such cases an important distinction must be observed; for whether a cause of action for deceit will arise from mere silence and a knowledge of the defects in the

article sold will depend upon the fact whether the defect is patent or latent. In Brown v. Gray, 51 N. C. 103, 72 Am. Dec. 563, the distinction is thus stated: "When the unsoundness is patent—that is, such as may be discovered by the exercise of ordinary diligence—mere silence on the part of the vendor is not sufficient to establish the deceit, although he knows of the unsoundness, because the thing speaks for itself, and it is the folly of the purchaser not to attend to it." But "when the unsoundness is latent—that is, such as cannot be discovered by the exercise of ordinary diligence—mere silence on the part of the vendor is sufficient to establish the deceit," provided he knows of the unsoundness. If the seller knows of a latent defect in the property that could not be discovered by a man of ordinary observation, he is bound to disclose it. If the defect complained of in the case at bar was unknown to the plaintiff and of such a character that he would not have purchased the mare had he known of it, and was a latent defect such as would have ordinarily escaped the observation of men engaged in buying horses, and the defendants, knowing this, allowed the plaintiff to purchase without communicating the defect, they were guilty of fraudulent concealment, and must answer accordingly. As supporting these views see Grigsby v. Stapleton, 94 Mo. 423, 7 S. W. 421; Lunn v. Shermer, 93 N. C. 164; Ross v. Mather, 51 N. Y. 108, 10 Am. Rep. 562; Beeman v. Buck, 3 Vt. 53, 21 Am. Dec. 571; West v. Emery, 17 Vt. 583, 44 Am. Dec. 356; Darling v. Stuart, 63 Vt. 570, 22 Atl. 634; Stevens v. Bradley, 89 Iowa, 174, 56 N. W. 429.

There is some evidence in this case to show that the defendants, or at least the defendant Philip Keim, knew that the mare was suffering from some disease; that she was spoiled; that, if plaintiff knew of the disease, he would not buy her. Defendants made no disclosure of the fact that the mare was sick except that she had a cold. There is no claim that the plaintiff knew the mare was diseased. He did know that she had knots on the head and neck, but was informed by the defendants, or one of them, that she was suffering with a cold. Glanders is a disease not easily detected except by those having had experience with it. It may be true, as contended by respondent, that the rule of damages is the same in actions arising upon contract and actions not arising upon contract; still litigants are entitled to have their causes submitted to the jury on the issues made by the pleadings and on the evidence introduced. If the evidence in the case at bar shows

any facts entitling the plaintiff to recover in this action against the defendants, or either of them, it is for fraud and deceit. The court did not err in refusing to direct the jury to find a special verdict as requested by appellants. The request to direct the jury to find a special verdict must be made at or before the close of the testimony, and before any argument to the jury is made. Section 7034, Rev. Codes 1905. The record does not show whether the request was made before or after the arguments to the jury. The party alleging error must show it affirmatively on the record. The question whether the defendants or either of them were liable for fraud and deceit should have been submitted to the jury under proper instructions. Neither the evidence nor the pleadings bring the plaintiff within the provisions of section 5421 of the Revised Codes of 1905, relating to an implied warranty.

For the reason stated, the judgment is reversed and a new trial ordered. All concur except MORGAN, C. J., not participating.

(124 N. W. 64.)

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THE STATE OF NORTH DAKOTA v. HENRY NYHUS.

Opinion filed December 10, 1909.

**Criminal Law — Public Trial — Exclusion of Public from Court Room.**

1. On a trial on a charge of rape, the making and enforcement of an order excluding all persons from the courtroom (after the jury was impaneled, and until the argument to the jury commenced) except "all jurors, officers of the court, including attorneys, litigants, and their attorneys, witnesses for both parties, and any other person or persons whom the several parties to the action may request to remain," does not deprive the defendant of a public trial within the statutory and constitutional provisions giving persons accused of crime the right to a "speedy and public trial."

**Criminal Law — Cross-Examination — Questions as to Other Offenses.**

2. On a trial for the offense of rape, it is beyond the limits of proper cross-examination to permit the accused to be asked as to former arrests for other offenses, without the opportunity being given by the questions to answer as to whether he was guilty of the offense for which such former arrest or arrests were made. State v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518, followed.

**Criminal Law — Remarks of Porescuting Attorney.**

3. On a trial for the offense of rape, it is prejudicial misconduct for the attorney for the prosecution in addressing the jury, to urge

a conviction "in view of the fact that you have before you two girls whose lives have been ruined by this defendant," etc.

**Criminal Law — Remarks of Counsel — Instruction of Court Thereon.**

4. Such statement to the jury is not rendered harmless or not prejudicial by a general caution in the instructions to the jury that misstatement of the evidence by the attorneys should be disregarded, and the issue determined from the evidence alone.

Appeal from District Court, Steele county; *Pollock,* J.

Henry Nyhus was convicted of the crime of rape, and appeals.

Reversed.

*Skulason & Burtness* and *Chas. A. Lyche,* for appellant.

Accused must be accorded a speedy public trial. Cooley on Const. Lim. (6th Ed.) 379; People v. Murray, 50 N. W. 995; People v. Yeager, 71 N. W. 491; State v. Hensley, 75 Ohio St. 255, 9 L. R. A. (N. S.) 277; People v. Hartman, 103 Cal. 242, 37 Pac. 153.

Reference to supposed collateral crime is improper. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Kent, 5 N. D. 557, 62 N. W. 631; State v. Roxum, 8 N. D. 548; State v. Ekanger, 8 N. D. 559; Van Bokkelein v. Berdell, 29 N. E. 254; Roop v. State, 34 Atl. 749; Carr v. State of Arkansas, 43 Ark. 99; Bates v. State, 30 S. W. 890; People v. Gay, 7 N. Y. 378; Stanley v. Aetna Insurance Co., 66 S. W. 432; People v. Hamblin, 8 Pac. 687; People v. Silva, 54 Pac. 146; In re James' Estate, 57 Cal. 578; People v. Warren, 66 Pac. 212; State v. Nussenholtz, 55 Atl. 589; State v. Burton, 43 Atl. 254; Germinder v. Machinery Mutual Ins. Ass'n of Waterloo, 94 N. W. 1108; State v. Brown, 69 N. W. 277; Ashcraft v. Commonwealth, 60 S. W. 931; Welch v. Commonwealth, 60 S. W. 185; Johnson v. Commonwealth, 61 S. W. 1005; Bonaparte v. Thayer et ux., 52 Atl. 496; State v. Renswick, 88 N. W. 22; State v. Huff, 11 Nev. 17; State v. Fournier, 122 N. W. 329; Colb v. Union Co. 49 Atl. 392; State v. Thompson, 103 N. W. 377; Dungan v. State, 115 N. W. 350; People v. Derbert, 71 Pac. 564.

Prejudicial statements by counsel for state, when attorney is not reprimanded by court, and jury cautioned to disregard them, are error. State v. Trueman, 85 Pac. 1024; State v. Greenleaf, 54 Atl. 38; State v. Dunning, 85 N. W. 589; People v. Smith, 56 N. E. 1001; People v. Payne, 91 N. W. 739; Mason v. State, 81 S. W. 718; 12 Cyc. 579; Hanawalt v. State, 24 N. W. 489; People

v. Mitchell, 62 Cal. 411; Raggio v. People, 26 N. E. 377; People v. Dane, 26 N. W. 781; Sasse v. State, 32 N. W. 849; People v. Evans, 40 N. W. 473; People v. Bowers, 21 Pac. 752; People v. Ah Len, 28 Pac. 286.

*Andrew Miller,* Attorney General, and *J. M. Johnson,* State's Attorney, for the State (*M. A. Hildreth,* of counsel.)

Exclusion of all persons other than those interested in the case where, from the character of the charge and notice of the evidence, public morality would be undoubtedly affected, does not violate the right of public trial. New York v. Hall, 51 App. Div. Rep. 57; Crisfield v. Perrine, 15 Hun. 200, 81 N. Y. 622; Grimmet v. State, 27 Tex. App. 36; State v. Brooks, 92 Mo. 542; 1 Bishop New Criminal Procedure, section 959; and see footnote to State v. Hensley, 9 L. R. A. (N. S.) 277.

When accused takes the stand and denies his guilt, the state can search his character and learn from his past record, whether his character is such as to warrant his credibility. State v. Rozum, 8 N. D. 548, 80 N. W. 477; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; 2 Elliott Evi., section 984; Whitley v. State, 56 S. W. 69; Lewis v. Bell, 40 S. W. 747; People v. Hite, 33 Pac. 254; Oxier v. U. S., 1 Ind. Ter. 85, 38 S. W. 331; State v. Greenburg 53 Pac. 61; Roberts v. Commonwealth, 20 S. W. 267; Driscoll v. People, 47 Mich. 413, 11 N. W. 221; Hill v. State, 42 Neb. 503, 60 N. W. 916; Hanoff v. State, 37 Ohio St. 178, 41 Am. Rep. 496; Kruger v. Spachek, 22 Tex. Civ. App. 307, 54 S. W. 295.

MORGAN, C. J. Defendant was informed against by the state's attorney of Steele county for the crime of rape in the first degree, alleged to have been committed upon the person of a female under 14 years of age on the 20th day of August, 1908. The defendant plead "not guilty," and, after a trial, the jury found him guilty of the offense charged. After making a motion for a new trial upon various grounds hereinafter to be noticed, the same was denied, and the defendant sentenced to imprisonment in the state penitentiary for a term of five years.

The grounds relied upon for a reversal of the judgment in this court are the following: (1) That he was deprived of a public trial by reason of the enforcement of an order of the court by which certain persons only could be present at the trial; (2) error in permitting the cross-examination of the defendant after objection to certain questions asked him concerning his having formerly been

arrested, and being the father of another illegitimate child, and questions concerning his having paid a certain female money to avoid prosecution; (3) misconduct of the prosecuting attorney in stating to the jury that the defendant should be convicted "in view of the fact that you have before you two girls whose lives have been ruined by this defendant;" (4) insufficiency of the evidence to sustain the verdict.

The trial court, after a jury had been impaneled and sworn, made the following order: "On motion of the state's attorney, it is ordered, in view of the nature of this case, it being what is commonly known as scandalous matter, that all persons be excluded from the room save and except the following named persons: All Jurors, officers of the court, including attorneys, litigants, and their attorneys, witnesses for both parties, and any other person or persons whom the several parties to the action may request to remain." The court had previously made an order excluding all witnesses from the court room until after they had been examined, except the witnesses for the defendant, who were permitted to be present during the progress of the state's case. The statement of the case shows that there was no objection to the order limiting the attendance of persons that were permitted to be present in the courtroom. It also appears in general terms "that the order was carried into effect and enforced" until the commencement of the arguments to the jury at the close of the testimony. The statement of the case also contains the following recital: "During the course of the trial several members of the bar were present from time to time, and one other person not included in the above order was also present part of the time by special invitation of the presiding judge." The defendant contends that, by the making and enforcement of the above order, he was deprived of his constitutional right to a public trial. It is noticeable from a reading of the record, as above recited, that it does not appear that any person was excluded from or refused admittance to the courtroom who was within the terms of the order that was made nor does it appear from the record than any one was refused admission to the courtroom except by an inference from the statement in the record that the order was enforced. It is not shown in any manner how many persons were admitted under the order, or how many were in attendance upon the trial, what was the seating capacity of the courtroom, and whether the seats were filled and the court-

room crowded or otherwise, does not appear. It does not appear how many jurors were in attendance at said term, nor how many witnesses, nor how many attorneys, nor how many litigants. It is not shown whether the defendant requested any one to be present, nor is it shown that he desired any one to be present, nor is it shown that any one was refused admittance, coming within any of the classes of persons that were permitted to attend. No restrictions were placed upon the number of persons that were permitted to remain at the request of the defendant.

It is contended in the argument that the order only permitted the defendant to make a request that certain persons who were present in the courtroom when the order was made might remain upon his request; in other words, it is contended that he was not permitted to request the attendance of any person at any later session after the making of the order. We do not think this to be a reasonable construction of the order. We think it was the intention of the trial court to permit the defendant to request any person to attend during the whole trial, and remain during any sitting of the court, and to be admitted at all sessions if his presence was desired and requested by the defendant.

In view of the meager showing as to attendance at the trial under the restrictions of the order, we cannot say, nor intimate, that the trial was not public within the meaning of the constitutional provision. If every one attended that the defendant desired to have present and all others attended that could have attended under the provisions of the order, we cannot say that the trial was not public. Every one who had business or duties in the courtroom, and every one that the defendant or state's attorney might request to be present, was permitted to be present. There is no contention nor room for contention that the order did not give the defendant the same privileges that were accorded the state's representative. There was no favoritism shown to the state nor to the defendant. It is not shown that any one was excluded by reason of the order, except by inference, as above stated. The Constitution of this state guarantees to all persons accused of crime a speedy and public trial. These provisions are for the benefit of the accused. They were enacted to forever make it impossible for public prosecutors or courts to continue the evils of secret trials as they formerly existed. These prohibitions or guaranties are construed generally to have been enacted to prevent

secret trials, and public trials in the literal sense of those words have never been construed to be granted by these provisions. It is never contended that the state is burdened by these provisions with the duty of providing courtrooms of sufficient capacity to accommodate every one who may wish to be present at trials. These provisions are held to be subject to a reasonable construction, and circumstances may arise where certain portions of the public may be excluded without impairing the defendant's rights under these provisions. For instance, it is conceded by text-writers and courts generally that persons of immature years may be excluded from the courtroom during the trial where the evidence relates to scandalous, indecent or immoral matters. Furthermore, the courtroom may be cleared to prevent interference with, or obstruction of, the due administration of justice. The orderly conduct of the courts in the administration of justice is deemed to warrant the exclusion of the public from trials where those present conduct themselves in a manner tending to obstruct justice, or tending to give either the state or the defendant an unfair trial. It is deemed better to limit the right to a public trial than that the trial may be conducted in such a manner by reason of those present that the rights of the parties may be prejudiced. Grimmet v. State, 22 Tex. App. 36, 2. S. W. 631, 58 Am. Rep. 630; State v. Hensley, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734; Lide v. State, 133 Ala. 43, 31 South. 953.

In Cooley on Const. Lim. (6th Ed.) page 373, this rule is laid down, and has been taken as a guide in many cases that have since involved this question: "It is also requisite that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials, because there are many cases where from the character of the charge and the nature of the evidence by which it is supported the motive to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidence of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused, that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance

of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable portion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, who would only be drawn thither by a prurrent curiosity, are excluded altogether." In State v. Hensley, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734, supra, the court in declaring an order excluding all persons, except the jury, defendant's counsel, members of the bar, newspaper men and one other person who was a witness for the defendant, said: "Perhaps, too, the character known as the 'courtroom loafer' whose attendance would be induced only by prurient curiosity, might be excluded without harm to the defendant, or prejudice to the state, although the matter of determining with certainty just who should and who should not be included in this category in the given instance, might not always be easy of solution, but should be, and, we think, necessarily and properly, left to the trial judge who is obliged to insist upon the orderly conduct of public business, and whose highest duty is securing to the parties, the defendant as well as the state, a fair and impartial trial; but the people have a right to know what is being done in their courts, and free observation and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency tends to public welfare." The court, however, held that the order in that case was too restrictive, and deprived the defendant of his constitutional right. It is to be observed, however, that the order in that case was much more restrictive than the one under consideration. In People v. Hall, 51 App. Div. 57, 64 N. Y. Supp. 433, the court, in considering an order excluding the public from the trial except persons requested to be present by the defendant or his counsel, said: "It is apparent, therefore, that, while the defendant is entitled to a 'public trial,' good morals or the exigencies of the situation may make that a relative term, without injury to the defendant and without infringement upon the sanctity of the rights granted to him; that such discretion is vested in the presiding judge, and the test is whether or not it has been adduced." In People v. Swafford, 65 Cal. 223, 3 Pac. 809, the court, in considering an order excluding all persons from the courtroom, except the judge, jurors, witnesses and persons connected with the case, said: "The word 'public' is used in the clause of the Constitution in opposition to 'secret.'

As said by Judge Cooley, it is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials." In Benedict v. People, 23 Colo. 126, 46 Pac. 637, the court, in speaking of an order excluding all persons from the courtroom except members of the bar, officers of the court, students of law, and witnesses in the case, said: "In a criminal case the trial must be public, not secret, but the public trial does not necessarily contemplate that every person whose morbid curiosity for indecent details draws him thither shall have that curiosity gratified by being permitted to be present in the courtroom to listen to the recital of disgusting facts." In Abb. Tr. Br. Cr. section 157, the rule is stated in the following words: "The exclusion by the court of all persons other than those interested in the case, where, from the character of the charge and the nature of the evidence, public morality would be injuriously affected, does not violate the right to a public trial." In People v. Hartman, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108, the court, in declaring an order excluding all persons from the courtroom except the court officials and the defendant too restrictive, and that it deprived the defendant of a public trial, said: "While the right to a public trial contemplated by the Constitution does not require of courts unreasonable and impossible things, as that all persons have an absolute right to be present and witness the court's proceedings, regardless of the convenience of the court and the due and orderly conduct of the trial, yet this provision must have a fair and reasonable construction in the interest of the person accused." In all these cases the rule laid down by Judge Cooley is approved as a proper test as to who may be excluded without infringing on the constitutional rights of the accused. These cases all sanction the test that a public trial does not mean in all cases a trial where the public must be admitted without restriction, and that the words "public trial" may, and must, be given more latitude in construction as against their limited meaning; further, that courts may, where indecent and immoral acts are to be detailed, limit the attendance at trials so far as young persons are concerned, and so far as others are concerned if the defendant's friends and those whom he or the counsel request to be present are permitted to attend, if they desire. There is no contention that there is any prejudice to the defendant by reason of the enforcement of this order, as it is not shown that any person was excluded, and no prejudice will be presumed to follow the making and enforcement

of the order under the circumstances, in view of the express object of the trial judge in making it.

We have not overlooked the decision in People v. Murray, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294, relied on by the defendant. Whereas that case is authority against a limited construction of the constitutional provision, the order of exclusion which was under consideration in that case and held to have violated the right of the defendant to a public trial was far more restricted than the order now under consideration. See, also, Jackson v. Commonwealth, 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. Rep. 336; Kugadt v. State, 38 Tex. Cr. R. 681, 44 S. W. 989; Bishop on Criminal Procedure, section 959; State v. Brooks, 92 Mo. 542, 5 S. W. 257, 300; State v. Callahan, 100 Minn. 63, 110 N. W. 342.

The defendant was a witness at the trial and testified fully concerning the charge made against him by the complaining witness, and denied specifically that he was guilty of the offense charged Objection was made to certain questions on his cross-examination. The state's attorney interrogated him as to former arrests and other matters, and the defendant's attorney objected to such questions as beyond the limits of proper cross-examination of a defendant when on trial for a criminal offense. The cross-examination was as follows: "Q. Have you ever been arrested before Q. What for? Q. Now Henry, have you—are you the father of any child? Q. Aren't you the father of that child sitting back there—that little child? Q. Did you pay that woman $500 to settle the case? Q. Where does she live? Q. Did you ever pay her $500 for strangling her once? Q. Is it not a fact that about three years ago, at a dance, you took her by the throat and strangled her?" Each of these questions was properly objected to, and the defendant compelled to answer them—that is, each objection was overruled. We think that this cross-examination went beyond the liberal rule adopted in this state in early cases, and particularly in State v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518, where the rule was elaborately stated. In that case the court said, in referring to cross-examinations in general: "Likewise it is proper to show his relation to the facts, his means of knowledge and opportunities for information, his power of observation, and his tenacity of memory; and, subject to the constitutional privilege of a witness to refuse to answer questions, the answers

to which may tend to criminate him, it is proper to show collateral facts which might tend to criminate, disgrace, or degrade the witness if such other facts tend to weaken his credibility—(citing cases). It is also well established that, when a defendant in a criminal case voluntarily takes the witness stand in his own behalf, he thereby subjects himself to the same rules of cross-examination that govern other witnesses, with the exception that his privileges are to some extent curtailed, in that he is not only required to answer any relevant and proper questions on cross-examination that may tend to convict him of the offense for which he is being tried, but he must also answer any such relevant and proper question that may tend to convict him of any collateral offense, when such answer also tends to convict him of the offense for which he is being tried, or bears upon any issue involved in such case—(citing cases)." In relation to the cross-examination of the witness for the purpose of attacking his credibility, the court said in that case: "The rule in these cases is somewhat strict, and necessarily so, because it is dangerous ground. Injustice may be done if the rule is relaxed. Where the cross-examiner seeks to impair the credibility of a witness by proving collateral crimes, he should be confined to specific acts. He may ask the witness whether or not he committed the act, or whether he has been convicted thereof, or imprisoned therefor, but manifestly the interrogatories should be so framed as to permit the witness to admit or deny the act itself. He should not for impeachment purposes be asked questions which simply suggest inference. It has repeatedly been held that a party could not be asked whether or not he had been indicted for a particular offense on the ground that an indictment did not prove guilt—(citing cases). For the purpose of proving the commission of a crime for which a party is being tried, any evidence is proper that raises a legal inference or makes it probable that the crime was committed by the accused. Not so, however, where it is sought to show a collateral crime to affect credibility. That issue is not on trial, and the jury must not be called upon to investigate it. It was not proper, then, to ask plaintiff in error in this case, when speaking about the alleged crime in connection with the bank, whether or not he was not 'accused,' etc., and whether or not it was not 'claimed' by the bank officers, etc., because all that may have been true, and yet no such crime as claimed have been committed."

In so far as defendant was asked and compelled to answer questions in regard to former arrests, the rule in the Kent Case, as above quoted, was clearly violated. Neither the questions nor the answers tended in any way to show his guilt of the offense of rape. The fact that he had paid money under some kind of a charge by the woman named did not tend to prove his guilt of the present charge, and the questions did not give him an opportunity to answer as to the truth of the charge under which the money was paid. By these questions the line of proper cross-examination was passed. We do not deem it necessary to cite authorities on this question, except State v. Kent, supra. That case has often been cited in subsequent decisions of this court, and its soundness on this point has never been questioned, although the rule has not been stated in subsequent cases with the same accuracy and fullness as in the Kent Case. The error in permitting such cross-examination would be alone ground for a new trial, and it is unnecessary to consider other assignments of error occurring at the trial. However, we deem it best to say that there was prejudicial misconduct on the part of one of the attorneys for the prosecution who was acting at the trial as special assistant state's attorney. In addressing the jury, the attorney stated that the state was entitled to a conviction "in view of the fact that you have before you two girls whose lives have been ruined by this defendant." Exception was promptly taken by the defendant's attorney to this language. The trial judge did not specifically charge or caution the jury to disregard this statement, nor did he reprimand the attorney, nor in any way make any remark as to the impropriety of the language at that time. That the statement of the attorney went beyond the limits of legitimate argument or comment is not debatable, and there is no attempt in this court to justify the remark. It is conceded that it was improper, and we deem it so clearly improper that a new trial would be granted on that ground alone. It was not comment on the evidence, but it was the independent testimony of the attorney. There was no evidence in the record that the defendant had ruined the lives of two girls, as stated by the attorney. The contention of the state in this court is that the objectionable remarks were rendered harmless by the charge of the court wherein it was stated that misstatements of the evidence by the attorneys should be disregarded, and that the jury should be governed solely by what the evidence was, and not

by the statements of the attorneys. We do not think that this general caution, given in every case, was in itself enough to necessarily remove from the mind of the jury the effect that must have been produced by the improper remark.

It is also insisted that the evidence does not justify the verdict, but consideration of this assignment is unnecessary in view of the fact that a new trial is granted upon another ground.

For the reason stated, the judgment is reversed, a new trial granted, and the cause remanded to the district court for further proceedings. All concur.

(124 N. W. 71.)

NOTE—Within the bounds of a judicial discretion, defendant in a criminal action may be cross-examined as to specific collateral facts for the sole purpose of affecting his credibility. Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

It is not error to admit proof of a collateral offense committed by the prisoner, when it is so connected with the specific offense as to tend to establish the latter. State v. Fallon, 2 N. D. 510, 52 N. W. 318. Commission by the accused of a collateral crime may be shown if it tends to prove the crime for which he is on trial, and the remoteness in time of such crime is immaterial. State v. Kent, 5 N. D. 516, 67 N. W. 567. Where a defendant in a criminal action voluntarily offers himself as a witness, he may be asked as to collateral crimes even if his answers disgrace him in the eyes of the jury. State v. Rozum, 8 N. D. 549, 80 N. W. 477; State v. Ekanger, 8 N. D. 559, 80 N. W. 482. Where evidence is not before the court upon which remarks of a state's attorney are based, it cannot be abuse of discretion to overrule objections thereto. State v. Stevens, 19 N. D. 249, 123 N. W. 888.

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E. DELAFIELD SMITH v. JOHN GAUB, BARBARA GAUB, MATILDA SCHAFFER, NORTHWEST THRESHER CO. AND FOSTER COUNTY STATE BANK AND CHRIST SCHAFFER AND H. A. HOGUE.

Opinion filed November 19, 1910.

**Deeds — Covenants — Qualification of One Not Included in Another.**

1. A covenant against incumbrances and a covenant of warranty contained in a deed to real property are separate and independent covenants of materially different import and directed to different objects, and there is no presumption that language qualifying one of these covenants was intended to be transferred to or included in the other.

**Deeds — Covenants — Exception to Covenant Against Incumbrances — Effect as to Covenant of Warranty.**

2. An express exception, contained only in the covenant against incumbrances, in a deed to real property, of a mortgage upon the land,

in the absence of qualifying words making the grant of the deed subject to such incumbrance, or making the restriction upon the covenant against incumbrances apply also to the covenant of warranty or generally to all the covenants of the deed, does not except such mortgage from the covenant of warranty. In such case the covenant of warranty may be regarded as full and general, and an action may be maintained upon it arising out of a failure of the grantor of the deed to protect the grantee in quiet enjoyment of the title conveyed by the deed against the mortgage mentioned in the covenant against incumbrances as well as any other paramount title.

**Deeds — Breach of Covenant of Warranty.**

3. The purchase by a warrantor of title to real property, of an incumbrance covered by his warranty for any purpose other than the protection of the title conveyed by him, and the assertion by him adversely to the title of his warrantee of paramount title based on such incumbrance, is a breach of the covenant of warranty. In equity the title so purchased by him inures wholly to the benefit of the warrantee, and a court of equity will not permit him to assert the same adversely to the title so warranted by him to such warrantee.

**Deed — Covenant of Warranty — After Acquired Mortgage.**

4. Plaintiff conveyed title to real property to defendant by a deed wherein he covenanted that he was "well seised in fee of the lands and premises aforesaid and had good right to sell and convey the same in manner and form aforesaid, that the same are free from incumbrances, except a certain mortgage amounting to $400 in favor of W., and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming, or to claim the whole or any part thereof, the said party of the first part will warrant and defend." After the delivery of this deed and the payment of the consideration named therein to plaintiff, he purchased from W. the mortgage for $400 mentioned in the covenant against incumbrances and brought action to foreclose the same against defendant and his grantee.

*Held*, that the mortgage purchased by plaintiff was not excepted from the covenant of warranty contained in the deed or assumed by defendant, and that the purchase of the same by plaintiff inured wholly to the benefit of defendant and plaintiff would not be permitted to maintain an action to foreclose the same against the land.

Appeal from District Court, Stutsman county; *Burke*, J.

Mortgage foreclosure by E. Delafield Smith against H. A. Hogue and others. Decree for plaintiff, and defendant Hogue appeals. Reversed and action dismissed.

*John Knauf*, for appellant.

*Harold M. Smith*, for respondent.

ELLSWORTH, J. This appeal arises in an action to foreclose a mortgage given by one Gaub and wife upon certain lands situated in Stutsman county. It appears that on the 15th day of July, 1899, Gaub was the owner of the land in question, and on that day executed to the Winona Savings Bank of Winona, Minn., the mortgage which the action is brought to foreclose. Afterward Gaub conveyed his interest in the land to the plaintiff, Smith, who with his wife joining, on April 30, 1901, executed and delivered to the defendant Hogue a deed of the premises in question, in which the consideration named is $400. The words of conveyance and of covenant contained in this deed are as follows: "We do hereby grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all that tract or parcel of land [here follows a description of the real property conveyed], to have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, his heirs and assigns forever. And the said E. Delafield Smith and Annie M. Smith, parties of the first part, for their heirs, executors and administrators, do covenant with the said party of the second part, his heirs and assigns, that they are well seised in fee of the lands and premises aforesaid and have good right to sell and convey the same in manner and form aforesaid, that the same are free from all incumbrances except a certain mortgage amounting to $400 in favor of the Winona Savings Bank of Winona, Minn., and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will warrant and defend." The defendant Hogue paid in full the consideration named in the deed, and upon delivery of the deed took possession of the land, and continued in possession until April 29, 1902, when he entered into a contract of sale with the defendant Schaffer. Under this contract Schaffer took possession of the land, and continued to hold the same until the time of trial. On November 14, 1904, the plaintiff, Smith, obtained from the Winona Savings Bank an assignment of the mortgage executed by Gaub and wife, and thereafter, the same being unpaid when due, instituted this action for its foreclosure. The defendant Hogue made answer, setting out the conveyance to him by the plaintiff Smith and wife and the cove-

nants hereinbefore quoted, contained in the deed, and claims that, the plaintiff having sold him the premises in question for a valuable consideration and under full warranty of title, the purchase by plaintiff of the mortgage sought to be foreclosed inures wholly to the benefit of the defendant, and that plaintiff should not be permitted to assert a paramount title obtained through the foreclosure of this mortgage, against either the defendant Hogue, or his grantee, Schaffer.

There can be no question but that the deed of plaintiff to Hogue contains a full covenant of warranty. The only point presented by this appeal is whether or not the recital, "except a certain mortgage amounting to $400 in favor of the Winona Savings Bank of Winona, Minn.," contained in the covenant against incumbrances, excepts this mortgage from the warranty. In case it does, there is, of course, nothing to prevent the purchase by plaintiff of this mortgage and the assertion by him of any title obtained through its foreclosure. On the other hand, if this mortgage is not excepted from plaintiff's covenant of warranty, he will not, after warranting the title to this land, be permitted to purchase and assert adversely to his grantee, Hogue, a paramount title obtained in this or in any manner. The covenant against incumbrances and the covenant of warranty contained in the deed of plaintiff to Hogue are separate and independent covenants. They are not connected in form or substance, and are not of the same nature or import. Of the two, the covenant against incumbrances is the broader and assures to the grantee a more immediate right of action in case it shall appear thereafter that incumbrances upon the title exist. The covenant of warranty is not an absolute guaranty of perfect title, but is simply an assurance to the grantee of quiet enjoyment of the title conveyed, and that the covenantor and his heirs will not thereafter claim the estate, but will undertake to defend it whenever assailed by paramount title. Rawle on Covenants (5th Ed.) Section 116. A covenant against incumbrances is broken as soon as it appears that there is an outstanding paramount title or incumbrance; and the grantee, under such a covenant, if he sees fit to do so, may at once purchase the paramount claim and make it the basis of a claim for damage against the covenantor. Of the covenant of warranty, however, there is no breach until an outstanding paramount title has been purchased by the covenantor or has been hostilely asserted by some other party. Either of these acts, however, consti-

tute a breach of the covenant of warranty, and the measure of damage is then the same as under the covenant against incumbrances. Rawle on Covenants, Sections 149, 150.

It is clear therefore that the purchase by plaintiff, Smith, of the Gaub mortgage, and its assertion by him in an action of foreclosure, is a breach of the covenant of warranty, unless this particular mortgage is excepted from its provisions. Plaintiff urges that under the peculiar language of the deed, whereby, it will be observed, he covenants, not for himself, but only for his heirs, executors, and administrators, neither of the covenants contained in the deed can be asserted personally against him. With reference to the covenant against incumbrances, plaintiff's position is sustained by direct holdings of this court. Dun v. Dietrich, 3 N. D. 3, 53 N. W. 81. An examination of the covenant of warranty discloses, however, that it is not in like manner restricted to the heirs, executors and administrators of the plaintiff, but is made directly and pointedly with the grantee by himself and wife as parties of the first part to the deed. If therefore this covenant of warranty is to be regarded as separate and independent of, and in nature and import different from, the covenant against incumbrances, it cannot be held to be limited to any extent whatever by the preceding restriction placed upon that covenant.

It is, however, urged by plaintiff that, owing to the verbal connection of the two covenants in the context of the deed, the language excepting the mortgage from the covenant against incumbrances must be held to apply as well to the covenant of warranty. Plaintiff cites an authority which unquestionably holds that a preceding special covenant against incumbrances excluding the incumbrance in question is to be regarded as an exception of such incumbrance from a following covenant of general warranty. Bricker v. Bricker, 11 Ohio St. 240. The holding of this case has not since its announcement, however, been approved or accepted as authority by any other court, either English or American. In the body of the opinion it appears that it was opposed to a then recent holding of the Supreme Court of Massachusetts in Estabrook v. Smith, 6 Gray (Mass.) 572, 66 Am. Dec. 445. The reason given by the Ohio court for refusing to follow the Supreme Court of Massachusetts is that: "The case, we think, must have received less careful attention than is usually bestowed upon questions arising in that court. The opinion there expressed is certainly in conflict with the general

current of English authority and the opinions expressed in the American cases referred to." The more recent cases, both English and American, however, as stated above, prefer to follow the principle announced by the Supreme Court of Massachusetts, and have done so in cases proceeding from courts entitled to the highest respect to such extent as to give this principle at the present time unqualified sanction and the great weight of authority. These courts hold, on a state of facts almost literally identical with that of this case at bar: That qualifying language of one covenant of deed may be properly considered as transferred to and included in other covenants only when they are connected, generally of the same import and effect and directed to one and the same object; that covenants against incumbrances and of warranty of title are not connected in form or nature, are of materially different import and directed to different objects; and that a covenant of warranty is not restricted by an exception contained only in a preceding covenant against incumbrances. Howells v. Richards, 11 East, 633; Estabrook v. Smith, 6 Gray (Mass.) 572, 66 Am. Dec. 445; Sandwich Mfg. Co. v. Zellmer, 48 Minn. 408, 51 N. W. 379; Welbon v. Welbon, 109 Mich. 356, 67 N. W. 338; Rooney v. Koenig, 80 Minn. 483, 83 N. W. 399; Weeks v. Grace, 194 Mass. 296, 80 N. E. 220, 9 L. R. A. (N. S.) 1092; Bennett v. Keehn, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112; Duvall v. Craig, 2 Wheat. 45-58, 4 L. Ed. 180.

We believe that these holdings embody the only reasonable and consistent construction of covenants in a deed such as are here presented. The fact that a restriction is put upon the covenant against incumbrances is not of itself the slightest evidence that a like intention existed with reference to the covenant of warranty. We have heretofore noted that the covenant against incumbrances is broader and of greater immediate value to the grantee in a deed than the covenant of warranty. It is perfectly conceivable therefore that a covenantor may wish to limit the covenant against incumbrances in one or more particulars, and yet be willing to make a full general covenant of warranty. For instance, in the deed in question, the plaintiff may have been unwilling to guarantee the title during his lifetime, or as against himself, or at all, against the mortgage given to the Winona Savings Bank. For reasons privately known to himself, he may have believed the mortgage to be void and of such character that it could not be used to disturb the quiet enjoyment of the estate granted to the defendant Hogue. Under

such conditions, if the party holding the mortgage should attempt to assert the same against the land, the defendant Hogue, in order to relieve himself of the burden of proving the validity of the mortgage in a subsequent action against plaintiff on the covenant of warranty, would be compelled to give him notice and opportunity to defend, and plaintiff could then have interposed a complete defense and secured Hogue's estate against disturbance. This would not be the case, however, if plaintiff had entered into an unqualified covenant against incumbrances. The discovery of the existence of the mortgage by Hogue would have given him immediate right of action against plaintiff; or he might have chosen to himself purchase the mortgage, and thus acquire a right of action that could not have been maintained on the covenant of warranty. However this may be, the intention of the parties can only be gathered from their contract. In this case we have no light upon the matter, aside from the recitals of the deed itself, except the oral statement of the defendant Hogue to the effect that he did not assume the mortgage at the time he took possesison of the land.

It is urged that, unless the assumption by Hogue of the mortgage in question was part of the consideration for the deed, the deed was made entirely without consideration. The deed, being an instrument in writing, is however, presumed to have been made for a valuable consideration. Section 5325, Rev. Codes 1905. This presumption is not conclusive, and plaintiff might have shown by oral testimony that it was made without consideration if such was the case. That such fact may be shown by parol is well settled. Fraley v. Bentley, 1 Dak. 25, 46 N. W. 506; Alsterberg v. Bennett, 14 N. D. 596, 106 N. W. 49. The plaintiff in this case, however, has seen fit to rest his case entirely upon the deed, unaided by any oral proof whatever. It follows that we can regard only the terms of the instrument, together with such reasonable presumptions as may be drawn therefrom. None of these presumptions give countenance to the theory that the defendant Hogue in fact assumed payment of the mortgage, or that it was excepted from plaintiff's covenant of general warranty. If the conveyance had been made subject to the mortgage in question, or had contained a recital that the defendant Hogue assumed its payment, an entirely different case would be presented. If plaintiff had wished or intended to except the mortgage from the covenant of warranty, he could easily have done so by making the restriction upon the covenant against incumbrances

apply to all the covenants of the deed. In view of the ease with which it may be accomplished, it is inconceivable that a careful conveyancer, in a document so formal and important as a deed, should fail to make the exception in some such manner.

From the foregoing premises it follows that the mortgage which plaintiff is attempting to foreclose against the land in question was not excepted from the covenant of warranty contained in his deed. His purchase and attempted assertion of the mortgage is a breach of his covenant of warranty, and it must be held that the purchase inures to the benefit of the defendant Hogue, whose title plaintiff has solemnly undertaken to warrant and defend.

The judgment of the district court is reversed, and the court is directed to dismiss plaintiff's action in foreclosure. All concur.

(123 N. W. 827.)

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STATE OF NORTH DAKOTA v. AMERICAN BOTTLING ASS'N.

Opinion filed January 7, 1910.

Appeal from District Court, Cass county; *Pollock*, J.

The American Bottling Association was convicted of illegal sales of intoxicating liquors, and appeals.

Affirmed.

*V. R. Lovell* and *George A. Bangs*, for appellant. *Arthur W. Fowler*, State's Attorney, for respondent.

PER CURIAM. The facts in the above entitled appeal are in all particulars the same as those presented by the case of State of North Dakota v. Fargo Bottling Works (just decided) 19 N. D. 396; 124 N. W. 387, with the single exception that the liquor sold by the appellant was labeled "Export Malt," instead of "Purity Malt," as in the other case. The proceedings had in district court were the same, the fine imposed on appellant is in a like amount, and the two appeals were presented to this court in a single brief by the same counsel and with an express understanding that the decision of this appeal should follow that of this court in the case of State v. Fargo Bottling Works.

It is accordingly ordered that the judgment of the district court in the above-entitled appeal be affirmed. All concur, except FISK, J., who dissents for the reasons assigned in his dissent in the former case.

(124 N. W. 396.)

G. E. KERMOTT v. HORACE BAGLEY, AS JUDGE OF THE COUNTY COURT OF MCHENRY COUNTY, NORTH DAKOTA.

Opinion filed January 13, 1910.

**Constitutional Law — Judicial Powers — Druggist's Permit.**

1. Chapter 183, page 266, Laws 1909, which imposes upon district judges certain duties relative to the issuance of druggist's permits, is not unconstitutional, although such duties are held to be administrative and not judicial in character.

**Constitutional Law —Vested Rights — Right of Appeal.**

2. Such statute is not repugnant to section 109 of the constitution of this state in depriving applicants for such permits of the right of appeal. Said section 109 is *held* not mandatory, but merely permissive, and, furthermore, it has no application to decisions in matters of a nonjudicial character.

Application by G. E. Kermott for writ of mandamus to Horace Bagley, county judge. Writ denied.

*Butler Lamb* for appellant, (*Palda, Aaker, Green* & *Kelo,* of counsel.)

Under the constitution non-judicial powers cannot be conferred on District Courts or its judges. United States v. Ferreira, 13th How. 40; Hayburn's Case, 2 Dall. 409; Phelan v. San Francisco, 20 Cal. 40; State v. Chase 2 Harr. and J. 297; Ex-parte Riebeling, 70 Fed. 310; DeCamp v. Archibald, 40 Am. State 692; Glaspell v. Jamestown, 11 N. D. 86.

Where the right of appeal is given it is inviolate. Dillingham v. Putman, 14 S. W. 303; Simpson v. Simpson, 25 Ark. 487; Ex-parte Anthony, 5 Ark. 358; Peak v. People, 76 Ill. 289; St. Louis Railway Co. v. Lux, 63 Ill. 523;Schlattweiler v. St. Clair, 63 Ill. 449,

*Andrew Miller,* Attorney General; *Alfred Zuger* and *C. L. Young,* Assistant Attorneys General, for respondent.

A duty is ministerial when the time, mode and occasion of its performance are so defined that nothing remains for judgment or discretion. Merlette v. the State, 100 Ala. 42, 14 So. 562; Fredman Brothers v. Mathes, 8 Heiak 502; State v. Board of Com. 45 Ind., 501; People v. Jerome, 73 N. Y. Sup. 306; Commissioners v. Smith, 5 Tex. 479; Mills v. Brooklyn, 32 N. Y. 489; Mississippi v. Johnson, 4 Wall 475; People v. Supervisor, 35 Barb. 408.

The duty of passing upon a petition for a license, is judicial. State v. Hilliard, 10 N. D. 439, 87 N. W. 980; Black on Intoxicating Liquors, Sec. 170; Schlaudecker v. Marshall, 72 Pa. St. 200; In re-

Raudenbuch, 120 Pa. Rep. 322, 14 Atl. 148; State v. Commissioners Tippecanoe Co. 45 Ind. 501; Weber v. Lane 71 S. W. 1039, 99 Mo. 81; Ex parte Thompson, 52 Ala. 98 Hopson's Appeal, 65 Conn. 146; McCrea v. Roberts, 89 Mo. 238, 43 Atl. 39.

Right of appeal is wholly statutory not constitutional. 2 Enc. Pl. & Pr. 16; People v. Richmond, 10 Col. 274, 26 Pac. 929; Myrick v. McCabe, Supra.

FISK, J. The relator makes application to this court for a writ commanding respondent, judge of the county court of McHenry county, to file relator's application for a druggist's permit, and to assume jurisdiction to hear and determine the same. The sole question involved is the constitutionality of chapter 183, page 266, Laws 1909, which deprives county judges of the powers and duties heretofore granted and imposed upon them relative to the issuance of druggist's permits, and attempts to impose such duties upon the judges of the district courts. Relator's contentions are that chapter 183 aforesaid is unconstitutional: First, because it is an attempt to confer upon the district court, or the judge thereof, nonjudicial powers; and second, that it is repugnant to section 109 of the state Constitution, in that it deprives the applicant of the right of appeal granted by that section from the decisions of the district court.

The provisions of the Constitution relied upon by relator's counsel in support of their contentions are the following:

"Sec. 85. The judicial powers of the state of North Dakota shall be vested in the Supreme Court, district courts, county courts, justices of the peace, and in such other courts as may be created by law for cities, incorporated towns and villages."

"Sec. 103. The district courts shall have original jurisdiction, except as otherwise provided in this Constitution, of all causes both of law and equity, and such appellate jurisdiction as may be conferred by law. They and the judges thereof shall also have jurisdiction and power to issue writs of habeas corpus, quo warranto, certiorari, injunction, and other original and remedial writs with authority to hear and determine the same."

"Sec. 109. Writs of error and appeals may be allowed from the decisions of the district courts to the Supreme Court under such regulations as may be prescribed by law."

"Sec. 21. The provisions of this Constitution are mandatory and prohibitory, unless by express words, they are declared to be otherwise."

Taking up relator's first contention that the duties attempted to be imposed upon the district judges under the statute in question are nonjudicial in the broad sense of the term, we are convinced that such contention is unassailable. The powers and duties thus attempted to be conferred are clearly administrative, rather than judicial in character. They are akin to many other duties of an administrative character conferred upon boards or officers to examine and pass upon applications for licenses to practice medicine or dentistry, or to dispense intoxicating liquors in states which license such traffic. The duties imposed upon drainage boards under our statute are of a similar administrative character. While in the discharge of such duties the officer or board may be called upon to act judicially in a sense; the duties are no less administrative in character. If, as contended by respondent's counsel, such duties are judicial as distinguished from administrative, it would inevitably follow as a logical conclusion that it would be beyond the power of the Legislature to confer such duties elsewhere than upon the courts, as all judicial power is, by the Constitution, expressly conferred upon the various courts therein enumerated. That the Legislature can confer such duties upon administrative boards and officers cannot be doubted.

The many authorities cited by respondent's counsel merely go to the question that duties requiring the exercise of judgment and discretion are of a quasi judicial, and not of a mere ministerial, character. This is manifestly true, but we are not here confronted with any such proposition.

We deem it unnecessary to cite authorities in support of the foregoing. Our conclusion is that such duties as are sought to be conferred upon the district judges by the act in question are of an administrative character. This brings us to a consideration of the question whether, under our Constitution, it is within the legislative power to impose such duties upon district judges. Upon this question the courts are divided; the weight of authority appearing to be against such legislative power. The recent case of Bank v. Town of Greenburgh, 173 N. Y. 215, 65 N. E. 978, wherein the majority of the judges upheld the validity of a statute similar on principle to the one here involved, but which contains a very able

dissenting opinion by Chief Justice Parker, concurred in by Judges Vann and Werner, furnishes good statements of the respective views of judges upon the question. See, also, Moynihan's Appeal, 75 Conn. 358, 53 Atl. 903; Tyson v. Washington County, 78 Neb. 211, 110 N. W. 634, 12 L. R. A. (N. S.) 350; In re Weston, 28 Mont. 207, 72 Pac. 512; State v. Brill, 100 Minn. 499, 111 N. W. 294, 639, 10 Am. & Eng. Ann. Cas. 425. The opinion of Elliott, J., in the latter case is very able and exhaustive, reviewing, as it does, the decisions of many courts upon this question and in addition to the authorities cited in the opinion, and the valuable note thereto in 10 Am. & Eng. Ann. Cas. 425, we deem it unnecessary, as well as useless, to call attention to other cases with the exception of those collated in the valuable notes to Foster v. Rowe, 8 Am. & Eng. Ann. Cas. 595.

The various authorities must be read and weighed in the light of the respective state Constitutions in force where such decisions were rendered, which, of course, are controlling. As stated in the opinion in State v. Brill, supra: "All the states, except New York Pennsylvania, Ohio, Wisconsin, Kansas, Delaware, North Dakota, and Washington, have adopted Constitutions which contain a distributing clause expressly providing for the division of governmental powers among three departments. All the states that have adopted this clause except Rhode Island, Connecticut and North Carolina, have further provided that no person or persons exercising the functions of one department shall assume or discharge the functions of any other department. The constitutions of all the states except Rhode Island, Connecticut, New Jersey, North Carolina, Louisiana, New Hampshire, Massachusetts, New York, Virginia, West Virginia, and South Carolina, provide that the powers shall be separated except in cases expressly directed or permitted. South Dakota provides 'that the powers of the government of the state are divided into three distinctive departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution.' Article 2. The Constitution of the United States and the Constitutions of New York, Pennsylvania, Ohio, Wisconsin, Kansas, Delaware, Washington, and North Dakota, contain no general distributing clause." After thus reviewing the various Constitutions the court further says: "Irrespective of the existence of a distributing clause, it is held that the creation of these departments operates as an apportionment of the different classes

of power. * * * As all departmemnts derive their authority from the same Constitution, there is an implied exclusion of each department from exercising the functions of the others." The court thereafter proceeds to review the many authorities both pro and con, and reaches the conclusion that the statutes there under consideration are unconstitutional "because they assume to impose upon the members of the judiciary powers and functions which are by the Constitution of the state assigned to another department of the government." There is much force in the views thus expressed by the Minnesota court, and, were it not for the fact that our Constitution contains a provision radically different in a vital particular from any other state Constitutions excepting two, we would be inclined to adopt the views of the Minnesota court.

Under article 4 of our state Constitution, which deals with the judicial department, we find the following section: "Sec. 96. No duties shall be imposed by law upon the Supreme Court or any of the judges thereof, except such as are judicial, nor shall any of the judges thereof exercise any power of appointment except as herein provided." It is a very significant fact that no like provision is found with reference to the imposition of nonjudicial duties upon other courts or the judges thereof. As before stated, there are but two Constitutions containing such provision. They are the Constitutions of Pennsylvania and Wyoming. We do not find that this question has ever arisen in the latter state, but in Pennsylvania, in a very recent case, the Supreme Court expressly passed upon a constitutional provision identically the same as section 96 aforesaid and that court reached the conclusion that the Legislature had the power to impose nonjudicial duties upon courts and judges other than those mentioned in said section. We quote from the opinion of the court as follows: "* * * We pass to the next objection raised to the act, which is that it imposes upon the court duties that are not judicial. The executive, legislative, and judicial branches of the state government are created by the people through their Constitution, and the power and duties of each are such only as are expressly conferred or imposed, or are inherent by necessary implication. But there are no powers inherent in either of the branches, nor duties to be evaded by either of them, if such powers have been expressly withheld from it by the people, or duties have been imposed upon it by them; and therefore no duty can be evaded by the executive or judiciary if the people have authorized its imposition

by the Legislature, their lawmaking power, on either of these branches. In the judiciary article the judges of but one court are exempt from the imposition of nonjudicial duties, and from them alone is the power of appointment withheld. 'No duty shall be imposed by law upon the Supreme Court or any of the judges thereof, except such as are judicial, nor shall any of the judges thereof exercise any power of appointment except as herein provided.' Const. art. 5, section 21. 'Expressio unius est exclusio alterius, is no less true of this clause than of any statute; and it is therefore to be presumed that the people * * * adopted the clause containing the limitation upon this court alone and left the judges of the other courts to continue to appoint when directed to do so by the Legislature. The real question is not as to the character of the duty to be performed by the courts under the act of 1905, but as to the constitutional power of the Legislature to impose it. If that power exists, the duty imposed in this clear exercise of it must be performed." Commonwealth v. Collier, 213 Pa. 138, 62 Atl. 567. It will be seen that the foregoing decision is directly in point, involving a constitutional provision verbatim like ours, and we are entirely satisfied with the soundness both of the reasoning and conclusions of that court.

If the maxim "Expressio unius est exclusio alterius" is not to be applied to the constitutional provision aforesaid, as it is thus applied by the Supreme Court of Pennsylvania, it is perfectly apparent that such section is not only useless but meaningless, and should have been omitted by the framers of our Constitution. The constitutional power existing in the Legislature to impose these duties upon district judges, it is of no concern to this court whether such exercise of power is in consonance with a wise public policy or not. This is, of course, a matter resting wholly with the Legislature.

In arriving at the above conclusion we are not unmindful of the fact that this court, in Glaspell v. City of Jamestown, 11 N. D. 86, 88 N. W. 1023, held void certain statutory provisions authorizing district courts to exclude territory from the corporate limits of cities in certain cases, upon the ground that such provisions sought to vest legislative powers in such courts. In that case, however, it was expressly conceded that if the power conferred was not judicial, the law was repugnant to the Constitution, and therefore, void. Hence the question here presented was not there raised nor

considered, and consequently the decision cannot be treated as a controlling authority on such point.

The duties imposed by chapter 183, although of an administrative character, and belonging in the broad sense of the term to the administrative or executive department of the state government, may be said to involve in their discharge functions of a quasi judicial nature. Whether the Legislature possesses the unrestricted power to impose upon the district courts or the judges thereof duties neither of a judicial nor quasi judicial character, but purely of a legislative, executive, or ministerial character, we are not here called upon to decide. The case of Glaspell v. Jamestown involves an instance of an attempt to impose on the district court duties purely legislative in character.

But one other proposition remains for consideration. It is contended that the act in question is unconstitutional because no right of appeal is allowed from the determination of the district judge. Such contention is based upon section 109 of our Constitution, which reads as follows: "Writs of error and appeal may be allowed from the decisions of the district courts to the Supreme Court under such regulations as may be prescribed by law." There are two sufficient answers to such contention: First, such provision is not mandatory, but merely permissive; and, second, the duties being purely administrative—not judicial—such constitutional provision has and could have no application.

Our conclusion is that the act in question is not vulnerable to either of the attacks made against it, and that the writ prayed for should be accordingly denied. All concur.

ELLSWORTH, J. (specially concurring). I concur in the result announced in the foregoing opinion upon the sole ground that the duties imposed upon the judges of the district court by chapter 183, p. 266, Laws 1909, relative to the issuance of druggists' permits, are quasi judicial, and neither clearly administrative nor purely legislative. When for the effective discharge of an important public purpose it is necessary that a single officer shall perform a duty made up partly of judicial functions and partly of functions purely administrative, so interwoven that it is impracticable to require a separate performance of these functions by officers of the judicial and executive departments, respectively, I believe that under our Constitution this duty may be imposed upon an officer of either department. Bishop on Noncontract Law sections

785-786; Mechem, Public Officers, sections 637-639; Bair v. Struck, 29 Mont. 45. 74 Pac. 69, 63 L. R. A. 481. If the Legislature sees fit to impose a complex duty of this character upon a judicial officer, it may be regarded as coming within his department in the same way that duties involving judicial functions may be assigned to officers of the executive department. If the duty is, however, clearly administrative or legislative, I do not believe that under our Constitution it can be imposed upon a judge of the district court. The reasons for this holding are clearly and to me satisfactorily set forth in the opinion of Chief Justice Morgan in the case of Glaspell v. City of Jamestown, 11 N. D. 86, 88 N. W. 1023; and in my view it is not necessary in deciding this case to in any manner modify or lessen the force of the principles announced in that case. I, therefore, limit my concurrence in this opinion to the holding that the duties required of the district judges in issuing druggists' permits are quasi judicial, and not clearly administrative, and to the result announced.

(124 N. W. 397.)

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MAIE B. RINDLAUB v. JOHN H. RINDLAUB.

Opinion filed January 29, 1910.

On Rehearing March 8, 1910.

**Appeal and Error — Statement of Case — Settlement after Appeal.**

1. The district judge retains full and complete jurisdiction, after appeal, to settle a statement of case to be used on appeal or to do any other act in furtherance of such appeal. *Held,* accordingly, that plaintiff's motion to strike defendant's statement from the record for reasons assigned as a basis for such motion is without merit.

**Divorce —Grounds — Evidence.**

2. The marriage relation will be dissolved only where its purpose has been defeated by grave and serious misconduct. Such misconduct, to warrant a judgment of divorce, must be established by evidence of a clear and satisfactory character. Public policy, good morals and the interests of society require that the sacred marriage relation should be surrounded with every safeguard, and its severance adjudged only where the complaining party has clearly and satisfactorily brought herself or himself within the terms of the statute.

**Divorce — Extreme Cruelty — Question of Fact.**

3. By section 4049, Rev. Codes 1905, "extreme cruelty" is designated as a ground for granting divorce, and by section 4051 it is de-

fined as "the infliction by one party to the marriage of grievous bodily injury or grievous mental suffering upon the other." Following the construction of this statute, adopted in Mahnken v. Mahnken, 9 N. D. 188, 82 N. W. 870, *held*, that grievous mental suffering may be sufficient to warrant a divorce under the statute, although not productive of perceptible bodily injury; but whether grievous mental suffering has been inflicted by one party upon the other is purely a question of fact, to be determined in the light of the particular circumstances surrounding each individual case.

**Divorce — Evidence — Clear and Satisfactory Character.**

4. Evidence examined, and *held* not of that clear and satisfactory character to warrant the granting to plaintiff of a divorce for extreme cruelty.

**Ground for Divorce — Habitual Intemperance — Morphine Habit — Sufficiency of Evidence.**

5. Evidence relating to plaintiff's other alleged ground for a divorce, namely, habitual intemperance in the use of morphine to such a degree as to disqualify defendant, a great portion of the time, from properly attending to business, and which has reasonably inflicted upon plaintiff a course of great mental anguish, examined, and *held* not established.

**Divorce — Counterclaim — Extreme Cruelty — Insufficiency of Evidence.**

6. Defendant's counterclaim, alleging facts constituting extreme cruelty on plaintiff's part, *held*, for reasons stated in the opinion, not sufficiently established by the evidence.

**Same.**

7. Defendant's counterclaim for willful desertion by plaintiff *held* fully established.

Appeal from District Court, Cass County; *Templeton*, J.

Action for divorce by Maie B. Rindlaub against John H. Rindlaub. From a judgment for plaintiff, both parties appeal. Judgment modified, and lower court directed to enter a judgment in defendant's favor granting him an absolute divorce, assigning to him the homestead during his life, and awarding to him the custody, during a portion of the time, of Bruce and John, two of the minor issue of the marriage.

*Barnett & Richardson* (*Pierce Butler* of Counsel), for plaintiff. *Ball, Watson, Young & Lawrence*, for defendant.

FISK, J. This is an action for divorce, and is here for trial de novo. Plaintiff had judgment in the court below for an absolute divorce and she was awarded the custody, until the further order of the court, of the three minor children, Bruce, born April 18,

1904, John, November 1, 1905, and Newhall April 4, 1907. By the judgment defendant is required to pay to plaintiff within 60 days from the date of the service of the findings, and upon the delivery by plaintiff to defendant of deed of conveyance of the homestead. permanent alimony in the sum of $30,000, and until the further order of the court the sum of $75 per month for the support, maintenance, and education of said children; also certain allowances, as costs and counsel fees in the case. The amended complaint upon which the cause was tried alleges two statutory grounds for divorce; the first being habitual intemperance, and the other, extreme cruelty. The alleged habitual intemperance is specified in the complaint as "the use of morphine and other like narcotic drugs to such a degree that the said habitual intemperance disqualifies said defendant a great portion of the time from properly attending to business, and has inflicted upon this plaintiff a course of great mental anguish." And the alleged extreme cruelty is particularly specified as follows: "That during all the time since plaintiff and defendant were married, defendant has treated plaintiff neglectfully; has shown her little or no kindness or consideration; that defendant has, during all of said time, at times, exhibited a violent temper; has scolded, stormed at, and abused this plaintiff, and has sought excuses and occasions to quarrel with and criticise plaintiff, and has frequently called plaintiff a liar, and has said to plaintiff that she has no pure thoughts. That it was hell to live with her; that she could go. During all the time since the marriage of plaintiff and defendant, defendant has found fault with and scolded and abused plaintiff because his meals did not suit him, and because meals prepared by plaintiff for his guests did not please him. That defendant is, and has been ever since the marriage of plaintiff and defendant, addicted to the use of morphine, and at the times when not stimulated by said drug, and when defendant has suffered for want thereof, he has been particularly cross, abusive, and fault-finding with this plaintiff. That plaintiff first learned that defendant used morphine a few days after her marriage, and when they were on their wedding trip, when plaintiff saw defendant take a hypodermic injection on the train. That plaintiff did not then understand what this meant, and prior to her marriage had no knowledge or information that the defendant was addicted to the use of morphine. That at times when plaintiff undertook to defend herself against the abuse of said defendant, or

make answer to his accusations and fault-finding, defendant has told this plaintiff that she could go, and has said to this plaintiff that he wanted nothing to do with her; that they would live in the same house, but that all he wanted of her was mere civility. That during the times when plaintiff has been pregnant and large with child defendant has been particularly abusive to plaintiff, taunting her with her condition and appearance. That after plaintiff and defendant were married, defendant took plaintiff on a wedding trip to countries contiguous to the Mediterranean Sea, including Palestine and Egypt, and from thence to Naples, Italy and, north across Europe. That during said trip the plaintiff became ill with la grippe, and afterwards when they arrived at Luxor in Egypt the plaintiff again became very ill, and was prostrated with pneumonia; that while in this condition they returned to Cairo, where the plaintiff was confined to her bed with pneumonia. While the plaintiff was still ill, and not wholly recovered from said attack of pneumonia, and was weak from the effects thereof, all of which the defendant well knew, the defendant compelled the plaintiff to continue their journey north. At no time after leaving Cairo did defendant give this plaintiff any medical care or show her any consideration, but on the contrary, during said journey north and through Europe, the defendant insisted and compelled this plaintiff to sight-see and to travel continually and without sufficient rest or nourishment, medical care or attention, and also insisted upon and compelled plaintiff to carry her luggage, and refused to employ, or permit her to employ, porters for such purpose. That during such time and times this plaintiff was sick and very weak, which fact was known to the defendant. That in the month of December, 1903, plaintiff was big with child and doing her own housework, including keeping up of fires, carrying coal, and doing all the drudgery. That defendant scolded and abused plaintiff, and complained of what she did and was able to do in keeping house, and found fault with plaintiff for being ill until plaintiff became prostrated, all of which defendant well knew. That defendant, although a physician himself, gave plaintiff no treatment whatever, and employed no physician until plaintiff became so ill that she was confined to her bed, when a physician was called. That at this time, and when plaintiff was confined to her bed, defendant came to her bedside and abused her, and told plaintiff that she was crazy, and that it was impossible to live with her. That on or about the night

of April 15th, shortly before her child was born, plaintiff was suffering pains, and, believing she was about to be confined, waked defendant and told him about her pain, whereupon defendant swore at plaintiff for disturbing him, and afterwards, when plaintiff said that she could not stand being sworn at, defendant said that if she could not stand it she could go. That during the month of August, 1905, when plaintiff was pregnant with her second child, and had so been pregnant for about six months, the defendant abused plaintiff until plaintiff fell upon the floor from the excitement and exhaustion occasioned by the defendant's said abuse, that defendant then called plaintiff a d——d fool, and stepped over the body of the plaintiff, and left her upon the floor of the room, by reason of which said abuse and bad treatment of plaintiff by the defendant plaintiff was made sick and ill and confined to her bed. That soon after the defendant again abused plaintiff, called her a d——d liar and 'truthful James,' and applying to plaintiff other epithets and names. Upon another occasion, when plaintiff was carrying her third child, defendant abused her until plaintiff left the room in which defendant was so abusing her, and he followed her to another room, continuing his abuse."

The answer puts in issue by specific denials the various allegations of the complaint under both alleged causes of action, and as to the charge of habitual intemperance he alleges that for many years "last past he has been afflicted with a physicial malady, which at irregular times, sometimes a few days apart, and sometimes several weeks apart, prostrates him, and that when thus prostrated he suffers excruciating and unendurable physical pain; that upon such occasions, and no others, defendant has been for many years accustomed to take small injections of a special preparation of morphine, the same being thus taken for the purpose of the recognized valuable therapeutic action of the drug upon the system, as well as the alleviation of such pains, and rendering it possible for defendant to endure the same; that defendant has never become addicted to the use of morphine or any like drug, and his use of the same was for the purposes aforesaid, and at the times aforesaid, and that the taking of the same under such conditions, and the amount taken, have been recommended and approved by the best medical advisers with whom defendant consulted." He denies "that he has ever become habituated to the use of morphine or other like drug, and denies that he ever used the same to any excess; de-

nies that the taking of the same has ever disqualified him for a great portion of the time, or for any portion of the time, from properly attending to his business and denies that the same has inflicted upon the plaintiff a course of great mental anguish or any mental anguish whatever. Defendant further alleges that plaintiff well knew at and prior to the time of their marriage that defendant was afflicted with a serious physical malady and well knew at the times of his prostration that he suffered great and unendurable pain as a result of such malady. Defendant denies that he has ever been addicted to the use of morphine except as hereinbefore stated and denies that either through the use of morphine or any other narcotic, under the circumstances stated, or otherwise, or the abstention from such use, defendant was made either cross, abusive, or fault-finding with the plaintiff." He admits "that he is by education and profession a specialist in the treatment of disease of the eye, ear, nose, and throat," and alleges "that in the practice of said profession he has at all times since his marriage with the plaintiff been required from time to time, to perform delicate surgical operations upon patients under his professional care; that except when prostrated by the acute attacks of his said physical malady, he has been accustomed, during all such period, to perform such delicate surgical operations." Defendant further alleges "that he has never made any secret of his use of morphine or other drug as a means of alleviating his physical suffering at the time of such prostrations." With reference to the various allegations contained in plaintiff's second cause of action relating to alleged acts of cruelty, defendant specifically denies the same.

Paragraphs 4, 5, 6, 7, 8, and 9 of the answer are as follows:

"(4) Further answering the complaint defendant denies that plaintiff, during her married life, has conducted herself towards this defendant as a dutiful wife, and on the contrary alleges that plaintiff for more than a year last past has been quarrelsome and fault-finding, has frequently shown little or no sympathy with defendant at the times when he has been prostrated with his physical malady, and that her conduct generally has lacked in sympathetic care and devotion to him. Defendant admits that for more than a year last past there have existed matters of dispute and misunderstanding between himself and the plaintiff, admits that they have occasionally quarreled, and admits that unkind words have been spoken by each of them; but defendant further alleges that in so far as such mis-

understandings, disputes, and quarrels having occurred, or unkind words have been spoken, the same have been caused as hereinafter fully set forth; denies that the same inflicted upon plaintiff grievous mental or bodily suffering.

"(5) Further answering the complaint, defendent alleges that such bickerings, misunderstandings and quarrels as have existed in the marital relations between the parties hereto have been very largely, if not wholly, produced and caused by unjust, unwarranted, and inexcusable interference and trouble-making on the part of the father and mother of the plaintiff herein. That her said family reside in Fargo, and have so resided for many years last past. That they and each of them have continually, for more than a year past poisoned the mind of the plaintiff against this defendant, and have interfered in the private family affairs of the defendant, and have misrepresented and maligned his actions and his motives, have manufactured and put in circulation the grossest and most inexcusable slanders and misrepresentations concerning him, and have instilled in the mind of the plaintiff a feeling of bitter hostility towards him because of certain alleged, but baseless and wholly imaginary, wrongs done her by the defendant. That plaintiff has at all times been greatly under the influence of her father and mother; has listened to and followed their plans and designs has given ready credence to their false and unwarranted slanders against defendant, and that in this way the happiness of the domestic life of the plaintiff and defendant was greatly impaired and interfered with. That the father and mother of plaintiff, very soon after defendant's marriage, conceived a bitter dislike to him, and since such time have systematically, and in all manner of ways, sought to instill into plaintiff's mind a feeling of dislike and hatred for defendant. That in so doing the family of plaintiff have resorted to the bitterest malice, and the most unjust and cruel falsehoods, even to the point of recklessly, maliciously, and falsely charging defendant with infidelity to his marriage vow, and instilling in plaintiff's mind a belief in such infidelity. That as a result of such malicious, cruel, and unwarranted interference in the family affairs of the parties hereto, the mind of the plaintiff became and is poisoned against defendant, and she has been ready to believe the falsehoods and slanders thus circulated by her parents, and has herself charged this defendant with infidelity, and has stated to others that he was untrue and unfaithful to her.

"(6) Further answering the complaint, defendent alleges that he has frequently begged plaintiff to free herself from the influences exercised upon her by her parents, and has frequently said to her they would live a happy and contented married life if they were free from the interference of her family. That prior to plaintiff's abandoment of defendant, defendant on several occasions, for the sake of preserving their marital peace and happiness, offered to plaintiff to remove permanently from Fargo, to give up his professional practice in said city, and to remove to some other place where they would be free from the interference of plaintiff's family, which offer plaintiff never accepted or agreed to.

"(7) Defendant further alleges that ever since his marriage with plaintiff he has furnished her with a home which was supplied with the appointments of comfort and luxury. That he provided her with ample help for the domestic work, and with nurses at the time of her own illness and the illness of their children. That he supplied her with horses and carriages for her use in driving. That he provided her with money in a bank account standing in her own name, and replenished the same from time to time so that she could draw thereon as she desired, and otherwise gave her whatever was necessary for the reasonable gratification of her tastes and desires. That in the months of August and September, 1906, plaintiff took a trip to Alaska in company with her father, the defendant paying all her expenses incurred in connection therewith, and defendant charges that, while upon such trip, plaintiff being absent from Fargo more than eight weeks in making the same, the plaintiff and her father conspired to break up defendant's home, and as far as lay in their power to wreck his domestic happiness, and to impair and destroy his professional standing. After returning from such trip plaintiff came back to their home, resumed the care of the house and the performance of her duties as housekeeper, and seemed glad to return. That on the 22d day of November, 1906, the plaintiff, without giving the defendant the slightest warning of her intention to do so, but as defendant is advised, and as he verily believes the fact to be, in pursuance of a pre-arranged plan between herself and her parents, in the forenoon of said day, after defendant had left their home and gone down to his place of business, forsook and left the home of defendant in company with her father, taking with her the two children, one of whom was dangerously ill, and also tak-

ing most of her personal belongings, and a large number of the private papers and effects of defendant, and that without the slightest warning of such an intention on her part, and to the consternation and great surprise of this defendant, the plaintiff began this suit. That the plaintiff went to the home of her parents, and has remained there ever since the commencement of this suit, and that, although he has repeatedly sought to see her and obtain an explanation of her conduct, he has been refused by her parents the privilege of so much as seeing or speaking to his wife, and that his wife is now so completely under the influence, control and dominion of her parents that it is impossible for defendant to so much as see her, or to talk over with her their differences in the past, in all of which matters the plaintiff's parents have acted with vindictive and cruel maliciousness, and with the intent to so poison the mind of plaintiff that she would be unwilling to return to her duties as the defendant's wife.

"(8) Further answering the complaint, defendant alleges that since plaintiff's departure from his home in Fargo, as aforesaid, he has continued to keep, and is now keeping, said home open, cared for by servants, and, notwithstanding the premises, plaintiff has never returned, or offered to return, to her home, and has refused to even see defendant since her said abandonment of him.

"(9) Further answering the complaint, defendant alleges that shortly prior to their marriage he presented to plaintiff a deed of conveyance to the south 95 feet of lots 11 and 12, block 33, of the original plat of Fargo, upon which to erect their home; that thereafter defendant erected a dwelling thereon, the total value of such lots and dwelling being about $25,000; that such premises have at all times since been the homestead of the parties hereto, and the same are now occupied as such by the defendant. Defendant admits that he has had a large practice in his professional work, but denies that his income has been anything like the amount stated in the complaint, and denies that he has accumulated a fortune in the sum of from $300,000 to $500,000, or in any like amount. Defendant alleges that his income and the amount of his present worth are greatly exaggerated in the complaint; that while he has in fact enjoyed a large professional practice, a considerable proportion of the work done has been charitable in its nature, and that a considerable proportion of the total charges made for professional work have been uncollectible; that exclud-

ing the homestead in Fargo, the furniture and furnishing thereof, the barn and ground upon which it stands, and the horses and carriages therein, defendant at the present time is worth not to exceed $100,000, and that in his opinion the value of such property does not in fact exceed the sum of $75,000."

Such answer also contains two counterclaims; the first charging plaintiff with extreme cruelty, and the second charging her with desertion on November 22, 1906. The first counterclaim, among other things, specifically alleges the following acts of plaintiff constituting the alleged extreme cruelty, to-wit: "That without cause, excuse or provocation, she has charged defendant with infidelity to his marriage vow. That she has charged him with being untrue and unfaithful to her since their marriage. That she has charged defendant with criminal intimacy with other women. That plaintiff also grossly slandered and abused defendant by stating to others that defendant has been guilty of infidelity to his marriage vow, that he had been criminally intimate with other women since his marriage to plaintiff, and that he had been untrue and unfaithful to her. That each and every of said charges and slanders were untrue, and were without foundation in fact. That defendant never gave plaintiff any cause, excuse, or provocation whatsoever for the making of said charges, or the circulation of such slanders, but that in all respects, since their marriage, he at all times conducted himself as a true and dutiful husband should do. That plaintiff has likewise charged defendant with being a morphine fiend, and with being addicted to the excessive use of morphine and other like narcotics; that she has uttered and put forth slanderous and untrue statements to the effect that he was a morphine fiend, and addicted to the excessive use of morphine and other narcotics, and all with the purpose of injuring and wounding his feelings, to impair and if possible destroy his professional standing and reputation as a physician and specialist in the practice of the medical profession in Fargo. That the making of such charges and slanders was without excuse or provocation, and that the same were utterly and wholly false and untrue. That by reason of the making of such charges, and the putting in circulation of such slanders, plaintiff has inflicted upon defendant great and grievous bodily and mental suffering. That on or about November 22, 1906, without the slightest previous warning of her intention so to do, plaintiff gathered up her per-

sonal belongings and departed from defendant's home, going to the home of her parents in this city. That she took with her also the two children, Bruce and John; the latter at the time being seriously ill. That by so doing she exposed the life of the said child, John, to very serious danger. That plaintiff's leaving her home under such circumstances, and taking the children in the manner as aforesaid, was immediately followed by the service of summons and complaint herein. That all of said acts upon the part of plaintiff were wholly without cause, excuse or provocation, and were planned and designed with the effect, and that they did have the effect, of inflicting great and grievous mental and bodily suffering upon defendant. That said actions of the plaintiff created gossip, and gave rise to the circulation of scandals, all without any excuse or provocation whatever upon the part of this defendant, and all of which caused him great and grievous bodily and mental suffering and anguish. That by reason of all of the facts hereinbefore stated plaintiff has inflicted upon this defendant great and grievous mental and bodily suffering, and has destroyed his peace of mind, and has rendered it impossible for him ever again to live with the plaintiff as her husband."

The prayer of the answer is: "(1) That the complaint of the plaintiff herein be dismissed. (2) That a final decree be made herein, granting unto defendant an absolute divorce from the plaintiff. (3) That the custody of the minor children, Bruce and John, be awarded to this defendant. (4) For such other and further relief as to the court may seem meet and proper." To such counterclaim a reply was served, admitting: "That she has stated in her complaint in this action that the defendant has been guilty of habitual intemperance in the use of morphine and other narcotic drugs, and is and has been addicted to the use of morphine as in said complaint alleged; reference thereto being had." And also: "That on or about the 22d day of November, A. D. 1906, she left her home, taking with her her two children, Bruce and John, and that she upon the same date commenced this action by the service upon the defendant of the summons and complaint"—but specifically denying the other allegations, both as to extreme cruelty and desertion.

We have thus fully set forth the various contentions of these parties as disclosed in their pleadings, as we deem it necessary to a clear understanding and a proper disposition of the case.

The learned trial court found against plaintiff on her first cause of action, and against defendant on both counterclaims, deciding in plaintiff's favor on her second cause of action, namely, extreme cruelty. In view of the fact that the action is here for trial de novo, we deem it unnecessary to review the findings of fact and conclusions of law in this opinion. Such findings and conclusions cover 46 pages of the printed abstract, going into the minutest details of evidentiary matters, whereas if they had been properly restricted to ultimate facts and conclusions, much less space would have sufficed. Such practice is not to be commended, and should be discontinued. Counsel, no doubt, are largely to blame by proposing findings in this form. Both parties have appealed, and ask a review and retrial of those issues only which were decided adversely to their respective contentions. Defendant's printed abstract contains 2,301 pages, and plaintiff's abstract 3,250, a total of 5,551 pages. There are eight printed briefs, so-called, four on each side; the number of pages in plaintiff's briefs being 838 and in defendant's briefs 421. Plaintiff's abstract duplicates everything in defendant's abstract, as we understand it, with other matters not material to defendant's appeal. This was wholly unnecessary and a useless expense. We have, at the expense of other equally important business before this court, and with much care and patience, read this great mass of printed matter, and we are convinced that much of this work was wholly unnecessary. The issues are simple, and there is no reason for such a protracted trial. Much of the testimony is repeated, and much more wholly irrelevant and immaterial. One-fourth of the time consumed was, we think, amply sufficient. We refer to these matters at this time because this case presents in so marked a degree the flagrant abuses so frequently indulged of the privileges given litigants by the so-called Newman law, which law requires that all evidence offered on the trial of certain cases must be received. Such abuses, if persisted in, should, and no doubt will, result in the repeal of such law, or an amendment thereof; that being the only remedy.

We will first consider the questions presented on defendant's appeal. Certain questions are raised and presented by separate briefs upon the judgment roll proper. These need not be considered, in view of the conclusions reached on the other features of the appeals. Nor, for like reasons, need we notice plaintiff's preliminary motion to strike from the record certain uncertified docu-

ments and papers enumerated in detail in her brief on the judgment roll proper. At the outset we are confronted with a motion by plaintiff's counsel to strike from the record the entire statement of case on defendant's appeal. The grounds of the motion are epitomized by counsel as follows: "First. By causing the judgment roll proper to be filed in the Supreme Court on August 20, 1908, without the settlement of the statement of the case, and causing the case to be placed on the calendar in said court, the defendant had abandoned all idea of settling his statement of the case, and had elected to try his case on the judgment roll proper. Second. That as no showing of good cause or reason was made to the Supreme Court on the application to remand the record why the defendant had the right to change his mind and again elect to try the cause on the evidence. The Supreme Court without such showing or without notice ought not to have remanded the record. Third. That as statutory time had long past within which to settle the defendant's proposed statement of the case, and as the defendant had not made any showing of 'good cause or in furtherance of justice,' the Supreme Court was without jurisdiction to remand the record for the purpose of having the defendant's proposed statement of the case settled, or to direct the district court to settle the same, and that the Supreme Court could no more gain jurisdiction for this purpose without such showing than the district court could have done." Such motion is wholly devoid of merit. It is not contended, nor could it be successfully contended, in the face of the record, that ample cause for an extension of time was not shown to the trial judge. In the light of the affidavit of Judge Young, which was presented and brought into the record and considered by the trial judge, no doubt exists in our minds of the jurisdiction to settle such statement. The case of McDonald v. Beatty, 9 N. D. 293, 83 N. W. 224, cited by respondent, is not in point.

The argument that causing the judgment roll proper to be filed in this court before the settlement of such statement evinces an election by defendant to submit his appeal on such judgment roll alone, is, in view of the record, manifestly erroneous, as is also the argument that this court could not, in the absence of good cause shown, remand the record to the lower court, as was done. The latter contention is sufficiently answered by saying that it was wholly unnecessary that such record should have been remanded. The trial judge was clearly in error in exacting this as a condition

to his proceeding to settle such statement. The trial court, after an appeal, retains jurisdiction to perform any act in furtherance of the appeal. Flynn v. Cottle, 47 Cal. 527; Colbert v. Rankin, 72 Cal. 197, 13 Pac. 491; State v. Board, 69 Wis. 264, 34 N. W. 123; Hunnicutt v. Peyton, 102 U. S. 354, 26 L. Ed. 113; 2 Cyc. 966, and cases cited; Tiffany v. Henderson, 57 Iowa, 490, 10 N. W. 884; Goff v. Hawkeye, etc., 62 Iowa, 691, 18 N. W. 307; James v. Lepert (Nev.) 2 Pac. 753; Mercantile Co. v. Fussy, 13 Mont. 401, 34 Pac. 189; McAllep v. The Latona, 3 Wash. T. 332, 19 Pac. 131; Coulter v. G. N. Ry. Co., 5 N. D. 568, 67 N. W. 1046. The case of Moore v. Booker, 4 N. D. 543, 62 N. W. 607, is not in point. That was a case where the trial court, after an appeal had been perfected, and the case argued and submitted in the Supreme Court, undertook to alter the record without first causing such record to be remanded for that purpose.

This brings us to the merits on defendant's appeal, in the consideration of which the question presented will be classified into two general branches: First, those relating to the correctness of the lower court's findings and conclusions as to the plaintiff's second cause of action, namely, extreme cruelty; and second, those findings and conclusions relating to defendant's counterclaims alleging extreme cruelty and willful desertion on plaintiff's part. In the retrial of these issues we are to be governed by certain general, but well-settled principles of law. The party having the burden of proof upon any issue must establish the truth of the fact or facts alleged by clear and satisfactory evidence. Before a court will be justified in dissolving the sacred marriage relation, and thus visiting upon the innocent offspring the undeserved punishment of being deprived of the happiness and comfort of the home life, the party seeking to sever such relation should bring himself or herself clearly within the provisions of the statute. As well stated by Mr. Nelson, author of the article on Divorce in 9 Am. & Eng. Enc. Law, 728: "The state permits the dissolution of marriage only where the purpose of the relation has been defeated by grave and serious misconduct. Such misconduct must, on an application for divorce, be established by competent evidence of a full and satisfactory character." Another text-writer expresses the same general principle as follows: * * * Public policy, good morals and the interests of society require that the marriage relation should be surrounded with every safeguard and its sever

ance allowed only in the manner prescribed and for the causes specified by law." 14 Cyc. 578. This court, in passing upon the question of the sufficiency of evidence to sustain a charge of extreme cruelty alleged by the wife against the husband as a ground for divorce, took occasion, through Bartholomew, C. J., to say: "Again in 1898, and following close upon one of those episodes which it is alleged produced, not only mental suffering, but bodily injury, we find plaintiff in St. Paul on means furnished by her husband, and writing him letters which might stand as models for happy, light-hearted and affectionate wives to send to absent husbands. We find no evidence in this case of the infliction of that grievous mental suffering that the law requires to justify the granting of a divorce. No doubt the language used by defendant would produce anger in a proud-spirited woman. But it is not for that cause that the marriage contract can be annulled. That contract, while it imposes upon the parties thereto the imperative obligation never to unnecessarily anger or wound each other, yet it also imposes the duty of forgiveness of all those weaknesses, imperfections and peculiarities to which humanity is ever prone. The sacred observance of that contract is demanded by many public interests. It is demanded by the interests of the immediate parties thereto, and, more than all, it is demanded for the proper nurture, protection, and training of the offspring that results from the marriage contract. The statutory grounds for divorce in this state are broad, and courts may not multiply divorces by granting them in cases not clearly within the statute." Mahnken v. Mahnken, 9 N. D. 188, 82 N. W. 870.

In the light of these general principles we proceed to a consideration of the evidence relating to plaintiff's allegations of extreme cruelty, upon which the judgment appealed from was rendered. In view of the great mass of testimony it is, of course, entirely out of the question for us to review the same at length in this opinion. We can only, in the most general and cursory manner, refer to it. Nor would it serve any useful purpose to do more, as each case necessarily stands upon its own peculiar facts.

The parties were married at Fargo on January 31, 1903, and lived together until November 22, 1906—3 years and 10 months—and, as a result of such marriage, three boys have been born, as heretofore stated, all of whom are now in the custody of the plaintiff. At the time of the commencement of the action, November 22,

1906, plaintiff was 28 and defendant 42 years of age. Plaintiff is the only child of Wm. B. Dougless and wife, and she was reared in the city of Fargo, where her parents have resided for many years. Defendant, a native of Wisconsin, of German parentage, is a specialist of the diseases of the eye, ear, nose and throat, and upon completing his medical education he located in said city in 1896 for the practice of his chosen profession, and he has been very successful, having attained eminence in his line. It is here that he met, wooed, and won the plaintiff. Immediately after the wedding, January 31, 1903, they embarked on a wedding tour to the old world, where they visited Egypt, Italy, the Holy Land, France, Germany and other countries, being absent for several months. Just prior to the marriage defendant caused to be conveyed to plaintiff certain real property in Fargo, and soon after such marriage defendant erected thereon a dwelling at a cost of nearly $25,000, and furnished the same in a comfortable and luxurious manner in which the parties made their home until the day the action was commenced, and where the defendant has ever since resided. During all the time they lived together plaintiff was furnished a separate bank account, which was kept replenished by defendant at all times, against which she was enabled to check at pleasure. She was also provided during most of the time, and at all times when possible to hire them, with servants, nurses and medical attendants. What are the acts of cruelty relied upon by respondent to sustain the judgment? And what is the proof as disclosed by the record?

It is asserted that defendant commenced his course of abuse and ill treatment of plaintiff immediately after the marriage, and while they were on their wedding tour. In addition to the many accusations made in the complaint the plaintiff narrates in her testimony a great many more, to the most important of which we will refer. She would have the court believe that immediately after the marriage a radical change came over defendant; that instead of a tender, loving and affectionate husband he almost instantly commenced towards her a course of gross abuse and ill treatment, without any apparent motive, and which abuse and ill treatment continued almost continuously throughout the period that they cohabited together. She even charges him with meanness, stinginess, and a lack of due consideration for her comfort and happiness, antedating the marriage, in providing an undesirable, poorly ventilated,

second or third class stateroom on the steamer, the Kaiserin Maria Theresa, on which they took passage on their wedding tour. Such compartments were engaged through correspondence, and undoubtedly were thus engaged long prior to the wedding day, as they departed on their long journey on the evening of the wedding. Plaintiff swears that while at the hotel in New York, just prior to taking passage on the steamer, defendant's conduct was not all she expected or anticipated; that he made many very slighting remarks about her father and mother, and in speaking about the wedding "a most peculiar expression came over his face, and he sneered and said, 'Well that whole thing was very peculiar,'" and she says that in referring to a conversation with a friend, who had asked him if he knew all the people who were to be at the wedding, to which he answered in the negative, he told her that this friend remarked, "I call that a damned insult." She also says: "There were other disagreeable things, but that [meaning the above] is the one that stands out most clearly in my memory." She also, in this connection, testitfied: "Of course his sneers at mother and father were harder to bear than anything else." She refers to an incident on the steamer just before sailing, which caused her to feel "very much neglected." She says: "About an hour before we sailed I could not find Dr. Rindlaub, and I was terrible anxious, because I was afraid he might have gone ashore and might be left, and we sailed before I knew whether he was on board or not. He had been out some time before he came on deck, before I saw him. When he came he said he had been writing letters in the cabin. Q. What was his manner on that occasion? A. Perfect indifference."

Again, she testifies that: "He didn't pay any attention to me at all on that trip. When I showed him any affection when we were alone in our stateroom, he would push me away from him and shake me off. If I took hold of his hand, he would shake my hand away." A little later she testified, "I was very unhappy all the way through the trip." At Jerusalem she asked the guide to purchase for her a little Bible bound in the wood of the olive tree, which he purchased, and she says: "I had a dreadfully unhappy time with Dr. Rindlaub because I spent $2.50 for that Bible. He walked the floor he was so white." Just before reaching Constantinople she was confined to her bed five days, and she swears that during that time: "He left me entirely alone. I was very de-

pressed and very unhappy. It was not entirely his not being there, but it was the way he acted when he did come. He was so indifferent to me; he didn't want me to touch him he wouldn't sit beside me; I can't tell exactly, only absolute indifference." At Cairo she was ill with pneumonia, and had a nurse, and during such illness Dr. Ring was called, and among other things eggnogs and port wine were prescribed, and she says: "I remember there were so many things that made me unhappy during that illness. One thing was the disgust of the doctor and his dissatisfaction about having to pay for the nurse's meals." "It seemed to me that the only subject of conversation that he ever had when he came into my room was the extra expense that my illness was causing." "I don't think he ever saw me drink an eggnog without talking about it, and saying it was perfectly ridiculous that our expenses were running up so terribly." "And he stormed and scolded about what he had to pay for the port wine. I was very unhappy about the matter." In going from Alexandria to Naples she says she asked defendant if he could not get another stateroom, and this "simply brought forth another tirade on the extra expense that my being ill had caused." "He didn't tell me whether he could get another stateroom or not, but simply that he would not try." "I was in bed, and very, very weak." "I was horribly depressed; I was in perfect despair." She claims that while in such weakened condition defendant compelled her to travel and sight-see against her protests that she was unable to do so. She speaks of having left her jewels under her pillow in Rome, and of the doctor returning for them while she continued the journey to Florence. The next morning she hired a cab at the hotel and met defendant upon his arrival, and she then testifies: "When I saw his face, when he got off the train, I realized that he was not quite the man I had been idealizing. He was ugly looking, and when he caught my eye he looked as if he hated me." And she then goes on to narrate a conversation in which defendant severely reprimanded her for being there, for hiring a cab at the hotel, instead of going out on the street to get it, where she could have gotten it much cheaper, etc. Plaintiff testifies to her weak condition when they reached Heidelberg, where they were obliged to walk the length of a long train, and she told defendant that she could not carry certain bags. Thereupon she handed them to a porter, and "Dr. Rindlaub grabbed the bags away from him and turned to me and hissed at me, 'You

will carry these yourself' and put them in my hand, and I had to carry them back to the station. I think I cried most of the rest of the night on the train."

She details another unhappy occurrence at Cologne, in narrating which she says: "Dr. Rindlaub always belittled everything I did and everything I was all along the trip. He was constantly making me feel that I was very poor in a money way. * * * He used to do it mostly by insinuations. He often referred to my lack of education, my poor intellect. I could not pack his things as he wanted them packed." During such quarrels she says that defendant, in effect, accused her of marrying him for his money, whereupon she threatened to go home and leave him, and that she meant it. She also complains of his alleged refusal to take her to any opera or theater while in Paris. On the return trip she says his treatment was about the same. When asked to sum up in a general way how defendant's demeanor towards her was on this entire trip, she answsred: "It was very indifferent, but it was more than that. He made me feel that I was so far beneath him in every way; that I was deficient in every womanly quality. She says she believes she saw him taking morphine twice on their return trip. They returned to Fargo some time in May following, and shortly thereafter took up their residence in what she designates as a small house without modern conveniences, and she testifies that during that summer defendant was very indifferent to her. She testified to sleeping on the porch two nights during that summer because she could not endure sleeping in the house. She says he stayed out nights a great deal, and "he used to tell me it was none of my business where he went; that was his usual answer, or else ignoring the question and simply sneering in my face." She says: "I went without help from before Thanksgiving until after Christmas. I was without help most of the time." She complains that the doctor compelled her to burn lignite coal, which was kept in a shed out by the alley, and was in large chunks, which had to be chopped, and she had to do this work and build the fires.

In the autumn of 1903 she sent for her father, and she says: "I wanted to go home. * * * I had endured things as long as I could, and Dr. Rindlaub told me that it was hell to live with me." Her father succeeded in persuading her to remain and try once more, but she says things went on after that just about as they had been going before. "Perfect indifference! I was sneered at,

everything I did. I used to entertain his friends continually. I was nothing but a servant in the house." She also accuses defendant of making fun of her looks when she was pregnant. That summer they visited his parents at Platteville, Wisconsin, and from there plaintiff went to Chicago to visit, defendant returning home, and plaintiff says that defendant told her while in Chicago to procure whatever she needed for herself and for the baby, and she testifies that she purchased a beautiful little outfit for the baby, the bill for which was $111, and she says that on her return defendant's attitude towards her had changed entirely from what it was at Platteville. "His manner was something I couldn't describe. He sneered at everything I did and everything I was. * * * When I showed him the baby clothes, * * * he walked up and down the room white as a ghost, with almost a terrible expression on his face, and he said, 'I would like to know what these are going to cost.' I told him. Then he flew into a terrible rage, asked me if I thought he was a millionaire;" and she swears that he compelled her to send these baby clothes back, and that her father gave her $50 after that for the baby's clothes. Later she says that she was compelled to entertain his guests and patients at dinners long after she ceased to be presentable on account of pregnancy. "And before confinement our maid went, and from that time on I did my own work, and of course in that house and with the arrangements of the coal and the chopping of the lignite and the chopping of the wood it was very heavy work, and soon after that I began to suffer excruciating pain, and was very, very ill all the time. When I would tell Dr. Rindlaub that I was ill he would sneer at me; tell him how my back ached he would say, 'How would you like to have the backache all the time?' Tell him it hurt me so much to carry these heavy loads, and carry water up and down the stairs and fill the stoves, he would say, 'Well, didn't Dr. Darrow say that exercise was good for you?' * * * I can't remember, for months, surely for weeks and weeks at a time, that he ever spoke a civil word to me in that house, unless, of course, we had guests in the house. * * * He didn't treat me as if I was a human being; didn't seem to look upon me in that way." Just before Bruce was born she says she was awakened in the night with terrible suffering, and thought she was about to be confined, and she awakened the doctor and told him about it, and he said, "Oh, Lord, I wish you would keep still and let

me sleep," and he turned over, and she suffered the rest of the night alone. The next morning at breakfact she said to him, "I can't stand it to be treated that way," and he said: "If you can't stand it you know what you can do, don't you? * * * If you can't stand it, you can go." At another time, when she put her arms around him in an affectionate way, she says: "He would throw me off and make very unkind remarks. One thing that I remember he said to me was that it wasn't necessary to slobber all over a person to let them know that you care for them; that that didn't mean anything; that I was nothing but an old hypocrite anyway." When she was carrying Bruce, their first child she says defendant accused her of being crazy. In this connection she refers to the time when she was confined to her bed and was very ill, and the defendant stood at the foot of her bed and looked down on her and said, "Maie, do you know that your mother is crazy, and you are just like her?" and she says, "I remember that I cried and sobbed and cried, * * * and he went out and left me." A little later she testifies as follows: "Q. Did he ever speak of you as being a hypocrite? A. Yes, very often. I used to meet him at the door when he came home and kiss him, and it was at these times that he would tell me that I was a hypocrite; that I didn't mean anything that I did. * * * Q. Did he ever make any statement criticising your father's manners or your mother's manners, and if so what was his way of making such criticism? A. Oh, father and mother were never spoken of in any way except with a slur or a sneer. That was so from the first of our coming home. * * * It hurt me more the things that he said of my father and mother than what he said about me; he could say anything to me, and it would not hurt me half as much." She says that as a result of the birth of Bruce she suffered laceration, and that on the fourth or fifth day thereafter Dr. Darrow performed an operation on her with no anæsthetic, and this in the presence of Dr. Rindlaub, and she says she suffered a long time from that operation, and "was in a tense kind of nervous condition." In speaking of his general demeanor towards her she used the following expression: "I never knew when there was going to be an outburst. It would come sometimes out of a perfectly clear sky. I never knew from our conversation or anything that had passed before, but often I could tell from his face, because it would generally be grey, and have those lines about

his face. His expression at such time is something I hardly know how to describe, excepting he expresses fury and hate; he hated me, and it showed in everything he did; everything he looked. There was one expression that at times when he was terribly angry with me I used to see, and that was a drawing of his upper lip so that his eyeteeth showed. It was like a dog when it snarls at you, unnatural to human beings." At another place she testifies that he repeatedly called her a liar. Again: "He used to tell me that my room was better than my company."

Plaintiff makes mention of a luncheon which she gave in honor of defendant's mother, and she says: "Instead of being pleased he was furious about it, because he said it threw Dr. Elizabeth and Julia (his sisters) in the shade; they were giving receptions with us, and he said it was a very selfish thing for me to do." And she goes on to say that the doctor's relations at such receptions had a "sneer on the face of every one" every time she spoke. She also testifies that defendant told her she lied when she disclaimed any intent in giving such party to "throw Dr. Elizabeth and Julia in to the shade." She recounts a scene just after the birth of the second child, in which she says as the defendant was going out of her room that night "he laughed and screamed just as I had, and mocked me just as I had screamed, very loud, looked at the nurse, and laughed." She also says: "He called me a damned liar on all occasions." She narrates trouble between them over certain ladies, referred to in the record as ladies numbered 2 and 3, with whom they both, and especially the defendant, were on very intimate, friendly and social relations, and she speaks of a conversation regarding certain gossip on account of the doctor and these ladies over attentions shown them by him, and she refused to tell where she heard it, and she testifies: "He said that this gossip was absolutely groundless, that I had made it up entirely, of course calling me a liar and a sneak and a coward, and I was stabbing people in the dark." She says she afterwards put her arms around him and said: "'Jack, don't you love me now?' He pushed me away. When he did that I said, 'You know I don't believe that you ever did anything wrong' Q. Why did you tell him that? A. I didn't believe that he had done anything criminally wrong. * * * That same night I * * * told him the same thing. I said, 'You know I don't believe that you have ever done anything criminally wrong.'"

She also narrates a scene which took place in the doctor's office in the spring of 1906, during which she, the defendant, lady No. 3, and Dr. Martin Rindlaub were present, and in which she swears that lady No. 3 and defendant took her to task about such gossip, and that lady No. 3 said, among other things, that she was demented, and "You wouldn't have any such notions as this if you were not demented, and every one knows you are," and she says that defendant affirmed everything lady No. 3 said. "Q. I think you told us yesterday that you had admired this woman's intellect, and looked upon her with a great deal of respect and esteem; that was the truth, was it? A. Certainly; I knew her from the time I was a little girl, and respected her in every way." Plaintiff found certain letters in defendant's pocket written to him in May, 1906, by lady No. 2 while on board steamer en route to Europe, and when asked what effect, if any, they had on her, she replied, "It was one more terrible thing piled on to everything else." When considered, however, in the light of the facts disclosing the relations between the parties as shown by the record, we fail to see anything in the letters which could reasonably inflict upon plaintiff grievous mental suffering. The ties of friendship between them were, to plaintiff's knowledge, akin to those of brother and sister, and such friendship had existed for years prior thereto, as plaintiff well knew.

On cross-examination plaintiff was asked if she had fully narrated the story of her trouble, to which she answered, "I have not told a hundredth part." And she was also asked, "Has Dr. Rindlaub no virtues?" to which she answered, "I couldn't find any, and I lived with him four years." The latter statement was somewhat modified thereafter. From the foregoing it will be seen that the picture, figuratively speaking, that plaintiff has painted of her husband is of the darkest hue. Many of the charges are very serious, and, if true, stamp defendant as a most villainous scoundrel.

How stands the proof? In answering this question we shall apply well-recognized tests in weighing the testimony of the various witnesses, and if any of them have exhibited an inclination to color or to exaggerate the facts, or have been successfully impeached as to material portions of their testimony by other credible evidence, either direct or circumstantial, their testimony will be given such credit only as in view of such facts it appears to us it is fairly and justly entitled to.

In the nature of things the plaintiff's case, in so far as her cause of action based on extreme cruelty is concerned, rests largely upon her own testimony, as acts of cruelty by either spouse towards the other are usually inflicted in the privacy of the domestic circle. Plaintiff has narrated a most remarkable, and to our minds, a most unnatural and incredible story. Commencing almost immediately after the wedding, and continuing throughout their cohabitation, she would have the court believe that the defendant was not only extremely cruel, but villainously brutal towards her; that even antedating the marriage he was so inconsiderate of her comfort and happiness, and was so mean and stingy as to reserve cheap second or third class staterooms for their bridal tour. That the latter complaint, as well as others of the same general character, is unfounded is most effectually demonstrated by the evidence even of the plaintiff herself, which shows that he was most lavish in the matter of providing her with every comfort and luxury which money could purchase. In expressing her satisfaction with purchases made by defendant while in Europe, she testified, "They were utterly beyond anything I ever thought of possessing." We cannot believe that plaintiff has any just or reasonable ground of complaint on this score, and we are forced to the belief that plaintiff, in referring to the manner in which defendant "stormed" at the extra expense on account of the eggnogs, port wine, nurse's meals, etc., necessitated by plaintiff's illness while on their wedding tour, intentionally exaggerated the truth, and sought to mislead the court. From a careful reading of her testimony we are inevitably forced to the conclusion that plaintiff has, in many particulars, sought to create in her favor an erroneous impression regarding the facts. The incidents above mentioned; her reference to the "terrible rage" of defendant over the purchase of the baby clothes and compelling their return, regarding which she was forced on cross-examination to admit, in effect, that she had not been fair with the court, and other instances too numerous to mention, serve to convince us that plaintiff was not, in narrating her story, "as fair as I possibly could be" (quoting her words). Much of plaintiff's testimony is not only very unreasonable and improbable upon its face, in view of other conceded or established facts inconsistent therewith, but it is most effectually impeached by witnesses having no especial interest in the case, as to nearly every material incident where there were witnesses to the transaction. Not only this, but

as we shall see, the evidence discloses that throughout the period of nearly four years during which they cohabitated together plaintiff wrote many letters to defendent, which, in the language of Chief Justice Bartholomew in Mahnken v. Mahnken, supra, "might stand as models for happy, lighthearted, and affectionate wives to send to absent husbands," which written expressions of wifely love and affection were reciprocated by defendant, as shown by his letters. In the light of this correspondence alone, as well as letters written to others by plaintiff, it is difficult to give credence to plaintiff's story of defendant's brutality. We will refer to such correspondence later. At this time we will refer to some of the other impeaching evidence.

Regarding the incidents which took place on the steamer just before they sailed for the Old World, it will be remembered that plaintiff positively testified that defendant left her alone for about an hour before they sailed, and she could not find him, and she says, "We sailed before I knew whether he was on board or not," and she further says, "Of course, I felt very much worried and filled with anxiety, and felt very much neglected just then." She positively denies that she told Major Darling that defendant was down writing a letter, but Major Darling testified: "We went on board, and I found Mrs. Rindlaub on the upper deck, * * * and I * * * asked her where the doctor was. She says, 'He is below writing some letters.' I hunted him up, and found him there, and he says he will be through in a few minutes and be up on deck. * * * and we went ashore and very soon the boat pulled out. We stood on the end of the dock * * * as the boat pulled out into the stream, and Mrs. Rindlaub and the doctor were up on the deck and waved their hands to us; I saw them there."

Regarding defendant's treatment of plaintiff while on this wedding trip Dr. Ring and Rev. Dalzell both disagree with plaintiff's story. Dr. Ring testified: "Q. Well, was his demeanor towards her that of indifference, Doctor? A. I think not. Q. How was he—was he pleasant? A. I think he was; I never saw him otherwise, in fact, in the times that I saw him." Rev. Dalzell: "Q. What would you say as to the conduct of Dr. Rindlaub as being lacking in attention to his wife, as they traveled together in the car, which an affectionate husband would display towards his wife? A. He seemed solicitous for her welfare and comfort. Q. In your shopping in company with Dr. and Mrs. Rindlaub what did you find to

be the disposition of the doctor in the matter of making purchases; was he free, or was he stingy with his money? A. He seemed to be free and generous." The witness Annie Conlin, who had variout opportunities of witnessing defendant's treatment of plaintiff while she was nursing at their home, testified: "I would say he was a good man as I have ever been around with in confinement, and then after the baby was born, he stooped down and kissed her, and he said, 'Maie, I will telephone over to your father and mother,' and he went into the next room and telephoned, and they came over." Edith Nelson, another nurse at their home, testified: "Q. How was he as to being affectionate or lacking in affection in his treatment of Mrs. Rindlaub; I mean in the matter of greeting her when he would come into the house or go away? A. Agreeable; he used to kiss her when he would come in. Q. Did you observe that during the six weeks of your last stay there during the fall of 1906? A. Yes, sir. Q. Did you see him kiss her more than once? A. I think so. Q. Was there any difference discernible to you in her treatment of him during that period, as to whether she responded to his greeting affectionately, or appeared to be lacking in affection? A. Why, I should say rather lacking. Q. How would you describe that to the court? A. Well, she would oftentimes leave the room on the doctor entering it, and the haughty appearance; also the inclination of the head when he kissed her. Q. Turn her cheek to him? A. Yes, sir. Q. This, now, refers to the last six weeks' stay in the house? A. Yes, sir." Sena Braseth, a cook in the Rindlaub home from November, 1904, until July, 1905, testified: "Q. During this time what was the doctor's conduct towards his wife? A. I never noticed it was anything but pleasant. Q. How did he greet her, as far as you know, when he would come home? A. Why, he would say, 'how-de-do, dear?' and lean over to kiss her. Q. What would she do? A. Why sometimes she would kiss him, and sometimes she would turn her face away." Mrs. Caroline Swanson, who was employed as a nurse in their family during the Christmas season of 1903, testified: "Q. What was the doctor's treatment of his wife during that period, Mrs. Swanson? A. Why, very pleasant; everything was very agreeable as to my—what I saw at the time."

Plaintiff positively denied that she ever stated to the witness Sundberg, or any one else, that defendant had had criminal relations with the lady known in the record as No. 3. She also posi-

tively denied telling Dr. Darrow the same thing, but the witness Sundberg testified just as positively to the contrary. We quote from his testimony as follows: "But she was very much excited, and it was only that one thing that she—she would go back to the same thing, that it was so, that this lady was his mistress, and that they had positive proofs." The witness Dr. Darrow testified: "Q. Did she tell you anything about having any proofs of No. 3 being her husband's mistress? A. Why, she said that her father had proofs." The witness Mrs. Kitely, who was a friend of the family, and visited them on several occasions, gave testimony as follows: "Q. * * * Did Mrs. Rindlaub give the name of any lady with whom she claimed her husband was criminally intimate? A. Yes, sir. Q. I am showing you this exhibit; is the one marked No. 3 the name of the lady to whom she alluded? A. Yes, sir. Q. Now, what did she say about there being intimacy between this lady and her husband? A. Why, she said she had learned that this lady had been the doctor's mistress long before she married him, and he had kept it up. Q. Since the marriage? A. Since the marriage." At another place plaintiff positively denied telling Dr. Darrow that defendant had knocked her down and kicked her; but the doctor testified on this point as follows: "Q. What did she say to you? A. Well, she said that she had had trouble with Jack, and that he had knocked her down and kicked her."

The following quotations from the written correspondence tend to throw much light upon the real domestic relations of these parties, and furnish unmistakable proof that plaintiff has, to say the least, greatly exaggerated the facts regarding defendant's alleged brutal treatment of her. In October and November, 1903, plaintiff expressed herself in letters to the defendant as follows:

"Jack, my dearest: * * * Even though I can do so little for you, it is a great comfort to be where you can speak to me if you do want anything when you are ill. I hope that I may hear from you to-morrow or Sunday for I have worried about you a great deal, my sweetheart."

"My darling: * * * Whatever other worries and cares you have had, we have really had each other and have been happy in each other, have we not? * * * You must not mind if I am a terrible baby about being away from you for it is only because I love you so much and surely you want me to love you. * * * With all my love, Maie."

"Mine Libre: * * * I am heartless enough to be glad, dear, that you will miss me, for I miss you very, very much, but I hope that you may be comfortable and happy and that the house may run quite as I should wish to have it. * * * With a heart full of love, Maie."

"Always remember Jack that I love you very dearly and want so much to make you happy in all things, and do not let people say things to you which make you doubt me. We must learn to trust and believe in each other, my sweetheart, and then we will always be happy. Most lovingly yours, Maie."

"It is just because people are jealous of your success that you have these things to meet. They do not realize what a splendid, conscientious darling you are, and they cannot hurt you, my boy; can they? * * * You have been a darling to write to me so often and I love you all the more (if I possibly could) for doing so. Most affectionately, Maie."

"I have wondered so many times since you left me how wives can go away from their husbands and stay for months, I never dreamed that I could miss a person so much, and I think of you by day and dream of you by night, my own darling. How happy we will be when we are together again. Most lovingly yours, Maie."

On November 9, 1903, defendant wrote plaintiff: "My precious one: * * * I am going home now, but it isn't much like home without you darling. I long to see and take you in my arms, but it won't be long now. The days will soon fly by. With all my love, Jack."

In March and April, 1905, plaintiff wrote defendant: "Jack, darling: * * * Bruce and I cannot bear to sit in the den now that you are gone. It seems the loneliest place in the house and I seldom go in there at all, especially in the evening, for that is where we have our happy times together. Do we not, dear? * * * Most affectionately yours, Maie."

"Jack, my darling: You cannot think how happy your sweet letter made me and I am glad that you feel the baths may help you. * * * Bruce is getting so smart. When he had his apple to-day he took each piece of skin out of his mouth and gave it to me It was too cunning for anything. All day to-day he has been saying, 'Pa; Pa; Pa; Pa;' I know that he misses you, too, dear. * * * With a great deal of love, affectionately, Maie."

"Jack, my darling: Two letters from you today made me the happiest of wives, you sweetheart. I do love you so. * * * Not that I expect you to be ill, dear, but if you are half as lonely as I it would be a sore temptation. * * * Father and mother were delighted with your message to them, dear, and send their love to you. * * * Don't worry about anything, dear, but just get well and know that I am ready to come to you at any moment that you want me with Bruce or without Bruce, just as you think best. Of course, I have no idea that you would think of our coming, but we are ready to if you do. With a heart full of love, Maie."

"My darling Jack: * * * We came home quite early and Oh, darling; you can't think how lonely the house seems, yet I am just as glad as I can be that you are to have such a nice rest and I feel sure that it will do a great deal of good. * * * So you see, dear, your wife and little son are beautifully taken care of, thanks to your generosity in letting us have these people about us. * * * With all my love, affectionately, Maie."

"My darling boy: * * * Darling, your letters make me very happy. I do think that you and I are nearer and dearer to one another every day that we live and how beautiful to have it so. * * * With a heart full of love, and hoping that you are ever so much better, believe me, Your affectionate wife, Maie."

"My darling boy: * * * It is after nine, far past my bedtime, so good night dear, I wish I might have a good night kiss and to sleep with my hand in yours, darling. Nearly every night I dream of you and it is so hard to wake up and realize that you are away."

On August 3, 1905, in a letter written by plaintiff to defendant's brother, plaintiff expresses herself as follows: "I have not been feeling as well lately but I must expect that of course. Jack is so sweet and considerate, however, that it helps a great deal over this most trying time."

Many letters from defendant to plaintiff are in the record, all of which contain very affectionate expressions, and none of which disclose the slightest intimation of any domestic unhappiness. It is not only difficult, but impossible, to reconcile these written evidences of affection with the testimony of plaintiff. The attempted explanation by her of her letters is very unsatisfactory, and, furthermore, defendant's letters to her are equally as convincing as hers in refuting the fact that any such unhappy relations existed as were

detailed by plaintiff upon the witness stand. The proof offered by plaintiff in corroboration of her testimony relative to alleged extreme cruelty is also somewhat lacking in its convincing character. Several medical experts, as well as other witnesses, testified relative to the physical condition of plaintiff. Some of them contrasted her appearance after her return from the wedding tour with her appearance prior to the marriage, and gave it as their opinion that there was a marked change, and that she had apparently lost much of her girlhood vivaciousness. The medical experts gave testimony tending to show plaintiff to be suffering with nervous prostration, which in their opinion might be caused by "worry, trouble, brooding, neglect, or severity," as stated by Dr. Sweeney, a nerve specialist of St. Paul, who, on September 27, 1907, first met and professionally treated her. Dr. Sneve—another nerve specialist of St. Paul—testified to meeting plaintiff in a professional way in May, 1907, in Dr. Sweeney's office, and he gave it as his opinion that: "She was unhappy; had been unhappy and been quarreling, and this had extended over a long period, and it produced mental storm." Dr. Aroty of Moorehead was called on November 22, 1906, the day this case was commenced, and treated plaintiff at her father's home in Fargo, and Drs. Lippincott and Wheeler of Seattle saw and treated her in August, 1906, and these doctors testify to her nervous breakdown. The testimony of some of these experts is based upon knowledge acquired long after the action was commenced, and that of the others upon knowledge acquired by them after or just prior to the bringing of the suit, and while the same was in contemplation by plaintiff. While this is not alone sufficient to discredit such testimony, still it is a somewhat important circumstance to be taken into account in weighing the same. Furthermore, Exhibits F, G, and H, which are photographs of plaintiff taken while in Alaska in the fall of 1906, furnish quite convincing proof of the robust physical condition of plaintiff at that time.

The witness Florence Nugent, an intimate girlhood friend of plaintiff, and who visited frequently at the Rindlaub home, gave it as her opinion that plaintiff was very unhappy, although, as stated by the witness, the plaintiff "never has said anything to me at all of any trouble." At times when she was present she says defendant was very indifferent, and didn't have much to say. Among other things, she testified: "Q. What was his manner to Mrs. Rindlaub whenever he spoke to her or answered any inquiry from her? A.

Very short, gruff; never had much to say to her. Q. * * * Was it in an angry tone or otherwise? A. No; not in any angry tone, just seemed perfectly indifferent." She testifies that about November 7, or 8, 1907—nearly a year after the action was commenced—she saw little Bruce walking with defendant along Broadway in Fargo in new and wet snow. The witness, Miss Mann, gave testimony substantially the same as the last witness, also corroborating her as to the incident regarding Bruce and his father walking in the snow down Broadway.

The witness Olson, a coachman for the defendant for about six months in 1904 and 1905, and whom the testimony shows was discharged from such employment by defendant, gave the following testimony relative to alleged cruelty: "Q. Did you use to observe the actions of Dr. Rindlaub toward his wife, from time to time? A. Why, he was always smiling and good-natured when there was anybody around. When nobody was around, he would speak up kind of nervous and cross. Q. Was that his general conduct when other people were not around and in sight and hearing? A. Yes. Q. For how long a period did you notice that? A. Oh, for a week or two. Q. How did he act towards his wife? A. Why, when I generally seen him he was kind of smiling, and so on, and sometimes Mrs. Rindlaub had red eyes, and looked like she had been crying."

The witness Mrs. Grant—a very intimate friend of plaintiff and her parents for many years—gave testimony similar to that of the witnesses Florence Nugent and Miss Mann. She also details certain conversations with defendant in the spring of 1907, in which defendant had asked her to aid in bringing about a reconciliation, but that, owing to certain statements or insinuations by the doctor regarding certain statements he claimed Mr. and Mrs. Douglass had made concerning her, she did nothing. On cross-examination this witness states that she communicated to plaintiff and her mother the substance of these conversations had with the doctor, and that there was no expression of any wish upon their part for reconciliation, and, as far as she could understand, the plaintiff and her parents were all three bitterly opposed to a reconciliation.

The witnesses Etta Hill and Mrs. Morris gave depositions to the effect that they were passengers on the steamer from Hoboken to Cairo, and they testify to their conclusions that plaintiff was unhappy, and that the doctor seemed indifferent and negligent to-

wards plaintiff, but the first witness testified that during the time Mrs. Rindlaub was sick she did not see Dr. Rindlaub away from the hotel, and the latter witness testified that at Naples she saw Mrs. Rindlaub carrying a heavy bag about a block and a half, and witness thought she had been too sick to do this.

The witnesses Mrs. Lasson and Mrs. Clark merely testify to Bruce's actions in 1907 in not wanting to accompany his father from the Douglass home, and they throw no light upon the issues involved.

The witness Mary Kingsley merely testifies that she was at the Haggert wedding, and overheard defendant ask plaintiff if she could not walk home. The proof shows that plaintiff was attired in a delicate gown, and the walks were muddy, and this incident is relied on as a circumstance showing extreme cruelty on defendant's part.

The witnesses Irene Clark and Hazel Hull merely refer to Bruce's actions in 1907 in not wanting to leave the Douglass home to visit his father.

The witness Dickinson—who is an employe of the steamship company—testified by deposition as to the location of the cabin which defendant engaged.

The witness Frances Sill testified by deposition that she saw Mrs. Rindlaub carrying a very heavy bag while they were going to the train at Naples, and she says the doctor was walking beside her and did not carry anything, and she further says: "He was pale and haggard, he was always surly, very surly and very disagreeable." "Q. Do you know how far it was she carried that heavy bag? A. I should think it was the distance of perhaps less than two of our blocks." Later she testified: "Q. What did you see as to the manner in which he acted toward her at the various times that you saw him on that trip? A. I should say that he was very disagreeable, very uncouth, and rather an unusual man; especially we were very much surprised to learn that they were bride and groom. I had supposed that they had been married a long while, and that he was very much broken down in health, and in every possible way he was a man that was completely broken down I should say; he was very disagreeable."

The witness Johnson—a very intimate friend for over forty years of plaintiff's father—called at the Rindlaub home in company with plaintiff's father four days prior to the commencement of the

action, and he corroborates plaintiff regarding the incident in which, as they were leaving the house, plaintiff said to her father, "Give my love to mother," to which the doctor replied in a sneering tone of voice, "Your love to mother, eh?" and he says the doctor was in an agitated condition at the time.

Edna White testified by deposition to meeting and forming an intimate acquaintance with plaintiff while in Alaska in the fall of 1906. She testifies to plaintiff's nervous condition while there. It is apparent from her testimony that they became chums, as they were together most of the time, and occupied the same stateroom while going from Marble Creek to Ketshikan and from the latter place to Juno.

The witness Mrs. West testified that in June, 1906, she met the parties at Detroit, Minn., and defendant seemed to be rather cold and indifferent, and that there was very little conversation between them. This witness was a patient of defendant, and stayed at defendant's home in June, 1906, while receiving treatment from defendant, and, among other things, she testifies as follows: "Q. Did you observe, while there, the treatment of Mrs. Rindlaub by her husband? A. Yes. Q. State what it was; whether it was kind or otherwise? A. It was not kind; he seemed to be rather cold and indifferent. Q. What did he say or do? A. I could not say; there was not very much said. Q. Do you mean by that that he seldom talked to his wife? A. Seldom, while I was there. Q. What is the fact as to whether he talked to his wife during mealtimes? A. There was very little conversation. * * * Q. What is the fact as to whether during your stay in his house Dr. Rindlaub found fault with his wife? A. I do not remember hearing him find fault with his wife, except once for not sending the horses for me. Q. What did he say? A. Nothing objectionable. Q. But did he scold her? A. It was very like scolding. Q. When Dr. Rindlaub talked to his wife, what was his manner, as to whether it was cross or good natured? A. Cross; I should have said cold. Q. What is the fact as to whether or not Dr. Rindlaub frequently talked with his wife? A. I do not know whether he talked with his wife or not. Q. Did he talk with her much in your presence? A. On commonplace things." On cross-examination she testified: "Q. This coldness or unkindness was in the form of indifference to her? A. More in manner than speech. Q. He said no unkind words in your presence? A. You would not call them unkind. Q. It was simply

the look in his face that made you think he was cold and indifferent? A. Yes. Q. You mean in addressing conversation to her? A. Yes. Q. The doctor is not a very talkative man, is he, Mrs. West? A. He has not been with me. Q. Did you say something about his speaking to her in regard to horses? A. Yes, one time, I walked from the office, and he did not like it, but thought she should have sent the horses for me, and he scolded her for not sending them. Q. The doctor wished you to have use of the horses while there? A. Yes. Q. You said that he spoke to his wife very mildly, or what did you say? A. I said that he scolded her very slightly. Q. It simply annoyed him because you, a guest of the house, was not properly supplied with the use of the carriage? A. Yes, I think so. Q. You recite this as the only fault-finding that you personally heard while you were there in the house? A Yes. Q. There were no bitter words passed between them in relation to this matter? A. No; not that I know of. Q. This did not produce a scene of any kind, crying, etc.? A. There was no scene; she was sorry herself. Q. And she considered the correction just? A. Yes; she did. Q. You say that you did not see the doctor angry with his wife at any time you were there? A. I did not hear him say any angry words. * * * Q. Now, you told in your evidence everything that you saw and heard while you were in the home of Dr. and Mrs. Rindlaub? A. Yes." Comment on this is unnecessary. It falls far short of corroborating plaintiff's story of cruelty, and in fact is more in defendant's than in plaintiff's favor.

The next witness—Ella Berg—was a nurse girl at the Rindlaub home from October, 1904, until June, 1905. She was asked to state how Dr. Rindlaub acted towards his wife when they were alone, to which she answered: "I can't hardly give any answer that will be anything." She then testifies: "Q. Did he treat her at such time affectionately or coldly? A. Coldly, I think. Q. When they were at the table, at their meals together, did or did not Dr. Rindlaub have any conversation with his wife, and what was his treatment of her at that time? A. Yes; he had conversation with her and it was all right as far as I heard." She corroborates to a certain extent the plaintiff's testimony regarding the incident of her going into the guestroom with her baby on a certain occasion, and remaining there two nights and a day, although the witness does not remember how long she stayed in there. Her testimony is of

little importance as throwing light upon the alleged acts of cruelty complained of.

The record discloses that much of the testimony of plaintiff's witnesses was procured by plaintiff's father, with whom the witnesses talked prior to giving their testimony, and it is but natural that he would put forth every effort to procure testimony as favorable to his daughter as possible. Like efforts may have been employed in procuring testimony in defendant's behalf. These are matters which we have duly considered in weighing the testimony of the various witnesses.

Space forbids a more extended review of the evidence bearing upon this feature of the case. Suffice it to say that in our judgment plaintiff has most signally failed in proving the truth of the facts relied on to establish her second cause of action by that degree of proof exacted in cases of this character. It is a significant fact that, with but a few exceptions, all the servants, nurses, and other witnesses having the best opportunities of acquiring knowledge of the facts are arrayed against plaintiff upon the issue of extreme cruelty. It stands out as an established fact in the case that to plaintiff's knowledge defendant is and was, during all the times referred to, afflicted with an incurable malady, and at frequent intervals, subject to unendurable pain, necessitating the use of narcotic drugs to relieve such pain. This fact, no doubt, furnishes some explanation for much of the demeanor of defendant as narrated by plaintiff and her witnesses; and yet, in the light of his said affliction, there has been apparently no inclination shown by plaintiff to exhibit the least degree of leniency or forgiveness. That there was more or less domestic troubles is no doubt true, but this is not an unusual coincidence in married life. The absence of these are the exception—not the general rule—as common experience teaches us.

From an examination of plaintiff's testimony we are impressed with the belief that the chief aim of her counsel throughout the trial was, not so much to establish extreme cruelty, as to lay a foundation upon which to ask a divorce upon her first cause of action, to-wit, habitual intemperance. Such object appears from the testimony to be uppermost in the contemplation of plaintiff and her counsel throughout the proceedings.

In concluding what we have to say upon this branch of defendant's appeal we feel constrained to differ with the learned trial court

upon the facts presented, and feel obliged to say that in our judgment the evidence does not warrant the findings and conclusions, the correctness of which is challenged by appellant's counsel.

This brings us to a consideration of the second branch of defendant's appeal, namely, his counterclaims for a divorce from plaintiff on the grounds of extreme cruelty and willful desertion. In considering this feature we shall asume that the trial court properly denied any relief to plaintiff on her first cause of action, the correctness of which holding we will consider later. Does the evidence warrant findings of extreme cruelty or willful desertion on plaintiff's part? This question was answered in the negative by the trial court, although that court expressly found as a fact "that plaintiff did charge defendant with being criminally intimate with other women." And also: "That the ladies with whom plaintiff accused the defendant of having criminal intimacy were and are of the highest standing in the city of Fargo, and are of unimpeachable character, and in every way above suspicion." The learned court evidently took the position, which is not without some support in the evidence, that defendant's relations with these ladies were not wholly free from criticism, and that he is not entirely blameless in the premises. In other words, that there are mitigating circumstances in plaintiff's favor sufficient to warrant the denial to defendant of any affirmative relief under his first counterclaim. While, for like reasons, we have concluded not to interfere with the trial court's disposition of this feature of defendant's appeal, we deem it proper to say that it is established by the record beyond question, and to our entire satisfaction, that plaintiff openly accused defendant of criminal intimacy with another woman. This is shown by the witneses Sundberg, Mrs. Kitely, and Dr. Darrow, and while disputed by plaintiff, she does not deny that she accused him of intimacy with such women, but denies that she ever, in effect, charged criminal intimacy. We cannot believe that all these three witnesses, even though strong partisans in defendant's favor, deliberately falsified regarding plaintiff's statements to them as above referred to. What possible motive could they have had for so doing? Plaintiff expressly disclaims any belief as to the truth of such accusations, but on the contrary she and her witness, Mrs. Grant, as well as every person expressing any opinion on the subject, unequivocally swear that the character of this lady, whom the witnesses Sundberg, Mrs. Kitely, and Dr. Darrow positively swear

that the plaintiff accused of being defendant's mistress, is absolutely above reproach. As testified by Mrs. Grant, in effect, there was no lady in Fargo whose reputation was of a higher character than such lady. We quote from her testimony as follows: "Q. You didn't know a lady in this town whose reputation was of a higher character than that of the third one of these ladies, did you? A. No, sir. Q. And her name is absolutely beyond suspicion as to her moral purity? A. I think so. Q. And didn't anybody in town question that statement? A. I think not, Mr. Watson. Q. If you dragged this town through with a fine tooth comb, you could not find a lady regarding whom the breath of suspicion would be less pointed than against the third one of those ladies? A. I think not. Q. That is true? A. I think so, Mr. Watson. Q. So that the circulation of these stories, by whomsoever they were circulated, was absolutely without foundation, and was a gross outrage upon both the doctor and this lady? A. Why, certainly." We are therefore forced to the inevitable conclusion from the evidence that plaintiff made the accusations complained of. There, no doubt, was furnished by defendant some excuse or justification for plaintiff becoming somewhat suspicious or jealous of this lady; but, in view of plaintiff's sworn statements that she never believed there were any criminal relations between them, she was certainly not justified in making such grave and serious accusations. Such accusations naturally caused public scandal, and could not but result in causing him grievance, mental suffering in bringing him into public reproach, scorn, and obloquy, and this, the plaintiff was bound to know.

In the light of defendant's serious physical condition, of which plaintiff was fully aware, it was doubly cruel on plaintiff's part to treat him as she unquestionably did treat him, not only in this, but in many other respects. That plaintiff falsely accused defendant of assault and battery against her person by striking or kicking her while she was large with child is even admitted by plaintiff, and this, above all other charges, would surely bring defendant into bad repute and public scorn. The evidence also discloses that, while defendant, who, as before stated, was afflicted with an incurable, and at times an unendurable malady, was practicing his profession, when, as his physician says, and as the lower court in effect found, he should be enjoying absolute rest and quiet, and was furnishing plaintiff a home with all the comforts and luxuries she could desire,

she secretly employed attorneys early in 1906, and later installed in defendant's home a female detective in contemplation of divorce proceedings, and at defendant's expense accompanied her father on a two months' trip to Alaska. Prior to her departure she played the part of a detective herself in securing what she deemed evidence of defendant's excessive use of morphine upon which to base an action for divorce. The deceitful methods admittedly resorted to by her to procure such evidence is quite indicative of her belief in the weakness of her cause. A meritorious case seldom requires in its preparation and support such extraordinary efforts as have been put forth by plaintiff and her counsel in this case. While on the Alaskan trip plaintiff wrote affectionate letters to defendant, and at the same time was consulting physicians in Seattle, who afterwards become witnesses in her behalf. Not only this, but she admittedly made a written computation of the estimated wealth and earning capacity of defendant for the undoubted purpose of basing an application for temporary and permanent alimony in her contemplated divorce suit. Shortly after her return to Fargo, and without the slightest warning to defendant, she left defendant's home and went to the home of her parents, taking with her their two children, Bruce and John, and on the same day caused to be served on defendant the summons and complaint herein, in which she accuses the defendant of the many acts of cruelty hereinbefore set out. If defendant was wholly blameless, and there were no mitigating circumstances, plaintiff's conduct would undoubtedly constitute extreme cruelty, entitling him to a dissolution of the marriage as prayed for, unless plaintiff has succeeded in establishing her first cause of action.

Upon defendant's last counterclaim, which charges plaintiff with wilful desertion on November 22, 1906, we are inevitably forced to the conclusion that defendant is entitled to the relief prayed for, unless plaintiff has successfully established her first cause of action, which we will hereafter consider. It is admitted that plaintiff on said date took their two chidlren, Bruce and John, and went to her parent's home, where she has ever since resided, and it is perfectly apparent that it is and has been, at all times since, her full intention never to return to her husband. Not only this, but it is undisputed that she took her departure as aforesaid without the slightest previous warning to defendant, and with a deliberate purpose of commencing this action, which she and her father, for many months

prior thereto, had been carefully contemplating and making preparations for bringing. It is impossible to imagine a stronger case of desertion unless it can be said that such conduct on plaintiff's part was legally justified under the evidence, in which event defendant, and not plaintiff, would be guilty of legal desertion. We are unable, for reasons already given, to reach the latter conclusion from this record, unless, as before stated, plaintiff has succeeded in establishing her first cause of action.

This conclusion brings us to a consideration of the merits of plaintiff's appeal. Such appeal challenges the correctness of the trial court's findings and conclusions upon the issue of defendant's habitual intemperance in the use of morphine. Owing to the length already of this opinion we shall dispose of this feature of the case as briefly as possible. Defendant is charged with the use of morphine, and other like narcotic drugs, to such a degree as to disqualify him a great portion of the time from properly attending to business, and which alleged habitual intemperance has inflicted upon plaintiff a course of great mental anguish. While it may not be material from a legal standpoint, we think the record fully justifies the assertion that but slight, if any, effort was ever put forth by plaintiff to save her husband, for whom she professed such devoted affection, from acquiring the terrible habit of which she now complains; her apparent desire being to secure evidence which would convict him of being guilty of such habit. She manifested no disposition to forgive and forget. The contrary is true of defendant, but his overtures for reconciliation were spurned by her and her parents.

Upon this appeal counsel for plaintiff contend for a reconstruction of our statute—section 4054, Rev. Code 1905—which will entitle plaintiff to a divorce, notwithstanding the fact, if it be a fact, that the morphine habit was caused by reason of the necessary use of such drug to alleviate pain and unendurable suffering. We do not thus construe the law, and in our opinion such a construction would do violence to the statute. If such a habit is reasonably and necessarily caused by conditions over which the victim has no control, it would be manifestly harsh and unreasonable to subject such party to such undeserved punishment. It would, in effect, be inflicting punishment upon the innocent. Such a condition is no less innocent, from the standpoint of the victim, than insanity. Both result from disease. We shall not attempt a review of the evidence

bearing upon this issue. It is too voluminous to permit even a cursory review thereof. It is sufficient to say that after a careful reading of the same we are fully convinced that the learned trial court's findings are in accord with the facts as we view them. Plaintiff's contention upon this issue is wholly irreconcilable with what must be conceded as an established and indisputable fact that defendant, during all the time of his cohabitation with the plaintiff, has, in a marked degree, maintained his pre-eminent standing as a specialist in his line, performing daily the most difficult operations intrusted to his care and skill. We are convinced that no one, under the evidence, can successfully contend that defendant's use of morphine incapacitated or disqualified him "a great portion of the time from properly attending to business." In the face of this stubborn fact, which stands out so prominently, it is difficult to believe that defendant's use of morphine reasonably inflicted "a course of great mental anguish upon" the plaintiff within the meaning of our statute above referred to. In the light of the facts as disclosed by this record we are impelled to the belief that plaintiff has been too diligent in discovering the shortcoming of her invalid husband and altogether too inactive in overlooking his frailties. A different course would have been more in keeping with her duty to her husband, her children, and the public. She has only herself to blame for the consequences.

Our conclusions upon the whole case are:

First. That the judgement appealed from, is so far as it grants to plaintiff a divorce, be reversed, and that a judgment be entered in defendant's favor dissolving the marriage relation upon the grounds alleged in his last counterclaim.

Second. That such judgment be modified so as to provide: That the custody of the children Bruce and John shall be, until the further order of the court, awarded to defendant, subject to the following conditions: That defendant shall not remove such children from this jurisdiction without permission of the court first obtained, and that plaintiff shall be permitted, during each afternoon between the hours of 3 and 6 o'clock, to visit said children at defendant's residence, when they are not at school, and that during the months of June, July and August, plaintiff may have the custody thereof, subject to defendant's right to visit them at least once each week for the period of one hour, and, in addition thereto, to take them to his home each Sunday afternoon between the hours of

3 and 6 o'clock; plaintiff, during the other months, to have the like privilege of taking said children to her home in Fargo each Saturday afternoon between the hours of 3 and 6 o'clock, the defendant to see that such children are safely transferred to and from plaintiff's home as aforesaid.

Third. Also, that until the further order of the court the custody of the minor child, Newhall, be awarded to plaintiff, but defendant shall be permitted to visit such child at least once each week, for the period of one hour.

Fourth. For the support, maintenance, and education of such children defendant shall pay to plaintiff the sum of $150 per month, payable each month in advance, during the times they are all in plaintiff's custody, and at other times the sum of $50 per month for Newhall, payable as aforesaid.

Fifth. The homestead, consisting of the south 95 feet of lots 11 and 12, in block 33 of the original town site of the city of Fargo, is hereby assigned to defendant during his life, or as long as he continues to maintain it as his home; he to keep and maintain the same free of incumbrances of every kind or character, and at his death, or before, if he should intentionally abandon such home, the same shall become plaintiff's absolute property.

Sixth. That the conclusions of the trial court numbered 9 and 10, which relate to the rights of the respective parties to certain personal property, including the wedding gifts, are hereby adopted unchanged as conclusions of this court, the judgment in this regard to be in conformity with the judgment heretofore entered by the district court.

Seventh. The judgment of the district court, in so far as it awards to plaintiff attorney's fees and the costs and disbursements in that court as finally taxed and allowed, is affirmed. There is hereby also allowed to the plaintiff, for suit money and attorneys fees in addition to the sums heretofore allowed by this court, the further sum of $1,200 and the payment of such allowances for attorney's fees and suit money shall be made by defendant to plaintiff within 30 days after the remittitur is filed in the district court. Aside from such allowances no costs or disbursements in this court shall be allowed to either party.

The district court is directed to vacate its judgment herein, and to enter a judgment in conformity with this opinion.

MORGAN, C. J., and ELLSWORTH, J., concur. SPALDING, J., having been of counsel, did not sit; CRAWFORD, District Judge, acting in his place by request.

CRAWFORD and CARMODY, JJ. A careful examination of the record convinces us that the plaintiff is entitled to a decree of divorce, custody of the children and alimony. Hence we cannot agree with the majority opinion and respectfully dissent.

ON REHEARING.

FISK, J. (on denying rehearing). The petition for rehearing is denied, but in denying same we deem it proper to give a brief statement of our reasons for so doing.

The first ground upon which a reheairng is prayed for is that the time during which plaintiff was engaged in prosecuting her action cannot be considered in computing the statutory period of desertion, entitling defendant to a divorce. The history of this litigation, as disclosed by the record, furnishes a conclusive answer to such contention. Conceding the correctness, as a general proposition, of the rule now urged, but without deciding the same, it is, to our minds, entirely clear that plaintiff should not be permitted at this late date to invoke such rule. Such point is raised for the first time in her petition for a rehearing. It is a new point in the case, and has no place in her petition. Furthermore, it has been waived. At the time the case was called for trial in the district court plaintiff's counsel asked and obtained leave to serve and file an amended complaint. Thereupon defendant was permitted, by consent, to serve and file an amended answer, wherein the second counterclaim, alleging desertion on plaintiff's part, was incorporated as a supplemental cause or ground for divorce. Plaintiff's counsel characterized such pleading as a supplemental, rather than an amended answer, stating: "That is a supplemental answer, based upon a * * * cause of action for divorce arising since the filing of the other answer. *We have no objection to the amended answer, if your honor please,* but we desire the record to show that it was served as of to-day before the commencement of the case." Subsequently a reply was served, putting in issue the allegations of such supplemental answer and crossbill. Throughout the entire litigation, both in the district and Supreme courts, not even an intimation was made by plaintiff's counsel that they relied, or intended to rely, upon any such point in defense of such supplemental cause

of action. Defendant has at all times asserted his right to recover on such crossbill, and plaintiff makes no reply to such contention, but the attitude of her counsel throughout the litigation amounts, at least, to a tacit admission by them of defendant's right to recover thereunder in the event the relief prayed for by plaintiff should be denied. In the light of the above facts plaintiff's counsel will not be heard, at this late date, to change their attitude upon this feature of the case.

Counsel assert, with apparent confidence in the correctness of their position, that the majority opinion, in effect, overrules the cases of Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58, Dowagiac v. Hellekson, 13 N. D. 257-265, 100 N. W. 717, and Ruettell v. Ins. Co., 16 N. D. 546, 113 N. W. 1029, upon the question of the weight to be given the findings of the trial court. Counsel are clearly mistaken. Jasper v. Hazen arose long prior to the enactment of our statute providing for trials do novo in this court, and the other cases relied on were *law* cases, and were not appealed under the so-called Newman statute. Hence such cases are in no respect in point here.

With reference to that portion of the decree relating to the custody of the children nothing new is presented in the petition requiring further notice. We have, however, carefully reconsidered this feature of the case, and in the light of all the facts we see no reason at this time for changing our former conclusions. This court will retain jurisdiction of the case in the future to the extent of entertaining applications for a modification of the judgment, and will, on application and sufficient showing, direct the district court to make any such changes or modifications in the judgment regarding the custody, support, and education of the children as in the judgment of this court may be deemed proper and for the best interests of such minor children.

But one other matter referred to in the petition will be noticed. At the end of the rehearing petition, and as an alleged newly discovered ground for a rehearing, counsel for plaintiff, in their great zeal for their client's cause, make the following somewhat remarkable and unwarranted statements: They charge, in effect, that one of the members of this court who participated in the decision of the case was actuated by implied bias in agreeing to the opinion and decision. Our attention is directed to exhibit 103, which counsel characterize as the "free list of the defendant," or, in other words,

a list of those whom defendant has treated gratuitously. Such exhibit is headed, "This list contains accounts uncollectible, accounts for which no charge was intended to be made, and accounts which have been settled by service or merchandise." Then follows the names of nearly one thousand persons, and opposite the names of most of them appear figures indicating charges, opposite the others no such figures appear. The name of one judge of this court is included in such list, and opposite his name appears the following: "1—1—7.....12." The utmost that can legitimately be argued from this is that, according to defendant's books of account, defendant made a charge of $12 on January 1, 1907, against one who two years later became a member of this court, and from this it is seriously argued that, not only did the relation of physician and patient exist between the doctor and such judge, but that there existed between them such an intimate friendship that the defendant performed, and such judge accepted, such professional service as a gratuity. Such argument is unfair and wholly unwarranted. The exact reverse would appear from the exhibit to be true. There was a charge made which conclusively refutes the inference contended for by counsel. Among other things, counsel say: "If we had had the slightest knowledge or intimation that the defendant in this lawsuit was the physician that had been chosen by any member of this court, and who had treated and performed valuable professional services for such justice, and for which no charge had been rendered or fee paid by such justice, we should have certainly protested to the court against such justice sitting as a member of the court to hear this case." Again they state: "We do not believe under the facts related, that Judge ———, or any other man similarly situated, could possibly sit in this lawsuit without prejudice or bias as between the parties, considering the detailed charges made against the defendant. * * * We insist that we are still entitled to the right which it is plain we have not yet had—that of submitting the issues of this lawsuit to a court composed entirely of judges having no acquaintance with, or reason to be prejudiced in favor of, this defendant. * * * Until this is done, in the opinion of our client and of ourselves, Mrs. Rindlaub will not have had that to which she was honestly entitled in this court, a fair and impartial hearing before fair and impartial judges." The foregoing statements are very broad, and wholly unjustified. While disclaiming any intentional improprieties on the part of such judge, counsel

boldly assert that their client has not been accorded a trial before a court composed of fair and unbiased judges, all because of the trivial claim aforesaid. Such facts would not even constitute statutory grounds for a challenge to a juror in a civil action. The exhibit, as printed in plaintiff's abstract, bears unmistakable evidence that the same was carefully scanned by some one connected with plaintiff's side of the case, as each of the names of the many witnesses for defendant, whose names appear therein, are printed in italics, yet it is asserted that the fact that such judge's name is contained thereon was first discovered at the time of printing this petition for rehearing. We do not mean to question counsel's word in the matter, but it is almost unbelievable, although possible, that such name was overlooked by the person who examined such exhibit for the purpose of underscoring for the printer the names of such witnesses. However this may be, it is preposterous to assert that such judge was in the least prejudiced or biased in defendant's favor on account of the fact disclosed by such exhibit. This contention is as equally devoid of merit as the assertion in the petition to the effect that paintiff had a right to submit the issues "to a court composed entirey of judges having no acquaintance with" defendant.

The petition is denied.

(125 N. W. 479.)

NOTE—Wife's false charges of husband's infidelity, excited by his conduct, although producing suffering, will not warrant a divorce. McAllister v. McAllister, 9 N. D. 324, 75 N. W. 256. Violent and abusive language by husband to wife producing anger on her part, does not necessarily inflict grievous mental suffering. Mahnken v. Mahnken, 9 N. D. 188, 82 N. W. 870. Infliction of grievous mental suffering, producing no bodily injury, may warrant a divorce. Id. As to divorce for extreme cruelty. DeRoche v. DeRoche, 12 N. D. 17, 94 N. W. 767. Habitual utterance of profane language and obscene stories by wife to husband and others in his presence, where by reason of husband's mental and other characteristics he is caused humiliation and suffering, is cruelty. Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99. So continuous fault finding, threats and other acts intended to aggravate and annoy. Id.

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## STATE OF NORTH DAKOTA v. FARGO BOTTLING WORKS CO., A CORPORATION.

Opinion filed January 7, 1910.

**Penal Statutes — Construction.**

1. Chapter 187, page 277, Laws 1909, amending as it does section 9366, Rev. Codes 1905, is part of the Penal Code of this state, and

its construction comes within the provision of section 8538, Rev. Codes 1905, that "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 their terms, with a view to effect its objects and to promote justice."

**Statutory Construction — Patent Ambiguity — Legislative Policy.**

2. If a penal statute of this state contains a patent ambiguity, and admits of two equally reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred. Nothing will be regarded as included within the provisions of such statute that is not within its letter as well as its spirit. If the meaning of such a statute is simply obscure, the legislative intent in the passage of the act will be considered as a light to assist the court in arriving with more accuracy at its meaning. It is the duty of a court in construing such a statute to adopt that sense of the words which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature.

**Same.**

3. Chapter 187, page 277, Laws 1909, construed in the light of these principles, is not contradictory in its terms, and is not ambiguous in the sense that it is susceptible of two or more meanings equally clear and reasonable.

**Intoxicating Liquors — Construction of "Alcoholic Principle as a Distinctive Force" — "Become a Substitute for Ordinary Intoxicating Drinks."**

4. Considered with its context, under a fair, reasonable and ordinary interpretation of the wording, the clause contained in chapter 187, page 277, Laws 1909, in the words, "any kind of beverage whatsoever, which retaining the alcoholic principle or other intoxicating qualities as a distinctive force, may be used as a beverage and become a substitute for the ordinary intoxicating drinks," is intended to describe a beverage which contains alcohol or other drug having an intoxicating quality, in a quantity reasonably appreciable, and in which said drug has not by chemical combination with other drugs also contained in the liquor, lost its intoxicating principle, which liquor according to common experience and observation will be resorted to by those accustomed to use intoxicating liquors as a beverage upon a failure to procure the ordinary intoxicating drinks in the usual way. In such a liquor, alcohol or other drug of kindred quality preserving its native characteristics must be present, but not necessarily in such quantity as to produce intoxication.

**Constitutional Law — Legislative Acts — Subject Expressed in Title — Amendments.**

5. Chapter 187, page 277, Laws 1909, is not in any of its parts repugnant to section 61 of the state constitution, for the reason that

the subject of the act is not expressed in the title. Being an amendment to chapter 110, page 309, Laws 1890, it is a sufficient compliance with the constitutional requirement of the subject-matter of such amendment is, germane to the subject of the original act of which this amended section is a part and is within the title of that act.

**Constitutional Law — Legislative Definition — Title of Act.**

6. Any liquor containing alcohol or the alcoholic principle or other intoxicating quality when declared by the legislature to be an intoxicating liquor, will be so regarded by the courts whether or not its ordinary use will produce intoxication in the average man. A definition of intoxicating liquor including within its provisions a liquor containing the alcoholic principle, but which it is admitted will not produce intoxication in any degree, is germane to the general subject of chapter 110, page 309, Laws 1890, and within the title, "An act to prescribe penalties for the unlawful manufacture, sale and keeping for sale of intoxicating liquors and to regulate the sale, barter and giving away of such liquors for medical, scientific and mechanical purposes."

**Statutes — Amendment — Re-enactment of Amended Portion.**

7. Chapter 187, page 277, Laws 1909, is replete in itself, and does not purport to amend section 9353, Rev. Codes 1905, providing a penalty for violations of the prohibitory law, and while it by implication affects and modifies somewhat the meaning of said section 9353, as well as many other sections of the general statute, it is not for that reason repugnant to section 64 of the state constitution, requiring that all portions of the amended statute that are retained in the new enactment be incorporated and published in the amended act.

**Intoxicating Liquors — Substitutes — Police Power.**

8. A malt liquor retaining the alcoholic principle as a distinctive force which it is admitted is "used throughout the state of North Dakota as a substitute for beer," cannot be regarded as an innocent, harmless and healthful beverage. It is a matter of common knowledge that a liquor of this description may be harmful in the sense that its use cultivates and stimulates an appetite for intoxicants which may become seriously detrimental to the general welfare. A liquor with these characteristics and used in this manner is a convenient vehicle of subterfuge and fraud and a means of evading the penalties of the prohibitory law. For this reason, a statute prohibiting the sale of such liquor within the state is a legitimate exercise of the police power of the state, and is not repugnant to the provisions of sections 1 and 13 of the state constitution.

**Intoxicating Liquors — Wrongful Sale — "Purity Malt."**

9. Defendant having pleaded guilty to an information charging that it sold within the state a liquor labeled "Purity Malt," and com-

monly called and known as "malt," which is a malt liquor retaining the alcoholic principle as a distinctive force which was and is sold and used throughout the state of North Dakota as a substitute for beer, and that said beverage contained 1.75 per cent of alcohol by volume and 1.40 per cent of alcohol by weight, is guilty of a public offense and liable to an imposition of penalties provided for violation of the prohibitory law of the state.

Appeal from District Court, Cass county; *Pollock*, J.

The Fargo Bottling Works Company, a corporation, was convicted of the wrongful sale of intoxicating liquor in violation of the prohibitory law, and it appeals.

Affirmed.

*V. R. Lovell* and *George A. Bangs*, for appellant. *Arthur W. Fowler*, State's Atty., for the respondent.

ELLSWORTH, J. At its session in 1909 the Legislative Assembly of North Dakota passed an act, the wording of which, including the title, is as follows:

"An act to amend section 9366 of the Revised Codes of North Dakota, as amended by chapter 191 of the Laws of 1907, defining intoxicating liquors."

"Be it enacted by the Legislative Assembly of the state of North Dakota:

"'Sec. 9366. Intoxicating liquor defined. The following liquors are hereby declared to be intoxicating and their intoxicating quality shall, by all courts, be presumed, viz.: Alcohol, whisky, rum, brandy, beer, ale, porter, wine and hard cider, also all spirituous malt, vinous, fermented or other intoxicating liquors or mixtures thereof by whatsoever name called whether mentioned in section one of this act or not, that will produce intoxication of any degree; or any mixtures of such, or any kind of beverage whatsoever, which retaining the alcholic principle or other intoxicating qualities as a distinctive force, may be used as a beverage and become a substitute for the ordinary intoxicating drinks, or any liquors or liquids which are made, sold or offered for sale as a beverage and which shall contain coculus indicus, copperas, opium, cayenne pepper, picric acid, Indian hemp, strychnine, tobacco, darnal seed, extract of logwood, salts of zinc, copper or lead, alum or any of its compounds, methyl alcohol or its derivatives, amyl alcohol or any extract or compound of any of the above ingredients, shall be considered and held to be intoxicating liquors within the meaning of this chapter.'

"Sec. 2. Emergency. Owing to the inadequate definition of intoxicating liquors now existing there is an emergency existing and this act shall take effect immediately upon its passage and approval."

This act was approved by the Governor of North Dakota on March 11, 1909, and under the emergency clause attached took effect immediately. On June 30, 1909, the state's attorney of Cass county filed in the district court of the Third judicial district for that county an information against the Fargo Bottling Works company, the defendant and appellant here, the charging part of which is to the effect that the said defendant "a corporation, late of the county of Cass and state aforesaid, did commit the crime of selling intoxicating liquor, committed in the manner following, to wit: That at said time and place the said defendant was and is a corporation duly organized and existing under and by virtue of the laws of the state of North Dakota; that at said time and place the said defendant did wilfully and unlawfully sell to one Arthur W. Fowler a quart bottle full of a certain beverage, which said beverage was then and there labeled 'Purity Malt,' and is commonly called and known throughout the state of North Dakota as 'Malt' and was and is a malt liquor, and that in the manufacture and production of which said beverage no alcohol was or is used as an ingredient, but in which, during such manufacture, the alcohol hereinafter referred to was and is produced by chemical action in the beverage itself, and which said beverage therefore then and there had and retained, by reason of the facts aforesaid, the alcoholic principle as a distinctive force, and was then and there and is sold and used throughout the state of North Dakota as a substitute for beer; that said beverage aforesaid contained one and seventy-five one-hundredths (1.75) per cent. of alcohol by volume, and one and forty one-hundredths (1.40) per cent. of alcohol by weight. This against the peace and dignity of the state of North Dakota, and contrary to the form of the statutes in such cases made and provided."

To this information the defendant corporation, when summoned to appear and answer pursuant to article 4, c. 15, Code Cr. Proc. (Rev. Codes 1905, Sections 10222-10230), interposed a demurrer on the ground "that the said information did not state facts sufficient to constitute a public offense." This demurrer was argued before the district court and overruled by the court on July 23, 1909. Thereafter, on August 18, 1909, the defendant filed a writ-

ten plea by the terms of which it "pleads guilty to the specific facts charged in the information herein without conceding, however, that such facts, if true, constitute a public offense." This plea being received and the state's attorney having moved for judgment against defendant upon its plea, the defendant interposed a motion in arrest of judgment upon the ground "that the information herein does not state facts sufficient to constitute a public offense." The court on the same day denied the motion in arrest of judgment and holding that the defendant by commiting the facts charged in the information was guilty of a public offense, to wit: that of selling intoxicating liquor contrary to the provisions of chapter 65 of the Penal Code as amended (Rev. Codes, 1905, Sections 9353-9395) as penalty imposed a fine of $400 and made an order that plaintiff have judgment against the defendant corporation for that sum together with its costs and disbursements of the action. A judgment in accordance with the mandate of this order was entered on the same day, from which judgment this appeal is taken.

In this court defendant submits for consideration four points, any of which, if sustained, require a reversal of the judgment of the the district court: (1) That a true interpretation of the terms of chapter 187, Laws 1909, does not include within the definition of intoxicating liquors or the prohibition of the statute liquors which, in fact, are non-intoxicating; (2) that if the interpretation contended for by the state in this case is the true interpretation of chapter 187, Laws 1909, then the provisions of said chapter offend section 61 of the state Constitution, in that the subject of the act is not expressed in its title; (3) that if the interpretation contended for by the state in this case is the true interpretation of chapter 187, Laws 1909, then the statutory amendment embraced in said chapter offends section 64 of the state Constitution so far as applied to the facts of this case, because section 9353, Rev. Codes 1905, upon the penal provisions of which this prosecution is based, is not "re-enacted and published at length" in the amendatory act; and (4) that chapter 187, Laws 1909, even though not vulnerable to the constitutional objections heretofore urged, so far as it attempts to include within the penal provisions of our statutes one prohibiting the manufacture and sale of a liquor not intoxicating, is a violation of an essential part of the rights of liberty and property as guaranteed to the defendant by section 1 of our Constitution, in that it seeks to interfere with defendant's enjoyment upon terms of equality with

all others in similar circumstances of the privilege of pursuing an ordinary calling of trade and of acquiring, possessing, and protecting property to an extent not warranted by a legitimate exercise of the police powers of the state.

Considering these points in the order in which they are enumerated, we will now determine whether or not chapter 187, Laws 1909, as fairly and reasonably construed, embraces within its terms any liquors not generally recognized as intoxicating. In our construction of this statute in all its parts, we bear in mind that it is a penal statute; that nothing is to be regarded as included within its provisions that is not within its letter as well as its spirit; and that, if it contains a patent ambiguity and admits of two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred. Further than this, however, rules of strict construction, especially those of the common law, have no application to the statutes of our state. Section 187, Laws 1909, amending as it does section 9366, Rev. Codes 1905, is part of our Penal Code and clearly within the provision that "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 purport of their terms, with a view to effect its objects and promote justice." Rev. Codes 1905, Section 8538. Penal statutes, therefore, "like all others, are to be fairly construed according to the legislative intent as expressed in the enactment, the court refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other equally refusing by any mere verbal nicety, or forced consideration or equitable interpretation, to exonerate parties plainly within their scope." 2 Lewis, Sutherland Statutory Construction (2d Ed.) Section 519. If the meaning of the statute or of some of its parts is simply obscure, the legislative intent in the passage of the act will be considered as a light to assist the court in arriving with more accuracy at its meaning, and a construction which gives some meaning to the statute or an obscure part or clause thereof will be preferred to one which renders it entirely nugatory and meaningless. "In short," as well stated by Judge Story, "it appears to me that the proper course in all these cases is to search out and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the

Legislature." United States v. Winn, Fed. Cas. No. 16,740. It is apparent at a glance that the purpose of this chapter is to define the liquors that are to be presumed by the courts to be intoxicating within the meaning of the statute prohibiting the sale and manufacture of intoxicating liquors. Pursuant to this purpose, a number of liquors or beverages are enumerated, divided into three or four classes, the first class including only such as are generally recognized as intoxicating, viz., "alcohol, whisky, rum, brandy, beer, ale, porter, wine and hard cider." The second class includes not by name but by general designation, "all spirituous, malt, vinous, fermented or other intoxicating liquors or mixtures thereof by whatsoever name called * * * that will produce intoxication of any degree, or any mixtures of such." The third class, by a description more sweeping and general than any in the act, embraces "any kind of beverage whatsoever, which retaining the alcoholic principle or other intoxicating qualities as a distinctive force, may be used as a beverage and become a substitute for the ordinary intoxicating drinks"—and the fourth class any liquors or liquids which are made, sold or offered for sale as a beverage and which shall contain "coculus indicus, copperas," and other poisonous drugs specifically mentioned. All liquors and beverages or mixtures of the same fairly included in any of these classes by express legislative declaration are intoxicating, and this court, as all other courts dealing with the subject, is required to so presume and hold. On the other hand, it may be said that any liquor which does not come fairly and reasonably within the letter and spirit of the definition announced in chapter 187 is not to be regarded as an intoxicating liquor in prosecutions under the penal prohibitions of our statute.

Accepting the foregoing classification for convenience in reference throughout this opinion, it is conceded that a liquor with the characteristics of "Purity Malt" is not included in the first, second, or fourth class, and that defendant is liable, if at all, for a violation of the statute prohibiting the sale of intoxicating liquors only in case this beverage is embraced in the third class. Defendant by its demurrer and plea admits that "Purity Malt" is a malt liquor, retaining the alcoholic principle as a distinctive force, which is sold and used throughout the state of North Dakota as a substitute for beer. Counsel for the state upon this appeal call attention to the fact that the information does not allege that this liquor is in fact

intoxicating, and that "for the purpose of this case it may and should be assumed that this beverage will not produce intoxication of any degree." By these admissions on the part of the defendant and the state the issue is narrowed to the single question of whether or not the sale of malt liquor retaining the alcoholic principle as a distinctive force and used throughout the state of North Dakota as a substitute for beer, but that will not produce intoxication in any degree, is under an ordinary and reasonable construction or the language used in chapter 187, Laws 1909, within the prohibition of the statute.

It does not appear to us that the language used in describing the third class of liquors or beverages referred to in the act is ambiguous in the sense that it is susceptible of two or more meanings equally clear and reasonable; neither is it contradictory in its terms. It lacks somewhat the transparent clearness which proceeds from directness and brevity of expression, and is an illustration of the principle that ornate effect obtained by means of much superfluous wording usually serves to obscure the meaning. Overworded as it is, however, the clause will admit of but one meaning that appeals alike to sound judgment and common sense.

It is urged by defendant that the phrase, "retaining the alcoholic principle," can mean only that the beverage must contain alcohol in sufficient quantity to produce intoxication; otherwise it would not be connected with the words, "or other intoxicating quality," which immediately follow. It further urges that the expression, "as a distinctive force," means to an intoxicating degree, and that the words, "become a substitute for the ordinary intoxicating drinks," can refer only to beverages that will produce intoxication. Examining carefully the expressions used, however, and giving to the words included in each its ordinary signification, we do not think the clause can be reasonably said to have such meaning. The term "alcoholic principle" has no reference whatever to quantity, but only to some characteristic or quality. As said by Judge Brewer in the Kansas intoxicating liquor cases (25 Kan. 751): "Alcohol is the intoxicating principle, the basis of all intoxicating drinks. Whatever contains alcohol will, if a sufficient quantity be taken, produce intoxication." This principle or quality tends always to intoxication in a degree, dependent entirely upon the quantity used; but whether or not intoxication is produced the "principle" remains the same.

In its use, therefore, of the expression "retaining the alcoholic principle or other intoxicating quality," the Legislature evidently meant to connect without reference to quantity two qualities, viz., the intoxicating quality present in alcohol with that found in other poisonous drugs, possibly those, or some of these, mentioned in the latter part of the act. The phrase, "as a distinctive force," as we understand it, implies not only that alcohol be present in appreciable quantity, but that, being so present, it retain its characteristic intoxicating principle. It is a well-known scientific fact that alcohol, when used in solution with other drugs, may by chemical combination lose many if not all of its characteristics, and become neutralized to such degree as no longer to retain the intoxicating principle. If it is so used, it is apparent that, though present in recognizable quantity, it is not present as a distinctive force. The word "substitute" means "one who or that which stands in the place of another; that which stands in lieu of something else." Webster's Dict. Defendant argues that the meaning is limited to "one thing serving the purpose of another," and that under this definition the only "substitute" for an intoxicating drink, is one that will serve the same purpose, or, in other words, produce intoxication. Such however, is not the only or the usual meaning of the word. As held by Judge Brewer in the opinion heretofore referred to, the intoxicating liquor acts were not intended as an "attack upon bay rum, camphor, or tincture of lemon. It was intended to strike at such liquors and mixtures only as were in ordinary and known use as intoxicating beverages, or which in the failure to obtain such beverages it could fairly and reasonably be believed would be used as substitutes." The expression "become a substitute for the ordinary intoxicating drinks" can only refer to such beverages as common experience teaches will be used in place of well-known intoxicating liquors, when by reason of a prohibitory statute or other extraordinary case they cannot be obtained by the usual means of sale and purchase.

In our view, therefore, under a true, fair, and reasonable interpretation, that clause of chapter 187, Laws 1909, defining the third class of liquors that are to be deemed intoxicating, is intended to describe a beverage which containing alcohol or other drug having an intoxicating quality in a quantity reasonably appreciable in which it has not by chemical combination with other drugs lost its intoxicating principle, and which liquor according to common ex-

perience and observation will be resorted to upon failure to procure the ordinary intoxicating drinks in the usual way. In such a liquor, alcohol, or other drug of kindred quality preserving its native characteristics must be present, but not necessarily in such quantity as to produce intoxication. Whether it is present in a quantity reasonably recognizable and as a distinctive force is a question of fact to be determined by the ordinary tests, among which is the consideration that it "may be used as a beverage and become a substitute for the ordinary intoxicating drinks."

In thus interpreting the meaning of a clause of this statute, we are not unmindful of the fact that a cardinal principle of construction requires that the act be considerel in its entirety. So considering it, we first observe that all liquors and beverages containing alcohol that are either well recognized as intoxicating or which as a matter of fact may produce intoxication to any degree are included in the first and second classes described. All liquors in any quantity containing drugs of intoxicating quality other than alcohol are included in the fourth class. Therefore, if that part of the statute describing the third class refers only to liquors that will produce intoxication, it is entirely superfluous. It adds no sensible meaning to the amended statute, and might be stricken out without narrowing the scope of the definition in the slightest degree. On the other hand, if this clause is intended to describe liquors that contain alcohol or other intoxicating drugs in a quantity so small that they will not ordinarily produce intoxication, it defines a class not covered by the other parts of the statute and accomplishes a definite purpose by its presence. Under this interpretation, it fits into and harmonizes with the other parts of the statute in a way that is very persuasive of the conclusion that no other meaning could have been intended.

It is urged by the defendant that the obscurity or doubtful import of the wording of this part of the statute warrants in its interpretation a consideration of extraneous facts such as "the conditions existing at the time of the passage of the law, the object to be gained by its enactment, the record of its passage as shown by the legislative journals, and any other matters contemporaneous with its enactment that will throw light upon the question." As heretofore stated, the statute is not in our view ambiguous or contradictory or of such doubtful import as to require a resort to these means of interpretation; and, were it done, the result would be only

to enforce with additional strength the construction we put upon this statute. A glance at the history of the law amended by this act shows that it was passed in the year 1890 pursuant to a constitutional provision requiring the legislative assembly to prescribe regulations and penalties prohibiting the manufacture or sale within this state of any intoxicating liquors; that in the years 1895, 1897, and 1907 amendments to the section of the law defining intoxicating liquors were passed, and that the evident purpose of these amendments was to broaden the definition and embrace within its scope certain liquors and beverages not before included. All these considerations speak in favor of an intent of the Legislature in these successive years to amplify the definition of intoxicating liquors, and extend its terms to beverages not already included in the first, second, and fourth classes. It is, however, urged by the defendant and admitted by the state that the legislative bill which was afterwards enacted as chapter 187, Laws 1909, when first introduced, contained in its first clause the word "malt," immediately after the word "Wine," and that at some time in the course of its passage this word was stricken out, and does not appear in the law as enacted. Defendant urges that the elision of this word by the Legislature is evidence of an intent to exclude the drink known as "malt" from the operation of the statute. It is apparent, however, that there may have been several other reasons for striking out the word which operate in a view contrary to such contention. The Legislature may have noted that malt, not being generally recognized as intoxicating, was not properly included in a list of liquors that are so recognized; or it may have reasoned that liquors of the malt class were covered by the general description in the definition of the third class, and that specific mention in the first class was superfluous; or it may have considered that such mention in the first class of a liquor bearing the specific name of "malt" would be merely confusing, as the word, as generally understood, describes not a specific liquor, but a class. An attempt to include it by name in the first class might thus have the effect of excluding it from the general description in the third class, while those disposed to sell it could readily evade the effect of the law, as thus worded, by the simple device of changing the name of the liquor from "malt" to "hop tea," "sea foam," "near beer," or any of the many names under which sales of liquors of this class are made. Any of those reasons would as logically apply to the act of the Legislature as the

one that it intended by striking out the word "malt" to include that entire class of liquors from the operation of the statute.

All facts necessary to bring "Purity Malt." the liquor sold by defendant, within the definition of chapter 187, Laws 1909, as we construe it, are supplied by the admission of the defendant. A liquor containing 1.75 per cent. of alcohol by volume and 1.40 per cent. by weight may certainly be said to contain alcohol in appreciable quantity. It is admitted that the alcoholic principle was present as a distinctive force, and that the liquor was sold and used throughout the state of North Dakota as a substitute for beer, an ordinary intoxicating drink. Such liquor, therefore, in law and in fact, coming within the prohibition of the statute, the courts in a case where a sale is admitted by defendant can only apply the penalty.

It is contended, however, that chapter 187, Laws 1909, if by its terms it includes a description of a liquor not intoxicating, is unconstitutional, for the reason that the subject of the act is not expressed in the title as required by section 61 of the state Constitution. The title of the act is quoted at the beginning of this opinion, and it will be noted that this chapter contains an amendment to an existing statute, and is not a new enactment. This court has adopted rules of construction governing titles of amended and original acts where such objection is made, and these principles have been announced in several of its opinions. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Powers Elv. Co. v. Pottner, 16 N. D. 359, 113 N. W. 703; State v. Burr, 16 N. D. 581, 113 N. W. 705; State v. Peake, 18 N. D. 101, 120 N. W. 47. The rules announced by these cases, most clearly applicable to the points presented by this case, are "the law will not be declared unconstitutional on account of the defect pointed out in the title unless it is clearly so and if the provisions of the act are germane to the expressions of the title the law will be upheld." Also, "it is not necessary that the subject of the particular section amended shall be stated in the tite of an amendatory act." It is sufficient if the subject matter of the amendment is germane to the subject of the act of which the amended section is a part and is within the title of the original act." The original act of which chapter 187 is an amendment was passed by the legislative assembly of 1890 under the title, "An act to prescribe penalties for the unlawful manufacture, sale and keeping for sale intoxicating liquors, and to regulate the sale, barter and

giving away of such liquors for medical, scientific and mechanical purposes." Chapter 110, page 309, Laws 1890. If the subject-matter of chapter 187 is germane to the subject of the law of 1890 and is fairly within the title of that act, its title is sufficient, whether or not it would be so standing alone. It is apparent without argument, we think, that a definition of the meaning of the term "intoxicating liquors" is not only closely related to, but may be said to be a necessary element of, a legislative act which purports to regulate the manufacture and sale of such liquors. Defendant, contends however, that, while a definition embracing liquors generally recognized as intoxicating is germane to this general subject, it ceases to be so when an attempt is made to include within its terms liquors that are not in fact intoxicating. This argument, however, entirely disregards the well-settled principle that a beverage declared by statute to be intoxicating liquor in the eyes of the law and the consideration of the courts at once becomes so. The effect that such liquor may have upon the human system becomes a wholly immaterial incident. In the administration of the law it is an intoxicating liquor, if for no other reason than because the statute so declares. State v. Intoxicating Liquors, 76 Iowa, 243, 41 N. W. 6, 2 L. R. A. 408; State v. Colvin, 127 Iowa, 632, 103 N. W. 968; Commonwealth v. Brelsford, 161 Mass. 61, 36 N. E. 677; Black on Intoxicating Liquors, section 2; State v. Frederickson, 101 Me. 37, 63 Atl. 535, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295. We are not here presented with a case where, as a text-writer suggests may some time happen, the Legislature has undertaken to declare, a beverage absolutely innocent of any intoxicating quality to be an intoxicating liquor. Black, Intoxicating Liquors, section 4. The definition applies only to liquors containing the alcoholic principle or other intoxicating quality, or, in other words, alcohol or some other intoxicating drug; and "alcohol is an intoxicating liquor regardless of the fact that the quantity drank at any one time would not have that effect. * * * However much it may be diluted it must remain an intoxicant when used as a beverage." The language of Judge Brewer heretofore quoted, in which he speaks of alcohol as the intoxicating principle, is pertinent on this point. That such a liquor may be declared to be intoxicating by the Legislature and so regarded by the courts whether or not its ordinary use will produce intoxication in the average man is settled by a concurrence of all authority. This being true, such liquor is appropriately included

in a general statutory definition of intoxicating liquors; and such definition is germane to the general subject of a regulation of the manufacture and sale of intoxicating liquors.

We pass now to a consideration of the third point raised by defendant, that chapter 187, Laws 1909, if it includes in its definition a liquor not intoxicating, is unconstitutional as violating section 64 of the Constitution. This section provides that "no bill shall be revised or amended nor the provisions thereof extended or incorporated in any other bill by reference to its title only, but so much thereof as is revised, amended or extended, or so incorporated, shall be re-enacted and published at length." The purpose of this provision is clearly enough that of preventing an amendment to an existing statute by means of a legislative bill which contains merely the amendatory words or a reference only to the title of the act sought to be amended, and does not give in full the text of the act as it will appear when amended. Defendant argues that chapter 187, Laws 1909, so far as it is amendatory of the general statute, can be operative only when it is combined with or included in the penal provisions of section 9353, Rev. Codes 1905, and, as this latter section is not included and published at length in the amended act, the amendment is unconstitutional.

It is difficult to understand how this constitutional objection can be said to apply to chapter 187, Laws 1909. It is replete in itself, contains no reference to section 9353, and does not purport to amend it. It is true that in practical operation the amended feature of chapter 187 will by implication affect and modify somewhat the meaning of section 9353 as well as of many other sections of the general statute. But, if section 64 of the Constitution is taken to mean that all sections of the general law in any manner affected or modified by an amendatory act shall be incorporated and published at length in the legislative bill containing the amendment, it may require the publication of large excerpts from the Code in every amendatory act of considerable scope, and at each session of the Legislature the amendments intended to be enacted will be hidden in the obscurity produced by publication and republication of volumes of matter from the existing general law. It is not conceivable that this constitutional provision was intended to require acts so useless and burdensome. "The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard

to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words or to substitute one phrase for another in an act or section which was only referred to but not republished was well calculated to mislead the careless as to its effect, and was perhaps sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent." People v. Mahaney, 13 Mich. 481. The objection that the defendant desires to direct against this phase of the law cannot therefore proceed on constitutional grounds. Its essence seems to be that a definition contained in an amended act by the terms of which a nonintoxicating beverage is declared to be an intoxicating liquor cannot be fairly held to come within the provisions of another section that prescribes a penalty for the manufacture and sale of intoxicating liquors. This objection is, however, fully disposed of by reference to the principle heretofore announced that any liquor containing the alcoholic principle or other intoxicating quality may be declared by the Legislature to be intoxicating, and, when so declared, must be by the courts regarded as such without further test or question.

We come, finally, to a consideration of the point that a law under which penal provisions prohibits the sale of a liquor that is not intoxicating or otherwise harmful or detrimental to life and health is a violation of defendant's constitutional rights of liberty and property, and not a legitimate exercise of the police powers of the state. Section 1 of our Constitution provides that "all men * * * have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and reputation; and pursuing and obtaining safety and happiness." Section 13 provides, "no person shall be * * * deprived of life, liberty or property without due process of law." These guaranties are in substance the same as those contained in the fourteenth amendment to the Constitution of the United States, and are generally regarded by the courts as securing to the individual the right to enjoy upon terms of equality with others in similar circumstance the privilige of pursuing any ordi-

nary calling or trade and of acquiring, holding, and selling whatever may be legitimately regarded as property. It is a universally accepted principle, however, that the rights of the individual in these particulars are not absolute and may be modified to a degree more or less considerable by measures providing for the general welfare, the protection of the health of the people, the prevention of crime and fraud, and the preservation of the public peace. The power of the state to enact and enforce measures of this character is generally referred to as its police power; and laws passed by a Legislature in furtherance of a legitimate exercise of the police power of the state are valid and enforceable, even though they interfere somewhat with the rights of liberty and property of the individual. All this is conceded by defendant, but he contends, notwithstanding, "that the beverages referred to in the information are the product of painstaking, scientific research. They are more palatable than tea or coffee and less injurious than either. They have been subjected to repeated analyses by the pure food commissioner of this state and always without criticism." That a law prohibiting their sale has not "for its object the prevention of a manifect evil or the preservation of the public health, safety, morals, peace and order, or the general welfare," and is therefore not a legitimate exercise of the police power of the state, but an unauthorized interference with the liberty and property of a citizen.

Many of the characteristics claimed by defendant for the liquor in question are not admitted, and this court cannot take judicial notice of these innocent and harmless qualities. The liquor is admitted to contain alcohol, and, in the absence of an admission on the part of the state that it is not intoxicating, would be presumed to be so. Even though not actually intoxicating in ordinary use, a liquor containing the alcoholic principle unneutralized and in full vigor to any degree whatever cannot be said to be less injurious than either tea or coffee. It is a matter of common knowledge that liquor of this description, while not actually intoxicating, may be harmful in the sense that its use cultivates and stimulates an appetite for intoxicants that may become seriously detrimental to the general welfare. Further than this, an alcocholic liquor that is used throughout the state as a substitute for the ordinary intoxicating drinks presents a constant opportunity and temptation to the criminal classes to make it a vehicle of subterfuge, fraud, and a means of evading the penalties of the prohibitory law. Such liquors

cannot be regarded as innocent and harmless, and must be put in a different class from the wholesome foods in common use, or from beverages that do not contain the alcoholic principle. "Alcoholic beverages are under the ban of the law in some form or other in most civilized countries. They are known to be the cause of crime, destitution, and pauperism. Malt liquors used as beverages are known to contain that destructive ingredient. It was proven upon the trial of this case that the beverage kept and sold by plaintiff in error contained it. The liquor sold by him was simply an effort to evade the law." Luther v. State, 83 Neb. 455, 120 N. W. 125, 20 L. R. A. (N. S.) 1146.

The state in the exercise of its police power has an undoubted right to take into consideration, not only the effect of the article sold upon the life and health of the individual, but also the fact that it may be used readily and conveniently as a cover to violations of the law. Elder v. State (Ala) 50 South. 370. As said by the Supreme Court of Kansas in passing upon a statute regulating the sale of cider which it was claimed, as of the liquor in this case, is a harmless and wholesome drink: "It may have been thought that the drinking of cider might foster a taste for strong liquors, and that, if the unrestricted sale of cider by the glass was permitted, the officers might be easily deceived as to the character of the drinks sold, and that a tippling shop might be carried on under the guise of a place to sell cider. In the interest of the health of the people, and the peace and good order of the communities, it was deemed wise to regulate the traffic. To sell it by the glass and allow it to be drank on the premises where sold was deemed to be subversive of good order, and dangerous to the health and morals of the people, and hence they imposed a regulation that it should not be sold in less quantities than one gallon, and should not be drank at the place of sale. Such a regulation violates no private right, and does not unreasonably or improperly restrain trade." Monroe v. City of Lawrence, 44 Kan. 607, 24 Pac. 1113, 10 L. R. A. 520. Under similar principles, the Supreme Court of the United States has held valid a statute prohibiting the sale of oleomargarine and the Supreme Court of Wisconsin has applied the same rule in its construction of a law prohibiting the sale of malt liquor. Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 32 L. Ed. 253; Pennell v. State (Wis.) 123 N. W. 115. See, also, Feibelman v. State, 130 Ala. 123, 30 South. 384; United States v.

Cohn, 2 Ind. T. 474, 52 S. W. 38; State v. Durein, 70 Kan. 1, 78 Pac. 152, 15 L. R. A. (N. S.) 908; State v. Guinness, 16 R. I. 401, 16 Atl. 901; State v. Frederickson, 101 Me. 37, 63 Atl. 535, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295.

We hold, therefore, that chapter 187, Laws 1909, was constitutionally enacted, and so far as it interferes with individual rights and property is a legitimate exercise of the police powers of the state. We further hold that it fairly and reasonably includes within its terms the description of liquor such as the defendant admits he sold after the law was in full operation.

Pursuant to these holdings, the judgment of the district court is affirmed. All concur, except FISK, J., dissenting.

SPALDING, J. I concur with my associates in their opinion expressed through Judge ELLSWORTH, but think the legislative assembly in framing the act in question only attempted to divide the liquors enumerated or described into two classes. It is reasonably clear to me that an attempt was made to place those named or described in that part of the act which precedes the semicolon in one class having reference to their quality and the proof necessary regarding them in prosecutions. Those described or named in that part of the act following the semicolon comprise the second class, and are enumerated together with reference to the same things. In the first class are those which are recognized as intoxicating in fact. Those in the second class containing the alcoholic principle or intoxicating qualities as a distinctive force so they may be used as or become a substitute for the ordinary intoxicating drinks, and other compounds containing coculus, indicus, etc., may not be intoxicating in fact. The use of those enumerated or described in the second class may create an appetite for intoxicants and their possession or sale may serve as a cover for evading the law relating to intoxicants and thus render its enforcement difficult or impossible. For these reasons, the act provides that those of the latter class "shall be considered and held to be intoxicating liquors within the meaning of this chapter." That is to say, in prosecutions under the prohibitory law, liquors coming under the second classification shall be held to be within the purview of the law on the subject of prohibition. That the prohibition of the sale of the latter class of drinks is constitutional is established by a large number of authorities, several of which are cited in the opinion of Judge ELLSWORTH. Divided into these two classes, as I think the

legislative assembly intended, no conflict exists between the two divisions of the law.

FISK, J. (dissenting in part). I regret my inability to concur in toto in the foregoing opinion. Everything therein contained meets with my unqualified approval with but one exception. I feel compelled to differ with the majority opinion upon the first proposition considered. It is well stated by my Brother ELLSWORTH that nothing is to be regarded as included within the provisions of the statute "that is not within its letter as well as its spirit." I freely admit that the prohibition of the sale of malt liquor, whether intoxicating or not, was probably the intent aimed at by the author of the bill, but that the letter of the statute, under any known rule of statutory construction, warrants the court in giving effect to such probable intent, I deny. I believe such interpretation is at war with the plain language employed. In the light of the record admission of the state's attorney that the malt in question is not intoxicating in the least degree, there is no room for the contention that, by the plea whereby defendant admits the truth of the facts alleged, it admits its violation of the statute in question. As I view it, the vital, controlling, and sole question is as to whether a malt liquor concededly nonintoxicating in the least degree is included within the ban of the statute when such statute is construed according to its letter as well as its spirit. In dealing with the statute I shall accept the classification adopted in the majority opinion. Under the second class is included, as stated in such opinion, "all spirituous, malt, vinous, fermented or other intoxicating liquors or mixtures thereof by whatsoever name called * * * that will produce intoxication of any degree, or any mixtures of such." By the use of this language it is perfectly apparent to my mind that, at least in so far as the letter of the statute is concerned, it was evidently the purpose to define "malt," as well as the other liquors mentioned in such class, to be intoxicating, and therefore the sale thereof prohibited, only on condition that they "will produce intoxication of any degree." Such is the plain language employed.

But it is said that class 3 is broader than class 2, and includes everything covered therein, and that malt and the other liquors, although not intoxicating in the least degree, are nevertheless prohibited, provided they retain "the alcoholic principle or other intoxicating qualities as a distinctive force" and "may be used as a beverage and become a substitute for the ordinary intoxicating

drinks." I contend that the general language employed in class 3 cannot reasonably be construed to cover the liquors specifically mentioned in class 2, and which are prohibited only when they "will produce intoxication of any degree." To say that the Legislature in the same section placed the ban on malt and certain other specially enumerated liquids only when they "will produce intoxication of any degree," and also immediately thereafter prohibited their sale regardless of whether they would produce intoxication of any degree, is contrary to all recognized rules of statutory construction.

The language employed in dealing with the third class is, in substance, the same language employed by Judge Brewer while on the Kansas supreme bench in dealing with a class of liquid mixtures and compounds which were used as a beverage and contained the alcoholic principle as a distinctive force in such mixture or compound. Intox. Liquor Cases, 25 Kan. 751. The language thus borrowed from the opinion of this eminent jurist is, I think, wholly misapplied, when given the meaning and effect which the majority opinion gives to it. Not only this, but such a construction of the language used in class 3 renders not only wholly unnecessary, but useless and meaningless, the specific statutory provisions of class 2. I am of the opinion that the only proper intention to attribute to the Legislature in the use of the language employed was the intent with which similar language was made use of by the Kansas court, which was to cover a class of liquors or mixtures not previously enumerated, but which "retaining the alcoholic principle or other intoxicating qualities as a distinctive force, may be used as a beverage and become a substitute for the ordinary intoxicating drinks." I think the language "retaining the alcoholic principle as a distinctive force," as used by Judge Brewer with reference to mixtures and compounds was intended by him to apply to the intoxicating quality thereof as a distinctive force; i. e., a force which would, if such liquor was taken in sufficient quantity, manifest its intoxicating quality.

A forced construction of this statute is neither demanded nor justified by a sound public policy. The manufacture and sale of malt of the character here in question has at all times up to the passage of the statute in question, at least, been perfectly legitimate, and quite an extensive industry has been established in its manufacture and sale, which is struck down by the majority decision.

That the Legislature has the full right within the police power of the state to prohibit its manufacture and sale I entertain no doubt, but it is an easy matter to do so in unmistakable language, and I do not believe it to be the duty nor within the legitimate function of the courts to construe as within a criminal statute acts not fairly within the letter thereof.

(124 N. W. 387.)

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ANNIE WINTERBERG, FORMERLY ANNIE RYCKMAN, SUING FOR THE USE AND BENEFIT OF GEORGE W. LYNN v. JOHANNES VAN DE VORSTE.

Opinion filed June 22, 1909.

**Mortgage Foreclosure — Sale of Sheriff's Certificate by Executor — Right to Assign.**

1. An executor may sell and assign a sheriff's certificate of foreclosure held by him as executor, and a sale legally and regularly so made conveys all the interest therein of the devisees under the will of which he is executor.

**Mortgage Foreclosure — Death of Mortgagee Pending Advertisement — Purchases from Devisees — Fraud — Equity.**

2. A proceeding for the foreclosure by advertisement of a real estate mortgage was commenced in the name of the mortgagee by her attorneys. While the advertisement was running the mortgagee died. At the sale the land was bid in by the attorneys and the sheriff's certificate of sale issued in the name of the mortgagee. Such certificate was subsequently assigned by the executor for a valuable consideration to a third party, who had no knowledge of any defect in the proceedings, and who, after taking the sheriff's deed, conveyed by warranty deed to appellant. The papers and records in the foreclosure proceeding disclose no defect therein. The mortgagor abandoned the premises on giving the mortgage, and never paid any interest, taxes or principal, and knew of the foreclosure and affirmatively acquiesced therein, and in the title and possession of the appellant for years.

*Held*, that a party who, for a nominal consideration, and by misrepresentation, secures quitclaim deeds from the devisees under the will of the mortgagee after the final account of the executor had been approved and the proceeds of the sale of the certificate had been distributed to and accepted by such devisees, who when executing such deeds claimed no interest in or title to the real estate in question, took no title by such conveyance.

*Held*, further, following the authority of Higbee v. Daeley et al., 15 N. D. 339, 109 N. W. 318, that such party, by deed from the original

mortgagor, obtained for a nominal consideration and through misrepresentation of the condition of the title to the premises attempted to be conveyed, acquired no title which a court of equity will protect.

Appeal from District Court, Emmons County; *Winchester,* J.

Action by Annie Winterberg suing for the use and benefit of George W. Lynn, against Johannes Van de Vorste. Judgment for plaintiff, and defendant appeals.

Reversed.

*N. A. Armstrong* and *John H. Perry,* for appelant.

Sheriff's certificate is personal property and foreign executor had jurisdiction over it. Joy v. Elton, 83 N. W. 875, 9 N. D. 428

The various deeds are void for champerty. Revised Codes 1905, Sec. 8733; Brynjolfson v. Dagner, 109 N. W. 320; Galbraith v. Payne, 12 N. D. 164; Schneller v. Plankinton, 12 N. D. 561.

No claims can be made thereunder. Higbee v. Daeley, 109 N. W. 318; Bausman v. Faue, 45 Minn. 412, 48 N. W. 13; Shelby v. Bowden, 94 N. W. 416.

*George W. Lynn,* for respondent.

Death of mortgagee revoked attorney's authority to foreclose. Brown v. Skotland, 12 N. D. 455, 97 N. W. 543; Scruggs v. Driver, 31 Ala. 274; Harper v. Little, 11 Am. Dec. 25; McDonald v. Hannah, 51 Fed. Rep. 73.

Action prosecuted in name of original grantor for beneficial, plaintiff, is not champertous. Galbraith v. Paine et al., 12 N. D. 164, 96 N. W. 258; Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77.

SPALDING, J. This is one of the cases now becoming very numerous in the courts of this state relating to speculation in defective titles to real estate. The facts may be summarized as follows: Annie Winterberg was, on the 1st day of May, 1889, the owner in fee of the S. W. ¼ of section 35, township 130 N., range 77 W., in Emmons county, and on that day executed and delivered a mortgage thereon as security for her note, payable in five years to one Hannah K. Loring, a resident of Massachusetts. This mortgage was recorded on the 5th day of June, 1889, in the office of the register of deeds of Emmons county, and contained a power of sale authorizing the mortgagee, or her agent, to foreclose and sell at public auction in case of default. Default was made by failure to pay the principal or any interest or taxes, and the mortgagee authorized the firm of Herreid & Williamson to foreclose such mortgage.

by advertisement under the power of sale, and accordingly first publication of notice of foreclosure was made, as provided by law on the 23d day of September, 1898. Between the dates of the first and second publications the mortgagee, Hannah K. Loring, died, and, apparently without knowledge of her death, publication of the notice was continued for the full time required by statute, and on the 5th day of November, 1898, the date fixed in the notice for sale of the premises, sale was made by the sheriff of Emmons county, and, Herreid & Williamson, being the highest bidders, the sale was made, and the sheriff's certificate executed in the name of said Loring as purchaser. Such certificate, and the other papers required and customary in such cases, were delivered to said attorneys, and recorded on the 14th day of November, 1898. The death of Hannah K. Loring occurred on the 24th day of September, 1898. She left a last will and testament wherein she constituted John M. Batchelder, of the county of Middlesex and state of Massachusetts the executor thereof. Such proceedings were had in the probate court of Middlesex county that on the 22d day of November, 1899, her will was admitted to probate, and said Batchelder was on the same day duly appointed as executor, and forthwith qualified as such. It also appears that he was appointed and acted after her death, and before qualifying as executor, as conservator of her estate. The certificate of sale went into the possession of said Batchelder as executor, and on the 20th day of February, 1900, he sold and assigned the same for the sum of $457 to one J. E. Horton, by an instrument in writing, which was duly recorded in the office of the register of deeds of Emmons county, on the 30th day of March, 1900. The laws of Massachusetts are pleaded and are offered in evidence, and show that under such law said sheriff's certificate of sale was personal property, and that the executor was authorized to convey the same without procuring an order of sale from the courts of Massachusetts. No redemption was made, and on the 1st day of May, 1900, the sheriff of Emmons county executed and delivered to said Horton the usual sheriff's deed which, it is claimed, conveyed said real estate to Horton. Such deed was recorded in Emmons county on the 1st day of May, 1900, an thereafter, and on the same day, Horton conveyed by warranty deed, which was duly recorded on the 8th day of May, 1900, to the defendant and appellant herein, who since that time has been in exclusive possession of the premises. Annie Winter-

berg abandoned the premises at or about the time of the execution of the mortgage, and, although she knew of the foreclosure proceedings, never raised any objection thereto, or made any claim of their invalidity, or that she retained any title in the premises. On the 13th day of April, 1905, on the representation and at the request of George W. Lynn, for whose use and benefit this action is brought, for the consideration of $20, Annie Winterberg quitclaimed said premises to one Wetherby, and it is alleged that she did so by reason of the promise made by Lynn, acting for Wetherby, that he would not disturb the title or possession of appellant; that such promise was false, and was fraudulently made for the purpose of obtaining such deed. On February 8, 1904, Lynn wrote the following letter to said Batchelder: "George W. Lynn, State's Attorney, Emmons County. Linton, North Dakota, Feb. 8, 1904. John M. Batchelder, Holliston, Mass., Kind Sir: Your favor of the 2d inst. received and contents noted, and your promptness in answering my former letter is appreciated. A client of mine has requested that I pass upon the title of certain tracts of land in this county in which the late Hannah K. Loring had an estate prior to her death. I wish to state at this time that the purpose of my correspondence with you is not adverse in any manner whatsoever to the interests of yourself or of the heirs and devisees of the said Hannah K. Loring but is for the purpose of perfecting a good and unquestionable title to the said tracts. To this end I have advised that, in order to obtain such title, he should secure a certified copy of the will which has been probated in your state, together with quitclaims from the heirs and devisees of the late Hannah K. Loring, all of which should be placed of record in this state. Will you undertake to secure the quitclaims, and in your opinion what will be the cost of securing them, including your services, provided I prepare all papers according to the laws of our state, and you attend to having the same executed? I have this day written the register of probate to ascertain the cost of securing the certified copy of the will, and when I have heard from you, and if everything is satisfactory to my client, I will send for the amount. An early reply will be appreciated, and in any event I will compensate you for your trouble. Yours, Geo. W. Lynn. Dic." And by means thereof, and on payment of $2.50 to each devisee, obtained quitclaim deeds from all the devisees under the will of said Hannah K. Loring to Wetherby, who thereafter deeded to Lynn by quitclaim deed.

Neither Lynn nor Wetherby have ever been in possession of nor received any rents or profits from said real estate. Annie Winterberg has at all times since the execution and delivery of such mortgage been an actual resident of the state of North Dakota. The answer demands affirmative relief, that said certificate of such foreclosure sale, and all foreclosure proceedings, be reformed to show said Batchelder as executor to be the purchaser at said sale, and that the same be held valid and be confirmed, and that said sheriff's deed be validated, and that the defendant and appellant be adjudged to be the owner in fee of such real estate, and for general relief. On the trial evidence was received showing the circumstances and facts surrounding the several transactions, most of which are in harmony with the statements of the answer. The court entered judgment against the defendant, adjudging that plaintiff is the absolute owner of the premises described, and quieting title in him, and directing the issuance of execution to place him in possession thereof, and for costs. From such judgment defendant appeals, and demands a trial de novo in this court.

It affirmatively appears from the testimony of Annie Winterberg, the mortgagor, that she abandoned the mortgaged premises, and surrendered the same immediately after executing the mortgage, and that she has never since made any claim to title therein. When Lynn called upon her and requested her to sign the previously prepared deed running to Wetherby, he informed her that he sought it to make the title a little clearer. She told him that she did not know that she had any claim on it any more. He informed her that she had a little claim on it yet. She testifies that at that time she made no claim to any interest in it, and that she told Lynn that she did not want to take the land from Van de Vorste, the defendant, and that if it did not interfere with him (Van deVorste) then she was willing to sign the deed, and that Lynn informed her that it would make no difference to Van de Vorste, but would just clear up the title a little; that she first learned that it did interfere with Van de Vorste and his title not a great while after that; that she would not have executed the deed had she been informed that it would interfere with Van de Vorste's interest and title; and that she relied upon the promise and statement of Lynn that it would not do so. He concedes that he showed her the five deeds which he had received from the executor, and used them to influence her to execute the deed to Wetherby, and claims that Mrs. Winterberg

was informed or told that Van de Vorste could recover from Horton, the party who took the assignment of the certificate of sale, and to whom the sheriff's deed was issued, the amount he had paid him for his deed. Mrs. Winterberg testifies that no such conversation occurred before she executed and delivered the deed to Lynn, but her testimony leads us to believe that some such conversation may have taken place after the transaction was closed. One Wescott, who drove Lynn to Mrs. Winterberg's place, testified to such a conversation, but he fails to place it before the delivery of the deed. Horton, the assignee of the sheriff's certificate, and the grantor of appellant, testifies that he purchased the sheriff's certificate from Herreid & Williamson, the representatives of the executor, and did so on the representation of Mr. Herreid, who had made the foreclosure, that everything was perfectly in order and all right; that he held a second mortgage on the place, and was considering redeeming from the foreclosure sale in question, but through this advice he discharged his second mortgage, and relied upon the certificate of sale. It is shown that the proceeds of the certificate of sale were received by the executor, Batchelder, and distributed, in the administration of the estate of Hannah K. Loring, to the parties designated in her will, namely, the persons who executed the quitclaim deeds delivered to Lynn through Batchelder, in response to the letter quoted.

It is contended on the part of the respondent that the foreclosure proceedings were absolutely void, and that no title passed, and that title should be quieted in him. Appellant asks for a reformation of the certificate of sale and sheriff's deed, and suggests several reasons why title should not be quieted in plaintiff. We are not aided to any material extent by the brief of either party to this appeal. It will be noted that respondent has not tendered, and does not offer to pay, the mortgage, the interest, or the taxes paid by appellant or his grantors. We have little doubt that on this ground the action should be dismissed, and we might be justified in going no further than reversing the judgment and dismissing the action; but, as this would only result in further litigation, we have concluded to determine the full rights of the parties in the premises. In doing so we find it unnecessary to pass upon the validity of the foreclosure or the right to a reformation of any of the instruments described. We may assume that in a proper proceeding, instituted without unreasonable delay, and by a party

with clean hands, it would be vacated. For a period of nine years, between the execution and delivery of the mortgage and the foreclosure proceedings, the mortgagor asserted no rights over the premises; permitted the mortagee to pay the taxes and institute foreclosure proceedings. She knew of the foreclosure proceedings while they were being conducted. She knew of the deed to Van de Vorste, and that he was in possession of the premises. She acquiesced in all of the proceedings, even to the time of the trial in the district court in May, 1906, seventeen years after she gave the mortgage. She not only acquiesced, but she refused to execute a deed if it would interfere with the interests of the appellant, and only gave the deed on assurances that it would not have such effect. This case does not present facts parallel with those in Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855. In that case the papers and records of the foreclosure proceedings showed on their face that such proceedings were illegal and invalid. In this case nothing connected with the foreclosure proceedings or the record relating thereto shows any defect in the proceedings. If the fact of the death of the mortgagee while the advertisement of sale was running, and the issuance in her name of the sheriff's certificate of sale after her decease, rendered the proceedings wholly void, the invalidity would not be disclosed by any inspection of the record or foreclosure proceedings. As far as they indicated everything was regular and valid. In the Finlayson case the record disclosed the invalidity of the proceedings. A purchaser, examining the record and going to the documentary evidence of the foreclosure, would find nothing to apprise him of any defective proceeding. The effect is evident in this case. Horton was an innocent purchaser so far as any legal notice of a defective foreclosure was concerned. He paid a fair and valuable consideration for the assignment of the sheriff's certificte. Such certificate was personal property, both in this state and in Massachusetts, and the executor had a right to assign it. Horton deeded, for a valuable consideration, to the appellant, who was apprised of no defect in the proceedings or title. He took possession under his deed in good faith. To hold with respondent, after the lapse of so many years during which the mortgagor, as shown by the record, has not only affirmatively acquiesced in the foreclosure, but disclaimed, and still disclaims, any interest in the premises, and told Lynn so when he procured his deed, would open wide the doors of the courts

to fraud and deception, and be contrary to equity and good conscience. The equities are so plain that we shall not take the trouble to cite numerous authorities.

In Higbee v. Daeley et al., 109 N. W. 318, 15 N. D. 339, this court held that one who seeks to have a sale, under proceedings regular on their face, adjudged void must show affirmatively that he asserted his rights promptly after the discovery of the facts. In that case a foreclosure was conducted in the name of the original mortgagee after it had assigned the mortgage; the assignment never having been recorded. The property was bid off by the assignee of the mortgage, and a sheriff's deed issued to such assignee. The record disclosed an absolutely perfect title in the holder of the sheriff's deed, and the defendant was a purchaser in good faith, as in the present instance. The court says: "It is also apparent that the defect is not one which could, under the circumstances of the case, cause any actual loss or prejudice to the plaintiff or any one else. There was a default which authorized a foreclosure, and the actual owner of the debt caused the apparent foreclosure to be made, and reaped the fruits thereof. The owner of the fee, or any other person entitled to redeem, were given the same notice of the sale, and had the same right to redeem, as they would have had if the foreclosure had been made in the name of the assignee of the mortgagee." These were among the reasons given for holding the mortgagor, or plaintiff in that case, to the use of reasonable diligence to avoid the sale. The plaintiff did not commence his action for twelve years after the sale, and ten years after the time the entire debt due under the mortgage matured; and, although it is not affirmatively shown that he had actual knowledge of the sale, it was held that: "If the plaintiff knew of the facts as to the real ownership of the mortgage before third parties acquired rights, but nevertheless permitted this apparently valid sale to stand unchallenged, he is manifestly in no position to invoke the aid of a court of equity. His continued silence under such circumstances would be equivalent to a fraudulent concealment which would estop him to deny the rights of innocent purchasers." In the case at bar the plaintiff and his attorneys knew all about the defective sale. Williamson conducted it; was attorney for the executor, and also attorney for plaintiff in the trial of this case in the district court. See, also, Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722. Bausman v. Faue, 45 Minn. 412, 48 N. W. 13, is directly

in point. In that case foreclosure proceedings regular in form were completed in the name of a mortgagee who had died before they were instituted, and the question of title between the grantees of the mortgagor and those of the purchaser at the foreclosure sale was involved, and it was held that the holder of the land through the foreclosure, who had purchased in good faith for value, and who, with his grantors, had been in possession for many years, was entitled to the equitable protection of the court, unless the plaintiff had been without fault, and that where the owner knew that his title appeared of record to have been divested, and remained quiescent for many years until the equities of bona fide purchasers of the record title had intervened, a court of equity would regard his laches, and where the delay appeared to be from a purpose to abandon the land to incumbrancers, that would constitute laches as respects innocent purchasers, and the court reversed the judgment entered in favor of the party guilty of laches, namely, the one holding under the mortgagor.

For these reasons we are of the opinion that the trial court erred in quieting title in respondent. We might rest our opinion on other grounds. It is suggested that the facts in this case bring it within the rule of Gates v. Kelley, 15 N. D. 639, 110 N. W. 770, but as this is only touched upon in the brief, we shall pass it, as well as the question of the deed being given when the grantor had not been in possession or received rents or profits for many years. It is intimated that the deeds from the parties claiming under the will of Hannah K. Loring conveyed title. They had nothing to deed. Their interest in the premises in the controversy had been sold by the executor. They had no legal or other title to convey, and they had received and accepted the proceeds of such sale. It is evident that gross frauds were perpetrated upon all the grantors in procuring the deeds to Wetherby.

The judgment of the district court is reversed, and title quieted in the appellant as to all claims of the respondent and parties claiming under or through him.

All concur, except MORGAN, C. J., not participating.

(122 N. W. 866.)

## THE STATE OF NORTH DAKOTA v. THOMAS O'NEAL.

Opinion filed December 10, 1909.

**Criminal Law — Indictment and Information — Failure to Charge Second Offense on Preliminary Examination Does Not Preclude It in Information.**

1. Where a complaint in justice court on which the accused is held to answer in the district court does not allege the keeping and maintenance of the nuisance as of a second offense, the state's attorney may, under section 9792, Rev. Codes 1905, file an information in the district court for the alleged offense charging it as a second offense.

**Indictment and Information — Nuisance — Description of Place.**

2. Where the complaint in justice court on which the accused is held to answer in the district court alleges that he kept and maintained a nuisance in "a one-story log and frame building on a certain farm upon which the said Thomas O'Neal then and there resided and near the east shore of Lake Metigoshe, in Bottineau county, North Dakota," the state's attorney may file an information in the district court for that offense as having been committed in a building situated on a specially described tract of land.

**Intoxicating Liquors — Illegal Sale — Evidence — Variance.**

3. Where the information charges a liquor nuisance to have been maintained in a building on the "northwest quarter of the northwest quarter of section 1, in township 163, range 76, Bottineau county, North Dakota," it is error to admit evidence that such nuisance was maintained at a place outside of said described tract of land.

**Intoxicating Liquors — Instructions.**

4. Where the information alleges that the accused kept and maintained a liquor nuisance in a certain described building on a specifically described tract of land, it is error to instruct the jury that he may be convicted if shown to have committed that offense at any other place within the county, notwithstanding the specific allegation of the information.

**Criminal Law — Trial — Attempt to Prove Second Offense.**

5. Where the state's attorney attempts to prove the maintenance of a liquor nuisance as a second offense, and fails to do so, and the jury is expressly cautioned to disregard such offer or evidence it was not error nor misconduct for the state's attorney to offer such proof.

Appeal from District Court, Bottineau county; *Goss*, J.

Thomas O'Neal was convicted of keeping a liquor nuisance, and he appeals.

Reversed.

*Noble, Blood & Adamson,* for appellant.

Information must describe the place and proof show the place as alleged. Hagen v. State, 4 Kan. 75; Commonwealth v. Heffner, 102 Mass. 148; Commonwealth v. Bacon, 108 Mass. 26; Bryant v. The State, 59 Ark. 439, 66 S. W. 183; Lowrey v. Gridly, 30 Conn. 450; State v. Robrer, 34 Kan. 427, 8 Pac. 718; Commonwealth v. McGaghey, 75 Mass. 296; Commonwealth v. Hersey, 114 Mass. 297, 11 N. E. 116; Botto v. State, 26 Miss. 108; Moore v. State 12 Ohio St. 387.

*J. J. Weeks,* State's Attorney, and *Andrew Miller,* Attorney General, and *Alfred Zuger* and *C. L. Young,* Assistant Attorneys General, for respondent.

When abatement is not sought, the locus of a liquor nuisance need only be laid in the county. Section 9373, Revised Codes of 1905; State v. Rozum, 8 N. D. 548; State v. Thoemke, 11 N. D. 386; State v. Becker, 20 Iowa, 438; Black on Intox. Liquor, section 486; Com. v. Logan, 12 Gray, 136; State v. Waltz, 74 Iowa, 610, 38 N. W. 494; Johnson v. State, 13 Ind. App. 299, 93 Ind. 375; State v. Lang, 63 Me. 215.

MORGAN, C. J. This is a criminal prosecution against the defendant for keeping and maintaining a common nuisance contrary to the provisions of the prohibition law. The complaint under which the defendant was arrested described the place where the nuisance was maintained as "a one-story log and frame building on a certain farm upon which said Thomas O'Neal then and there resided, and near the east shore of Lake Metigoshe, in Bottineau county, North Dakota." The defendant was bound over to the district court after proceedings before a justice of the peace, at which the testimony was not reduced to writing. In the district court, the state's attorney filed an information against the defendant for keeping and maintaining a common nuisance, and the place was described in the information as "a one-story log and frame building situated on the northwest quarter of the northwest quarter of section 1, in township 163, north of range 76." In the information, the offense of keeping and maintaining a common nuisace was also stated and alleged to be of a second offense. After the defendant was arraigned under this information, he moved

to quash the same on the alleged ground that he had not received a preliminary examination on the charge set forth therein, and that there had not been any preliminary investigation by the state's attorney in regard to the commission of any other offense shown by the testimony before the justice of the peace, pursuant to the provisions of section 9792, Rev. Codes 1905. These motions were each denied, and the defendant excepted to the denial. After the jury was impaneled and sworn, the state's attorney asked leave to amend the information to the effect that the offense was committed on section 2, and not on section 1, as alleged in the information. The state's attorney then stated to the court that the description of the place in the information was wrong as to range and section. The request to amend was denied by the court, and the trial proceeded. The defendant was convicted of the offense charged in the information, and duly sentenced to four months' imprisonment in the county jail, and adjudged to pay a fine of $300 and costs, and, in default of payment of the fine, that the defendant be imprisoned in the county jail for a further fixed period.

The assignments of error urged in this court are: (1) That the state's attorney filed an information for a different offense than that shown by the complaint in the justice court, under which he was held to the district court. This objection is intended to include the point that the information charged the nuisance to be maintained as a second offense, and that it was charged in the information to have been kept and maintained at a different place. (2) The defendant moved that the jury be advised to acquit the defendant by their verdict at the close of the testimony. Such motion was overruled, and this is now urged as error. The question intended to be raised by this motion is that the evidence shows that the offense was committed on a different subdivision of land than that set forth in the information; in other words, the contention is, on this point, that the information alleges that the nuisance was maintained on a farm situated in section 1, range 76, and the record shows that the offense was not committed at a place in range 76, or in section 1, if committed at all. (3) Errors of law in relation to the introduction of evidence as to the keeping and maintaining of the nuisance. The question intended to be raised by this assignment is that it was prejudicially erroneous to receive any evidence as to the commission of the offense in any

other locality or place than in section 1, range 76. (4) The court erred in charging the jury that, if the evidence showed the defendant to have kept and maintained a nuisance within the county of Bottineau, he should be found guilty, notwithstanding the fact that the information charged the nuisance to have been maintained on the northwest quarter of the northwest quarter of section 1, township 163, north of range 76.

As to the claim that the statement in the information constituted a different offense than the one set forth in the complaint in the justice court, there is no merit. The elements of the offense charged in the complaint, and those constituting the offense charged in the information, are the same. There is no additional act necessary to be proved or charged as to the offense charged in the information and that charged in the complaint. The allegation that the prosecution is for a second offense goes simply to the punishment, and has nothing to do with the constituent elements of the crime. Section 9792, Rev. Codes 1905, permits the state's attorney to file an information for a different offense than the one charged in the complaint under certain circumstances, but the offense for which the defendant was informed against in this case was not a different offense than that described in the complaint. So far as the description of the place where the nuisance is alleged to have been kept the description in the information more specifically locates the place. In the complaint, the place was only generally described, and the fact that the subdivision of land on which the nuisance was located was specifically described in the information does not make the offense different. In State v. Rozum, 8 N. D. 518, 80 N. W. 477, this court has passed on both of these contentions adversely to the claims of the appellant. Further, defendant was not found guilty of keeping and maintaining a nuisance as a second offense in this case. The court withdrew from the jury any consideration of the former charge and prosecution, and cautioned them that the same was not before them. There was, therefore, no prejudice to the defendant in any event as to allegations of the information as to a second offense.

Appellant claims that it was error for the state's attorney to attempt to show, in the presence of the jury, a former conviction under a charge of keeping and maintaining a nuisance. Such proof as was offered was by record evidence. No error was committed in this respect. The caution to the jury not to consider such

evidence was so full and specific that it would be unreasonable to presume prejudice by reason of the fact that the state's attorney attempted to prove such former conviction and failed, and upon such failure the court cautioned the jury that the matter was not before them at all.

It is also contended that there was error committed by the trial court in admitting evidence that the defendant kept a nuisance at any other place than that described in the information, and that it was error to instruct the jury that the defendant could be convicted of such charge if shown to have maintained a nuisance at any place in Bottineau county, although charged in the information with having maintained a nuisance in "a certain one-story log and frame building situated and located on the northwest quarter of the northwest quarter of section 1, in township 163, north of range 76 west, near the east shore of Lake Metigoshe, in said county and state." We are satisfied that it was error to admit such evidence, and to instruct the jury that the question of the specific place where the nuisance was kept was immaterial, although specifically alleged in the information.

It is apparent that a different question is here presented than the one decided at this term in State v. Ball, 123 N. W. 826. In that case it was held that a general description of the place was sufficient when the charge pertained to the maintenance of a nuisance in a building in a village, where no order of abatement or establishment of a lien on the premises is sought. In other words, the defendant in that case was held not to be prejudiced by the fact that the state had elected only to proceed against him by fine and imprisonment, and had not resorted to the additional remedy of having the nuisance abated. In the case at bar the place where the nuisance was maintained was specifically described in the information, and the defendant had a right to believe that he could not be convicted of maintaining a nuisance at any other place than that specifically described in the information. In other words, until the information was amended by proper proceeding, or a new one filed, the defendant was not advised that the state would attempt to show that the offense was committed upon other premises than the one described specifically in the information. The object of describing the offense specifically is to apprise the accused of what he is charged with, and such object is entirely nullified when the specific charge in the information, so far as the

description of the place is concerned, is abandoned, and evidence admitted to the effect that such offense was committed at another place, anywhere within the bounds of the county.

The rule is generally commended and sustained that in charging the keeping and maintaining of a nuisance, the proof must correspond to the allegation, and this is the rule although it was not necessary to have described the place with particularity in the first instance. If it is necessary to describe the place at all in the information, and the same is described specifically therein, the proof must conform thereto, substantially. In other words, if proof is admitted as to a place not described in the information, it will be deemed to be proving another and distinct offense, which is always objectionable. In this state, some description of the place where a nuisance is maintained is essential. Section 9383, Rev. Codes 1905, expressly so provides. Proof, therefore, that the nuisance was committed at a building on section 2, in some other range than in range 76, relates to a different offense than the one alleged to have been committed on section 1, in range 76. A similar question was decided by this court in State v. Virgo, 14 N. D. 293, 103 N. W. 610, where the court said: "The offense for which defendant was being tried was not the offense for which he had been acquitted. Upon the former trial he was charged with keeping a liquor nuisance upon block 11, and in the present indictment with keeping a nuisance upon block 12. The accusations charged different offenses, and it was not possible to make them the same even by an averment and oral evidence. * * * The keeping of a liquor nuisance on block 11 is not the same offense as keeping one on block 12, and the evidence which would establish one would not be sufficient to establish the other. The offenses were distinct."

It is generally held that in prosecutions for keeping and maintaining a nuisance, if the information specifically describes the place where the nuisance was maintained, the proof must correspond, substantially, to such specific allegations. The rule is well stated in 23 Cyc. 260, as follows: "Under an indictment for a violation of the liquor laws, the evidence as to the place of commission of the offense must show that it was within the territorial jurisdiction of the court. And the evidence must correspond strictly with the allegation, when the averment of place is material to the description of the offense. If the indictment charges

the commission of the offense within a certain municipality, as a town, city, district, or precinct, it is not supported by evidence which shows the place to have been beyond the limits of such municipality or within the limits of another." On page 261, the rule is further stated as follows: "Where the place is an essential element of the offense, and the indictment describes the building, tenement, or shop with particularity, the proof must correspond with reasonable certainty to the allegation, or there can be no conviction. This is the case where the indictment is for maintaining a liquor nuisance, or selling liquor to be drunk on the premises where sold. But reasonable intendments will be made to uphold the description of the premises as given in the evidence." In 14 Enc. Pl. & Pr. 1099, the rule is stated as follows: "Though an allegation as to the particular location of a nuisance may not be necessary, yet, if it is alleged, it must be proved as charged." In Com. v. Heffron, 102 Mass. 148, the court said: "An offense having no essential connection with the place in which it is committed, like a common assault or simple larceny, though charged to have been committed in a particular town, may be proved to have been committed anywhere within the county. (Citing cases.) But in an indictment for an offense in its nature local, as in the cases of larceny in a building, burglary, arson, desecrating and disfigurig a burying ground, striking in a churchyard, or nuisance in the highway, the allegation of place is a necessary part in the description of the offense, and must be proved as laid. (Citing cases.) It was therefore rightly ruled at the trial that the question whether the tenement which the defendant was charged with keeping and maintaining as a nuisance was in Northampton, as alleged or in Williamsburgh, was material."

In Johnson v. State, 13 Ind. App. 299, 41 N. E. 550, the court said: "If it was essential to describe the real estate in the affidavit, it was also essential to prove it substantially as alleged, or there would be a fatal variance, and this rule applies to unnecessary matters of description as well as to necessary matters—that is to say, if some description is necessary, but the pleader goes further, and alleges unnecessary matters of description, then he is required to prove both as alleged. (Citing cases.) But if no matter of description need be pleaded at all, then if pleaded it is surplusage, and need not be proved as alleged, or at all, and there is no variance."

In 1 Bish. Crim. Pro., section 485, the rule is stated as follows: "If a necessary allegation is made unnecessarily minute in description, the proof must satisfy the descriptive as well as main part, since the one is essential to the identity of the other."

In Hull v. State, 120 Ind. 153, 22 N. E. 117, the court said: "It is settled that where an indictment or information contains allegations descriptive of the identity of that which is legally essential to the charge, even though the description be unnecessarily minute, the proof must agree substantially with the description." In the last case cited the court held that no description of the particular place was essential, and that the allegation concerning the place was therefore surplusage. See, also, Com. v. McCaughey, 75 Mass. 296; State v. Verden, 24 Iowa, 126; State v. Reno, 41 Kan. 674, 21 Pac. 803; State v. Sterns, 28 Kan. 154; State v. Gurlagh, 76 Iowa, 141, 40 N. W. 141.

The state relies on the case of State v. Sterns, supra, to sustain its contention that an amendment to the information would have been proper, and that proof of the maintenance of the nuisance at any place in the county was admissible under the allegations in the inforamtion as to the description. In that case the allegation in the information was specific, but erroneously described the place where the nuisance was maintained, and the trial court granted leave to amend the information as to the description. We have no doubt of the correctness of that decision, although the precise point of that case is not involved in this case. It is sufficient to decide on this appeal that there was error in admitting evidence of the maintenance of the nuisance in any other place than the one specifically described in the information, and that the charge to the jury on that point was erroneous for the same reason.

The judgment is reversed, and the cause remanded for further proceedings. All concur.

(124 N. W. 68.)

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THE LANGWORTHY LUMBER COMPANY v. MARK HUNT AND HENRIETTA C. HUNT.

Opinion filed October 1, 1909.

**Mechanics' Liens — Rights of Subcontractor.**

1. Under the mechanic's lien law (chapter 79, Rev. Codes 1905) a subcontractor is entitled to a direct lien for work done or materials

furnished the contractor, irrespective of the state of the accounts on the contract between the owner and the contractor, or the amount due or unpaid upon their contract.

**Same — Payment to Contractor — Liability of Owner.**

2. The owner must keep advised whether material used in his building is paid for or not, and, if he pays the contractor within the time specified by the statute, he does so at his peril.

**Same — Contracts — Abandonment — Completion of Contract.**

3. The abandonment of his contract by a contractor after a substantial portion of it has been performed does not of itself work a completion of the contract.

**Same — Notice to Owner — Time.**

4. Notice sent by registered letter to the owner by a subcontractor, informing him that he is furnishing material for the contract, after its abandonment by the contractor and before steps are taken to complete the work by the owner, is seasonably sent under the requirement that such notice be given the owner previous to the completion of the contract.

Appeal from District Court, Wells county; *Burke*, J.

Action by the Langworthy Lumber Company against Mark Hunt and Henrietta C. Hunt. Judgment for defendants, and plaintiff appeals.

Reversed.

*John A. Layne, James A. Manley* and *B. G. Skulason*, for appellant.

A subcontractor has a lien irrespective of the state of the account between the owner and contractor. 27 Cyc. 90; Robertson Lumber Co. v. State Bank of Edinburg, 105 N. W. 719.

If the owner pays the contractor during the ninety days after the material is furnished, or thereafter, after a lien is filed, he does so at his peril. 27 Cyc. 90; Albright v. Smith, 51 N. W. 590, 2 S. D. 577; Albright v. Smith, 54 N. W. 816, 3 S. D. 631; Barnard v. McKensie, 4 Colo. 251; Gardner v. Leck, 48 N. W. 1120; Donahy v. Clapp, 12 Cuch. 440; White v. Miller, 18 Pa. St. 52; Robertson Lumber Co. v. State Bank of Edinburg, 105 N. W. 719, 14 N. D. 511.

Abandonment of the contract by the contractor does not affect the rights of a materialman. Red River Lumber Co. v. Friel, 73 N. W. 203; Sieman v. Biemann et al., 84 N. W. 490.

*Lee Combs*, for respondents.

Owner's knowledge of furnishing material does not entitle material man to a lien without the notice required. 27 Cyc. 111; White v. Washington School District, 42 Conn. 541; Richards v. O'Brien, 173 Mass. 332, 53 N. E. 858; 27 Cyc. 120, note B, and cases cited; 27 Cyc. 115, and cases cited; French v. Hussey, 159 Mass. 206, 34 N. E. 362; Basham v. Toors, 51 Ark. 309, 11 S. W. 282; McMillan et al. v. Phillips, 5 Dak. 294, 40 N. W. 349.

Abandonment of contract is a completion of the time allowed for notice. 27 Cyc. 139, note D, page 140; note E, and cases cited; Johnson v. LaGrave, 102 Cal. 324, 36 Pac. 651.

Where owner objects to materialman, to his furnishing material, it is a compliance with the statute. Metz v. Lowell, 83 Ill. 565; St. Louis Nat'l Stock Yards v. O'Reilly, 85 Ill. 546; O'Brien v. Graham, 33 Ill. App. 546; Schubert v. Crowley, 33 Mo. 564.

SPALDING, J. This action was tried by the court, and is here for trial de novo. The defendants had judgment, and plaintiff appeals. It is an action brought to foreclose a mechanic's lien upon lots 17 and 18, in block 3 of Chess & Lloyd's addition to the city of Fessenden, Wells county, N. D. The evidence is conflicting as to some facts, but, as we regard it, these conflicts are of no importance. Our decision must be based solely upon questions of law.

As far as material to our decision, the facts appear as follows: Title to the lots described stood in defendant Mark Hunt. He had deeded the same to his mother, the defendant Henrietta C. Hunt, but the deed had never been recorded. Henrietta C. Hunt entered into a contract with one Weseman for the erection of a dwelling house on the lots mentioned for the sum of $2,027. Weseman was to furnish all the material and labor necessary to complete the construction of such dwelling. Between the 4th day of June and the 15th day of November, 1906, the contractor purchased lumber and building material from appellant, the plaintiff herein, amounting in the aggregate to the sum of $1,147.60. Some articles were returned, reducing the amount to $1,092.65, and since this action has been brought other articles have been returned which appellant concedes may be credited, reducing the total debt to $1,084.70, no part of which has ever been paid. No question is made as to all of such lumber and material being used in the erection of the dwelling house and a considerable portion of it was used by respondents in completing it. The testimony is in con-

flict as to when the defendant Henrietta C. Hunt first knew that the plaintiff was furnishing any material to Weseman, but she admits that she did know it on the 31st day of October, 1906. Weseman proceeded on the contract until the superstructure was erected, inclosed and plastered and some of the other inside work done, when he abandoned it. It is not claimed that he notified any of the parties that he was about to or had abandoned the contract. Respondent had paid Weseman $1,013.50, the last payment having been made on the 15th day of September, 1906. The date of the abandonment is not definitely fixed, but it is reasonably certain that it occurred between the 14th and 24th days of November, 1906. On the latter date, appellant sent respondent Henrietta C. Hunt a registered letter, as required by section 6237, Rev. Codes 1905, notifying her that it had furnished the material in question to the contractor for use in her dwelling house, and on the 7th day of December, 1906, a similar notice was sent by registered letter to the respondent Mark Hunt. Nothing was done by respondents toward completing the structure until after such notices were received by them and the lien filed. On the 8th day of December, 1906, appellant filed in the office of the clerk of the district court in and for Wells county the verified account, necessary to perfect a mechanic's lien against the premises for which the material was furnished. Thereafter notice was given to appellant demanding that suit be commenced to enforce such lien, whereupon this action was instituted.

This court has already held that the mechanic's lien law, under which this lien is claimed, must be classified as belonging to the Pennsylvania system, as distinguished from the New York system, and that the subcontractor is entitled to a lien irrespective of the state of accounts between the owner and the contractor, or the amount due or unpaid upon their contract. Robertson Lumber Co. v. Bank, 14 N. D. 511, 105 N. W. 719. In the same case it was held that the owner must keep advised whether the material used in his building is paid for or not, and, if he pays the contractor during the ninety days after the material furnished, he does so at his peril. Section 6237, Rev. Codes 1905, reads as follows: "Any person who shall perform any labor upon or furnish any materials, machinery, or fixtures for the construction or repair of any work of internal improvement or for the erection, alteration or repair of any buildings or other structures upon land, or in

making any other improvements thereon, including fences, sidewalks, paving, wells, trees, grades, drains or excavations under a contract with the owner of such land, his agent, trustee, contractor or subcontractor, or with the consent of such owner, shall upon complying with the provisions of this chapter, have for his labor done, or materials, machinery or fixtures furnished, a lien upon such building, erection or improvement and upon the land belonging to such owner on which the same is situated or to improve which the work was done, or the things furnished, to secure the payment for such labor, materials, machinery or fixtures; provided that no person who furnishes any materials, machinery or fixtures as aforesaid, for a contractor or subcontractor, shall be entitled to file such lien unless he notify the owner of the land by registered letter previous to the completion of said contract that he has furnished such materials, machinery or fixtures. The owner shall be presumed to have consented to the doing of any such labor, or the making of any such improvement, if at the time he had knowledge thereof, and did not give notice of his objection thereto to the person entitled to the lien. The provisions of this section and chapter shall not be construed to apply to claims or contracts for furnishing lightning rods or any of their attachments." It will be noticed that the foregoing section requires the notice by the materialman to be given to the owner previous to the completion of his contract by the contractor. The trial court evidently held that the naked abandonment of the contract or work, under this statute must be construed as a completion of such contract, and that, the appellant not having notified respondents that it was furnishing materials to Weseman until a few days after such abandonment, no lien could be sustained. This is in accordance with the contention of respondents, while appellant insists that under the Pennsylvania system the mere fact of a contractor abandoning the contract when partially completed does not of itself work a completion of the contract. We must hold that the trial court erred in its construction of the law and that the abandonment by the contractor of the contract when a substantial portion of it had been executed does not work a completion of the contract. The mechanic's lien law is designed to protect materialmen and laborers, and should be liberally construed to effectuate this purpose. Salzer Lumber Co. v. Claflin, 16 N. D. 601, 113 N. W. 1036. Among the things which a contractor engaged on a losing contract is liable

to do at any time is to abandon the same, and protection against this, in the interest of the materialman or subcontractor, is one of the most essential elements entering into the mechanic's lien law, and is among the purposes for which it was enacted. In the absence of a specific provision of the statute on the subject making the execution of the contract complete when abandonment occurs, we cannot assume that the law contemplates such a result. There are two lines of authorities on the subject, but we discover none sustaining the contention of the respondents except those construing statutes held to be in conformity with the New York doctrine. Those which are held to harmonize with the Pennsylvania system hold to the contrary, with the possible exception of some wherein the subject is covered by the statute itself. We are cited California authorities and others; but the statute in California expressly provides that the contract is terminated by its abandonment. The subcontractor in this state is entitled to a direct lien for work done or materials furnished to the contractor, and in states where a direct lien is given the failure of a contractor to complete his contract does not destroy the subcontractor's lien. Boisot on Mechanics' Liens, section 236; 27 Cyc. pp. 100, 101, and cases cited; Red River Lumber Co. v. Congregation of Israel, 7 N. D. 46, 73 N. W. 203.

It follows from what we have said that the notices by registered letter were sent to the respondents seasonably, and that their property must sustain the burden of the lien in question. All other questions hang upon the one as to whether the contract was completed by the abandonment. Hence they need not be noticed.

The judgment of the district court is reversed, and it is directed to enter judgment of foreclosure in accordance with this opinion. All concur, except MORGAN, C. J., and ELLSWORTH, J., not participating.

(122 N. W. 865.)

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## H. J. HOPE v. GREAT NORTHERN RAILWAY CO.

Opinion filed October 11, 1909.

**Railroads — Accident at Crossing — Contributory Negligence.**

1. Plaintiff drove his team and wagon to town with a load of wheat. After unloading the wheat at an elevator south of the rail-

road track and east of the highway crossing the railroad track, he drove out of the east side of the elevator, swung west to the highway and turned north to the crossing. His view of approaching trains from the east was completely obstructed by freight cars standing on the side tracks and the three elevators. It was a cold day. He was dressed quite warmly, and had his cap pulled down about the edges of his ears. He had a lumber wagon with a double box, and was driving quite rapidly. The ground was frozen, and the wagon made considerable noise. When he was about thirty feet from the main track he jerked up his team so as not to gallop over the crossing. Just then the team gave a jump and struck the side of the engine of the regular passenger train coming from the east. Both the horses were injured and the wagon badly damaged. The driver did not look for any train coming from the east after he drove out of the elevator, neither did he hear any train coming or make any effort to ascertain if there was one. *Held* he was guilty of contributory negligence.

**Same — Last Clear Chance.**

2. *Held,* that the doctrine of the last clear chance, to prevent an accident, is not applicable under the evidence in this case.

Appeal from District Court, Cavalier county; *Fisk,* J.

Action by H. J. Hope against the Great Northern Railway Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

*Dickson & Johnson,* for appellant.

*C. J. Murphy, Fred S. Duggan,* and *Arthur LeSueur,* for respondent.

CARMODY, J. The plaintiff sued to recover the value of horses and a wagon damaged in a collision with one of defendant's passenger trains at the city of Langdon, N. D., on the 5th day of December, 1902. The accident occurred at the crossing of the railroad tracks and Third street in said city, and about 100 feet west of the passenger depot. Third street, being the main street in the city of Langdon, runs north and south, and the railroad tracks cross it running northwesterly and southeasterly. The main railroad track is the most northerly of three parallel tracks. South of it, and about ten feet distant, is a passing track, and south of this passing track and about twenty-two feet distant from it is the elevator or side track. The depot is located on the north side of the main track, about 100 feet east from Third street crossing. Three grain elevators are on the south side of the tracks and east of Third street. On the day of the accident both the pass-

ing track and the side track were well filled with freight cars on both sides of the crossing. The cars on the east side of the crossing came up to about twenty-five or thirty feet of the crossing, most of the cars being on the passing track. There was also a string of cars on the side track along the elevators, and cars on both tracks west of the crossing, leaving a passageway of 60 feet or so. Plaintiff's man, B. Hope, drove the team and wagon in question to town that day with a load of wheat, and had to cross south over the tracks on the Third street crossing to get to the elevators. After waiting a few minutes to allow a freight train to move east by the crossing, he crossed to the south side, and took his load of grain to the most easterly elevator. After unloading the grain he drove eastward out of the elevator, then turned south and west and drove back along the route he had come toward the crossing with his team on the trot or gallop. The weather was pretty cold, the ground frozen hard, and the empty wagon with a double grain box, made a great deal of noise. As he drove south of the elevators westward toward the crossing they obstructed his view of the tracks, and the spaces between the elevators that he passed were blocked by the freight cars, and by this freight train, which extended from the crossing some distance beyond the elevators, occupying the passing or center track. They completely obstructed Hope's view of the main track, and the fireman's view of the highway. Hope drove down from the elevator platform and around back to the crossing over the first and second tracks, and into the side of the engine of the incoming passenger train on the third track, and from the time he left the elevator until the collision, his horses, then under control, were on the trot or gallop, and did not stop, except momentarily between the first and second tracks, where the driver pulled them in because, as he said, he "did not want to gallop over the tracks." John Lee, a section man, was shoveling snow off of the first track at the crossing when the horses came up to cross it. He testified he endeavored to stop the rig by waving his shovel at the driver and calling to him at the top of his voice. The driver saw him, but, according to his testimony, he did not see Lee wave his shovel or hear him call. The team almost came to a stop between the first and second tracks, and seemed to start forward again on the jump and continue until they struck the engine; they struck the left side of the engine and were badly injured; the driver escaped uninjured.

The train which struck the horses was the regular daily passenger train going west; it was due at 12:30 and was about an hour late. The driver knew the time of the train's arrival, and also knew that sometimes it was late. According to the testimony of the train crew and other employes of defendant, the brakes had been applied some 900 feet east of the crossing, and the engineer blew the station whistle at the usual point, but did not see the horses until after the accident. The fireman, according to his testimony, was in his window ringing the bell and saw the horses as they emerged from between the cars on the passing track not more than 30 feet from the engine. He saw them strike the engine on the steam chest on the left side. There was a dent where they struck. The defendant's witnesses, Adams, Bissell, Hill, McNiell, Carlson, and Gunderson, testified that the engine whistle was blown as usual for the station, and the fireman was ringing the bell as the train came in. The driver and two other witnesses for plaintiff, then at the depot, did not hear those signals, but would not testify they were not given.

The case was tried by Hon. W. J. Kneeshaw, presiding judge, and a jury. The defendant at the close of the testimony moved for a directed verdict in its favor, which motion was denied. The case was submitted to the jury, who found a verdict for plaintiff. Thereafter the defendant moved the court for judgment notwithstanding the verdict, which motion was granted by Hon. C. J. Fisk, the judge before whom it was heard. From the judgment notwithstanding the verdict, this appeal was taken.

The point for consideration is whether, under the evidence, plaintiff's driver was guilty of negligence proximately causing the injury, or of contributory negligence as a matter of law. We think the order of the court, granting judgment for defendant notwithstanding the verdict, was right. It conclusively appears that the driver was guilty of contributory negligence. He drove south over the crossing in question, with a load of wheat about 10 minutes before the accident, so that he knew the situation there, and the location of the tracks. After unloading the wheat he turned around and returned to the crossing, driving parallel to the tracks and south of them, not stopping once in this drive. There was a string of box cars on the center track and other cars on the elevator track, and three elevator buildings, all of which shut out the view of the main track from him, and the view of the driver and team from the en-

gineer and fireman of the passenger train. The driver looked east as he was going down the elevator bridge and did not see any train, saw the cars on the elevator track and passing track. It was quite cold, and he was dressed warmly, had his cap down about the edge of his ears. The ground was frozen and the double box on the wagon was empty. The wagon made a noise on the hard road so that he did not hear the train or any noise except that made by the wagon. From the time he left the east elevator until the collision his team did not stop, except that, after he crossed the first track, he pulled up the lines and momentarily stopped them; he said because he "did not want to gallop over the track." He said: "They were just standing still for a moment, that was just for an instant; I jerked them back, and they stopped like that, and away they went again. I was between the box cars when the horses jumped; they took fright." His idea in pulling them up was just so they would not go fast over the track. The first he saw of the passenger train or heard of it was when he saw the train and horses and smoke all at once; all went together. According to the testimony the train was running from 12 to 20 miles per hour. There was no point after he left the elevator at which it was possible for him to see the main track or the train coming on it from the east. According to his own testimony he paid no attention whatever to the approach of the train on the main track. At no time did he stop his horses or listen for the train. The noise of the moving train conveyed no warning to him. The noise of his wagon on the hard frozen ground probably prevented him from hearing it. It is conclusively established by the driver's own testimony that he did not take the care commensurate with the very apparent dangers of this crossing. A person is bound to use care commensurate with the known or reasonably apprehended danger. It is an established rule of the courts that a traveler, about to cross a railroad track, must bear in mind the dangers attendant upon crossing, and vigilantly use his senses of sight and hearing in the endeavor to avoid injury. He is required to do all that care and prudence would dictate to avoid injury. "Those who attempt to cross a railroad track at a public highway crossing must exercise ordinary care, in view of all the surrounding circumstances, to avoid receiving an injury by collision with trains. But, in the very nature of things, the standard of such care cannot be absolutely fixed, * * * and the general rule is that a person about to cross a track must bear in mind the

dangers attendant upon crossing, and vigilantly use his senses of sight and hearing in the endeavor to avoid injury. * * * The traveler, however, is rigidly required to do all that care and prudence would dictate to avoid injury; and the greater the danger, the greater the care that must be exercised to avoid it. And where, because of physical infirmaties, darkness, snow, fog, the inclemency of the weather, buildings, or other obstructions and hindrances, it is more than usually difficult to see or hear, greater precaution must be taken to avoid injury than would otherwise be necessary, and, under such circumstances, there can be no excuse for the failure to adopt such reasonable precautions as would probably have prevented the injury." 7 A. & E. Enc. of Law (2d Ed.) 428-435.

The driver was charged with knowledge that this was a dangerous place, being a railroad crossing, and, as a matter of law, it cannot be assumed that cars are not approaching on railroad tracks, and there is no danger therefrom. He was bound to assume that cars were coming till he had satisfied himself by direct evidence to the contrary, and to use care commensurate with this state of facts. Bond v. Lake Shore Ry. Co., 117 Mich. 652, 76 N. W. 102; Elliot v. Ry. Co., 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; Chicago, etc., Ry. Co. v. Smith, 141 Fed. 930, 73 C. C. A. 164; Day v. Ry. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335.

In the aspect of the evidence most favorable to plaintiff, he cannot recover in this action. The driver's course of conduct amounted to contributory negligence as a matter of law. Payne v. Ry. Co., 108 Iowa, 188, 78 N. W. 813; Smith's Adm'r v. Norfolk, etc., Ry. Co., 107 Va. 725, 60 S. E. 56; Haas v. Ry. Co., 47 Mich. 401, 11 N. W. 216; Bond v. Ry. Co., 117 Mich. 652, 76 N. W. 102; Proper v. Ry. Co., 136 Mich. 352, 99 N. W. 283; Rogers v. Ry. Co., 187 Mass. 217, 72 N. E. 945; Shatto v. Ry. Co., 121 Fed. 678, 59 C. C. A. 1; Ry. Co. v. Houston, 95 U. S. 702, 24. L. Ed. 542; Hook v. Ry. Co., 162 Mo. 569, 63 S W. 360; Wands v. Ry. Co., 106 Mo. App. 96, 80 S. W. 18; Burns v. Ry. Co., 136 Ala. 522, 33 South. 891; Fletcher v. Ry. Co., 149 Mass. 127, 21 N. E. 302, 3 L. R. A. 743; Debbins v. Ry. Co., 154 Mass. 402, 28 N. E. 274; Marty v. Ry. Co., 38 Minn. 108, 35 N. W. 670; Shufelt v. Ry. Co., 96 Mich. 327, 55 N. W. 1013; Ihrig v. Ry. Co., 210 Pa. 98, 59 Atl. 686; Seefeld v. Ry. Co., 70 Wis. 216, 35 N. W. 278, 5 Am. St. Rep. 168; Carter v. Ry. Co., 72 Vt. 190, 47 Atl. 797; State v. Ry. Co., 102 Md. 257, 62 Atl.

754; Railway Co. v. Holden, 93 Md. 417, 49 Atl. 625; Day v. Ry. Co., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335; Gulder v. Ry. Co., 70 N. J. Law, 196, 56 Atl. 124; Cleveland Co. v. Heine, 28 Ind. App. 163, 62 N. E. 455.

In Elliott v. Ry. Co., supra, the court said: "It can never be assumed that cars are not approaching on a track or that there is no danger therefrom."

In Chicago, etc., Ry Co. v. Smith, supra, the court said: "The laws requires of one going into so dangerous a place the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for his protection, and if this duty is neglected, and injury results, there can be no recovery, although the injury would not have occurred but for the negligence of others."

In Shatto v. Ry. Co., supra, the court said: "Plaintiff approached a railroad crossing in a city, with which he was familiar, at about 4:30 in the afternoon. The wind was blowing strongly from the south, and his view of approaching trains from the north was obstructed by a freight train standing on the switch track nearest him, and by high board fences, dwelling houses, piles of lumber, etc. Plaintiff had his ears covered, and, as he approached the crossing, looked and listened, and, hearing no train, continued driving his horse at a trot until within 100 feet of the track, when the horse began prancing or single-footing. Plaintiff drove between the cars of the freight train, which had been cut at the crossing, and, when his horse got his head beyond the cars, he swerved and jumped to the left, when plaintiff was struck by a train approaching from the north on the main track. Held, that plaintiff's failure to stop before driving on the track, under such circumstances, was contributory negligence as a matter of law."

In Smith's Adm'r v. Norfolk, etc., Ry. Co., supra, the court said: "A traveler on a highway must, before crossing a railroad, use his senses of sight and hearing, and his failure to do so is, as a general rule, negligence; and, since the track is a proclamation of danger to him, he must make the acts of looking and listening reasonably effective."

In the light of the principles settled by the decisions herein cited we are of opinion that plaintiff's driver was negligent in his approach to the crossing in question, so negligent and lacking in care as to preclude plaintiff's right to recover. But one other question remains. The plaintiff contends that defendant is responsible, in

any event, under the facts in this case because it had the last clear chance to prevent the collision, or at any rate the jury had a right to draw that conclusion from the testimony of the section man, Lee. Plaintiff claims that Lee could have drawn the attention of the driver to his danger and averted the collision. We cannot sustain this contention. The undisputed evidence shows that Lee was on the south track. When he first saw Hope he was 30 or 40 feet south of the main track driving his horses at a slow trot, and then they sprung and jumped right into the engine. After Lee saw the team it was clearly impossible for defendant to avoid the injury. It had no chance whatever to stop its train after discovering the team. The order granting the motion for judgment notwithstanding the verdict was clearly right and the judgment is affirmed.

All concur, except FISK, J., disqualified.

(122 N. W. 997.)

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HATTIE M. VIETS v. L. SILVER AND MAX BRODKY.

Opinion filed April 12, 1910.

**Change of Venue — Place of Trial Determined from Pleadings.**

1. In determining his rights with reference to the place of trial of a civil action, in accordance with the provisions of chapter 6, Code Civ. Proc., a defendant is not required to examine critically and with technical exactness the complaint; but may assume that the character of the action is such as it purports upon the face of the complaint to be, and plaintiff who has deliberately chosen the form and substance of his pleading cannot be heard to claim that the character of the action through deficiency in certain material allegations is other than on the face of the complaint it appears to be.

**Change of Venue — Location of Land in Controversy — Nature of Action.**

2. An action in which the complaint upon its face states a cause of action for the foreclosure of a mortgage against real property must, on proper and timely demand of the defendant, be tried in the county in which the real property is situated; and a motion to change the place of trial to such county will be sustained, regardless of the fact that a critical examination of the complaint may reveal that it does not contain allegations sufficient to state a cause of action for foreclosure of a mortgage, and merely such as will constitute a cause of action for the recovery of money only.

**Change of Venue — Place of Trial — Hearing.**

3. As a motion for change of place of trial must from its nature be determined before trial and often before issue in the action,

a district court in acting on such motion may assume that the character of the action is such as the complaint purports to state and refuse to examine the same as it would upon trial of issue presented by a general demurrer to the complaint for the purpose of determining the exact character of the cause of action stated.

Appeal from District Court, Richland County; *Pollock,* Spec. J.

Action by Hattie M. Viets against L. Silver and another. From a judgment changing the place of trial. Plaintiff appeals.

Affirmed.

*Purcell & Divet* for Appellant.

No brief by Respondent.

ELLSWORTH, J. The complaint of plaintiff alleges, in substance, that in the month of August, 1903, the plaintiff was the owner and in possession of a certain tract of land particularly described in Logan county, N. D.; that on or about the 29th day of August, 1903, plaintiff sold to the defendants the said described land at the agreed price of $1,400, no part of which has ever been paid except the sum of $400; that on said day plaintiff made and delivered to defendants a warranty deed of said land; that on the same day defendants as evidence of their indebtedness to plaintiff, for the unpaid balance of the purchase price of said land, made and delivered to plaintiff a promissory note for the sum of $1,000 with interest at the rate of 6 per cent. per annum for two years from date and 8 per cent. per annum thereafter until paid; that on the same day, for the purpose of securing the indebtedness aforesaid of defendants to plaintiff, defendants made, executed, and delivered to plaintiff an instrument in writing, whereby they mortgaged to plaintiff the said land in question, which mortgage provided that, upon failure of the defendants to pay when due the said sum of $1,000, the said mortgage might be foreclosed, and the said premises sold for the satisfaction of said indebtedness, that no part of said indebtedness has ever been paid and that the entire sum of $1,000 with interest as described in said promissory note, is due and payable. The prayer for relief is in these words: "The plaintiff demands judgment against the defendants for the sum of $1,000, and interest as hereinbefore stated, and for the foreclosure of the said mortgage and the sale of said premises to satisfy the indebetedness aforesaid, together with the costs and disbursements of the plaintiff, and any other and further relief the plaintiff may be entitled to." A summons, designating in its margin the county of Richland as the venue of the action, was issued, and with the complaint was served

on the defendant Brodky outside the state on July 23, 1908. No other service was ever made or attempted. It is undisputed that at this time both of the defendants were nonresidents of the state of North Dakota, and, so far as the record shows, neither had any property therein. An affidavit evidently intended as the basis for service by publication of summons was issued by plaintiff's attorney and filed with the complaint on July 16, 1908. This affidavit does not contain an allegation of any of the statutory grounds authorizing service by publication of summons as provided by the last five subdivisions of section 6840. Rev. Codes 1905; and, unless it can be said that such grounds are supplied by the allegations of the complaint, the affidavit is plainly insufficient to authorize service of summons by publication.

On September 8, 1908, the defendants appeared jointly by counsel, and made demand in writing that the place of trial of the action be changed from the county of Richland in the Fourth judicial district of the state of North Dakota to the county of Logan, in the Fifth judicial district of said state, and with such demand served an affidavit of defendant's counsel, alleging as a reason for such demand that the real property mentioned in the complaint and on which plaintiff seeks to foreclose the mortgage referred to is situated in the county of Logan, in the Fifth judicial district of the state. This demand was followed by a motion to change the place of trial of said action, which was heard before the district court on September 14, 1908, and an order made changing the venue from Richland to Logan county. On September 16, 1908, defendants served a joint answer containing a general denial of the allegations of the complaint. Plaintiff appeals from the order of the district court changing the venue from Richland to Logan county, alleging as error that such action was unwarranted by the facts presented upon defendants' application for such change. It is apparent that, if the action is one for the foreclosure of a mortgage of real property, it must on proper and timely demand of the defendants, be tried in the county in which the real property is situated. Section 6827, Rev. Codes 1905. On the other hand, if it is simply a personal action for the recovery of money only, the defendants being nonresidents, it may be tried in any county of the state which plaintiff may see fit to designate in the summons. Section 6829, Rev. Codes 1905.

It will be observed that the complaint in this action alleges the execution and delivery of a mortgage containing a power of sale, and that the relief prayed for is the foreclosure of and sale of the premises described, and any other and further relief the plaintiff may be entitled to. Plaintiff directs the attention of this court, however, to the fact that the complaint is deficient in certain allegations necessary to the statement of a cause of action for foreclosure of a mortgage, and that without amendment of the complaint such foreclosure cannot be decreed by the district court. The deficiencies mentioned consist in the omission from the complaint of any allegation that the attorneys instituting the action hold a power of attorney authorizing them to foreclose; and that no proceedings have been had at law or otherwise for the recovery of the indebtedness described in the mortgage. Rev. Codes 1905, sections 7455, 7485; Fisher v. Bouisson, 3 N. D. 493, 57 N. W. 505. At the hearing upon the motion for change of place of trial in the district court plaintiff's counsel introduced an affidavit to the effect that "this action is not brought for the purpose of foreclosing the mortgage as is contended for by defendants, but for the purpose of recovering money only, and that the plaintiff does not intend to, and will not, make any application to amend the complaint herein, to state a cause of action in foreclosure, and this affidavit is made and filed for the purpose of estopping the plaintiff of record from hereafter making such application to amend." Plaintiff contends that upon the complaint as served together with the affidavit above quoted from, which effectually forestalls any attempt to amend upon the trial, the action can be regarded as one for the recovery of money only which may be brought and tried against these defendants in any county in the state designated in the summons.

The point presented is not by any means clear or free from doubt. This court in its consideration of the same is somewhat embarrassed by the fact that, while the plaintiff and appellant has filed a brief and is represented on this appeal by able counsel, the defendants, after service of their answer, have not seen fit to further appear or to assist this court in any manner in reaching a correct conclusion. There is therefore laid on this court the double duty of carefully investigating the merits of the points of exception presented by plaintiff, and, on the other hand, protecting the defendants from the results of any improvident or inconsiderate action when they do not manifest sufficient interest in the event

of this appeal to take any measures to protect themselves from such hazard. It is apparent that, if this action from its initiation is to be regarded as one for the recovery of money only, no jurisdiction whatever was conferred by the service made upon either of the defendants. Defendants might in perfect safety have disregarded the action entirely and remained wholly unaffected in person or property by any judgment that the court might have rendered. It was only by means of allegations in the complaint to the effect that the action was brought to determine in some form a right or interest to real property in Logan county and for the foreclosure of a lien upon the same that jurisdiction of the subject-matter was conferred upon the district court and a right acquired to serve the summons by publication. It is inconceivable that plaintiff's counsel in bringing an action in this form mistakenly supposed that it was one for the recovery of money only, or that by the procedure adopted the court could acquire jurisdiction either of the subject-matter of the action or of the persons of the defendants. It therefore must be assumed that the deficiencies in the complaint came to the mind of plaintiff by an after-thought when defendants had by general appearance for the purpose of moving to change the place of trial in the action conferred upon the court jurisdiction of an action which he now contends is purely personal and transitory. The sufficiency of the complaint to constitute a cause of action either for the foreclosure of a mortgage or for the recovery of money only could be determined only upon the trial. The venue of the action must, however, necessarily be determined on motion made before the trial. It is obvious, therefore, that the determination of this motion must depend upon considerations other than a critical examination of the complaint. Upon the determination of such motion, the court cannot decide issues that might arise later upon demurrer or speculate upon the uncertainties of the trial or forecast the action that might be taken by the court, or by either party, with reference to striking out certain allegation of the complaint or allowing amendment by the introduction of others.

With these considerations in mind, we think it follows that the place of trial of the action must be determined upon the face of the complaint from a merely superficial survey of the character of the action that plaintiff had commenced. From the preliminary process of this action and inferences naturally and unavoidably arising from the incidents of its initiation, plaintiff could only have in-

tended to commence an action for the foreclosure of a mortgage. Defendants could not be required to examine the complaint with technical exactness for the purpose of determining whether or not it contained allegations sufficient to constitute a cause of action for foreclosure. In determining the attitude and character of their defense we think defendants might treat the action according to its form and general nature as one for the foreclosure of a mortgage. As their appearance was originally made only for the purpose of moving that the place of trial be removed to the county in which the land lay, we may assume that it was actuated by the purpose of preventing the foreclosure of the mortgage rather than of presenting a defense to a personal demand. If they were misled into an appearance they would not otherwise have made by the fact that the action appeared on its face to be of local character, plaintiff who deliberately prepared his complaint in this form will not be permitted to acquire any advantage by means of a misconception so induced. Until defendants can be placed in the same position that they were in prior to the time of their appearance for the purpose of moving to change the place of trial, plaintiff should not be heard to declare that his cause of action is other than it purports on its face to be. The application of this principle may result in constraining plaintiff to dismiss this action and bring another showing its character unmistakably on its face in response to which defendants may appear or not as they see fit; but we believe it is the rule most conducive to justice between the parties and under which the purpose of the statute fixing the place of trial is best effectuated.

The order of the district court changing the venue from Richland county to Logan county is therefore affirmed. All concur.

(126 N. W. 239.)

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## W. W. Corbett v. Great Northern Railway Company, a Corporation.

Opinion filed February 10, 1910.

Rehearing denied April 13, 1910.

**Railroads — Injury to Animals — Contributory Negligence.**

1. Plaintiff's horses were killed by a railway train of defendant, after escaping from a yard inclosed by a fence consisting, on one side, of only one wire, and located in close proximity to defendant's

track. Defendant pleaded that leaving the horses in the yard so fenced, in close proximity to the track, constituted contributory negligence, and the court charged the jury that this did not constitute contributory negligence. *Held,* error.

**Railroads — Injury to Animals — Evidence Confined to Negligence Alleged.**

2. The plaintiff was inquired of on direct examination as to the condition of the right of way with reference to snow and other things lying there. Objection was made, on the ground, among others, that it was not within the issues; the action having been brought for negligence in the running of the train, and not in the maintenance of the right of way. The objection was overruled. *Held,* for reason stated in objections and under circumstances of this case, error.

**Evidence — Cure by Striking Out.**

3. In answer to the question above stated, the witness testified that oats were sprinkled upon the track. Upon appellant's motion this answer was stricken out, and the jury cautioned not to consider the same. No reference was made to it in the court's charge. In view of the evident purpose of the question and answer and issues as framed in the pleadings, it is *held* that striking out the answer did not cure the error, although this court is not prepared to say that it was reversible error. Trial courts should, as far as possible, abandon the prevailing practice of admitting improper evidence and relying upon curing the error by subsequently striking it out.

**Instructions — Evidence.**

4. A charge which may lead the jury to believe that the defendant must make out its defense conclusively, or by undisputed evidence is reversible error.

**Railroads — Negligence — Evidence — Presumptions.**

5. Section 4297, Rev. Codes 1905, provides that killing or damaging any horses, cattle or other stock by the cars or locomotives along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation. In an action for killing or injuring stock, proof of ownership, killing or damaging, and its value, makes a prima facie case; but when the plaintiff relies solely upon the statutory presumption of negligence, and the testimony of those in charge of the running of the train is unequivocal that everything was done that could be done, after the discovery of the stock upon the track, to prevent its injury, and that the train was properly equipped and all appliances in good order, and no conflicting evidence is offered as to material questions, and the circumstances are not in conflict with such evidence, the prima facie case made under the statute is overcome, and the defendant is entitled on proper motion, to a directed verdict.

**Railroads — Negligence — Evidence — Statutory Presumption.**

6. Whether the statutory presumption has been fully met and overcome is in the first instance a question of law.

**Animals — Running at Large — Open Season — Duty of Owners as to Railroad Right of Way.**

7. Under section 1933, Rev. Codes 1905, it is lawful for certain stock to run at large between the 1st day of November and the 1st day of April, except in counties where the electors vote otherwise. *Held*, the object of the statute permitting stock to run at large during the months named is to permit it to feed upon commons and unfenced lands without liability of owners for damages done on such lands, and not to impose upon the owners of such premises any greater degree of care for or towards such stock than is required at other seasons of the year.

**Trespassing Animals — Running at Large — Negligence of Owner of Premises.**

8. The statute quoted only affects the remedy or measure of damages in case of injury by such animals, and as applicable to acts of negligence by the owner of the premises onto which stock strays during the open season such stock is trespassing.

**Railroads — Animals on Track — Duty of Railway Company.**

9. Following the previous decisions of this court, it is *held* that as to trespassing stock the duty of the railway company and its servants is to use ordinary care not to injure it after its discovery upon the track or right of way.

**Decision Distinguished.**

10. Ely v. Rosholt, 11 N. D. 559, 93 N. W. 864, distinguished.

Appeal from District Court, Williams County; *Goss*, J.

Action by W. W. Corbett against the Great Northern Railway Company. Verdict for plaintiff, and from an order denying a new trial, defendant appeals.

Reversed, and new trial granted.

*C. J. Murphy* and *Arthur Le Sueur*, for Appellant.

Statutory presumption is to bring in proofs in possession of railway company, and when overcome by proof, burden is on plaintiff to establish his case without aid of such presumption. Hodgins v. M., St. P. & S. Ste. M. R. R. Co., 3 N. D. 382, 56 N. W. 139; Smith v. Northern Pac. Ry. Co., 3 N. D. 17, 53 N. W. 173; Cumming v. G. N. Ry. Co., 15 N. D. 611, 108 N. W. 798. Whether the presumption is overcome is a question for the court. Spaulding v. Railroad Co., 30 Wis. 110, 33 Wis. 582; Volklman v. R. R. Co., 5

Dak. 69; Huber v. R. R. Co., 6 Dak. 392. Railroad company must use ordinary care after discovering danger to stock. Bostwick v. Minn. & P. R. R. Co., 51 N. W. 781; Hodgins v. Soo Ry. Co. supra.

*H. B. Doughty* and *A. L. Knauf,* for Respondent.

SPALDING, J. This is an action for damages for the negligentt killing of two horses and injuring two other horses so they had to be killed, belonging to respondent, by one of appellant's railway trains on the 12th day of March, 1907. The defendant denied the allegations of the comnplaint, and alleged that if the stock was killed by appellant's train, the killing was caused by the negligence of the plaintiff in permitting it to run at large and go upon the right of way and tracks of defendant. The case was tried before a jury, and the plaintiff submitted evidence of ownership, the killing by one of defendant's freight trains, and the value. The plaintiff himself testified that he did not allow the horses to run at large intentionally at any time, and, as we understand his testimony, showed that his pasture was on one side of the railway track, and within 50 yards of it; that on the other side of the track he had a shed for his horses and a yard, and that he allowed them to run loose in the yard nights, and that they were free to remain in the yard or go into the shed. He testified that around this yard was a two-wire fence, except on the south side where there was only one wire. The wire was about four feet from the ground, and about three feet above the top of the snow. He testified that they had escaped from the yard once before during the six weeks he had kept them there. The injury and killing were also shown, and witnesses testified as to the hour of the day the accident occurred. This is the substance of the evidence as far as material to our present consideration at the time plaintiff rested his case. The appellant submitted a motion to instruct the jury to reurn a verdict in its favor, upon the grounds that plaintiff had not made out a case, and that the proof showed contributory negligence, in that the plaintiff kept or maintained no sufficient or proper inclosure for stock, which was allowed to run in close proximity to the track of the defendant. The court denied this motion, and an exception was duly taken. We shall consider the assignment of error based on this ruling in connection with the instructions of the court to the jury.

The defendant then submitted the testimony of the engineer who had charge of the locomotive at the time the accident occurred. He testified that he was 30 years of age, had been an engineer 2 years

and 5 months, and was a fireman 4 years before that; that he was familiar with what was necessary to do in cases of the kind; that under the circumstances everything was done that could have been done that would have tended in any way to prevent the accident to the horses; that everything about the engine was in good working order and in good repair; that he saw the stock at the very earliest possible moment that he could have seen it; that the track over which he had come was down grade into Buford, where the accident occurred; that it was not downgrade at the exact spot where it occurred, but that the downgrade extended to a point about 40 car lengths before he reached the place of the accident; that when he first saw the horses he was too close to do anything to prevent the accident; that he whistled and tried to scare them off the track; that that was the only thing he could do; that the application of the air brakes or anything of that kind would have been futile, and could not have prevented his striking the stock; and that by reason of this fact he made no effort to stop the train. He first testified that he struck the stock at 5:25 in the morning, but subsequently changed it to 6:25; that in the daytime there was nothing to obstruct one's view going downhill into Buford for about half a mile from a curve in the track to the depot; that he struck the stock about 10 car lengths from the depot and about four or five car lengths after he first saw it. He also stated that all the appliances that are used for stopping a train that are usually on an engine were on the engine he was running, and in good working order, and that had there been time to stop, there was nothing to prevent his stopping, and that the only reason he did not stop was because he did not see the horses soon enough; that from the time he saw them until he struck them was only an instant, so short a time that he could hardly measure it. The plaintiff offered some evidence in rebuttal, but it in no way conflicted with the testimony of the engineer, except as to the degree of darkness prevailing when the accident occurred. No evidence was offerd by plaintiff to show actual negligence. He relied on the presumptoin created by the statute. After the evidence was all submitted the defendant moved the court to direct a verdict in its favor on the ground of contributory negligence and failure of proof, which was denied. The court instructed the jury, and it returned a verdict in favor of the plaintiff, assessing his damages at $600.

Twenty-four errors are assigned by the appellant. Many of them are technical and go merely to the order of proof and are without merit. Others need not be considered, as they go to the main assignments of error. The plaintiff was asked on redirect examination the following question: "Q. At the place where you tracked them on the right of way of the Great Northern Railway, what was the condition of the right of way with reference to snow and other things lying there?" This was objected to as immaterial, and not within the issues. The objection was overruled, and the witness answered that the track was covered with a free skift of snow between the rails. That the train had gone by, and the oats that were sprinkled upon the track were covered with snow, except where the horses had pawed them out. Appellant moved to strike out the answer on the grounds urged in the objection, and that it was immaterial and related to matters not specified in the complaint and not within the issues. Whereupon the court granted the motion so far as it related to the oats and statements relative thereto, and cautioned the jury not to consider the same. No reference was made to this testimony in the charge. The evident purpose of this question was to bring matters to the attention of the jury prejudicial to the defendant, and not covered by the complaint, and to lead the jury to infer that the railway company had negligently permitted oats to remain upon its right of way, thus attracting stock which might be in the neighborhood to the track and causing it to remain there. The charge in the complaint was the negligent running of the train, not the condition of the track or negligently strewing oats on the track, even if they were scattered there by the railway company. We are of the opinion that the admission of this evidence constituted error. It may not alone be sufficient to warrant granting a new trial. We call attention to it for the purpose of suggesting that trial courts are much too liberal in permitting witnesses to answer improper questions, and then relying on developments in the progress of the trial to determine whether such questions should have been permitted. In this manner evidence is got before the jurors which they have no right to consider, and the subsequent striking it out and a caution against considering it never effaces it from their memory. The experience of the members of this court in reading evidence in those actions which we are required to try de novo justifies us in saying that even those trained in the legal profession find it extremely difficult to over-

look and not be influenced by incompetent and irrelevant testimony which they are compelled to read, although they know it should not be considered. Much less can laymen, serving as jurors, obliterate such evidence from their memories and give it no consideration. It is much easier, when it is subsequently found that the question is proper, to permit its reception than to attempt to remedy its improper reception by later striking out the answer. It is a practice which should be, as far as possible, abandoned.

The court charged the jury that there was no contributory negligence in the case, and that the plaintiff was without fault in the management of his stock at the time of the killing, as shown by the uncontroverted evidence in the case. In this there was prejudicial error. The best that can be said of plaintiff's position and in support of his contention is that minds of reasonable men might disagree as to whether permitting horses to remain loose overnight in a yard 50 yards from defendant's track, with only one wire as a fence on one side of the yard, and that only three feet above the snow, was negligence on the part of the plaintiff, and that the question should have gone to the jury. Carr v. M. St. P. & St. Ste. M. Ry. Co., 16 N. D. 217, 112 N. W. 892.

The court charged the jury that, where the defendant shows conclusively, by undisputed evidence, that it was at the time of the injury operating the train in question by its servants or agents in a careful manner, and that it was properly equipped with all the modern and usual appliances, that if they did not find that the employes were, under a fair preponderance of all the evidence guilty of some act of carelessness which resulted in the killing of the stock, then it should find for the defendant. This instruction was such as to convey to the jury the impression that to overcome the presumption of negligence raised by the statute the burden was on the railway company to make a showing that was impossible for any one to rebut. It required defendant to show conclusively, by undisputed evidence, that it was not in fault. This is not the rule of law, and so charging is reversible error.

A motion for a new trial was denied. This and the denial of defendant's motion to direct a verdict in its behalf at the close of the evidence was error. The plaintiff submitted no evidence whatever, before resting his case, having any tendency to show actual negligence on the part of the defendant, but relied solely upon the prima facie case made under the statute by proving the ownership,

killing and value. Section 4297, Rev. Codes 1905, provides that killing or damaging of any horses, cattle, or other stock by the cars or locomotives along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation. The intent in enacting this statute was to bring into court those who have knowledge of the facts and compel them to produce such proof as they possess. Generally the corporation operating a railway train and its employes possess the only information relating to negligence in operating the train, and this is why the burden is taken from the plaintiff after proving the ownership and killing and placed upon the defendant; but, when the plaintiff relies solely upon the prirma facie case made under the statute, less is required to rebut the prima facie case than would be necessary to rebut his evidence if the plaintiff relied upon actual proof of negligence, and when a prima facie case has been met by evidence which is not in conflict with material evidence, or with the circumstances surrounding the injury or killing, the presumption arising under the statute is eliminated, and it becomes incumbent upon the plaintiff to show actual negligence by a fair preponderance of evidence. Whether such presumption has been fully met and overcome by the defendant's evidence is, in the first instance, a question of law. Hodgens v. M. St. P. & S. S. M. Ry. Co., 3 N. D. 382, 56 N. W. 139; Smith v. N. P. Ry. Co., 3 N. D. 17, 53 N. W. 173; Duncan v. G. N. Ry. Co., 17 N. D. 610, 118 N. W. 826. One of the animals hit by defendant's train in the present instance was a stallion. Under the provisions of section 1933, Rev. Codes 1905, stallions are not permitted to run at large at any season of the year. It follows that this stallion was trespassing. Under the rule in Wright v. M., St. P. & S. S. M. Ry. Co., 12 N. D. 159, 96 N. W. 824, the measure of defendant's duty was to exercise ordinary care not to injure it after it was discovered to be in a place of danger, and defendant was not required to keep a lookout for trespassing stock. See, also, Locke v. Ry. Co., 15 Minn. 350 (Gil 283); Palmer v. N. P. Ry. Co., 37 Minn. 223, 33 N. W. 707, 5 Am. St. Rep. 839; Harrison v. Ry. Co., 6 S. D. 100, 60 N. W. 405. Under section 1933, supra, it was lawful for the other injured animals to run at large when this accident occurred.

The only conflict in the testimony related to the degree of darkness when the accident occurred. Some of defendant's witnesses testified that it was daylight, while others testified that it was not clear daylight. The engineer testified that it was dark and cloudy,

but not as dark as in the night-time. This conflict is immaterial if the defendant owed no greater duty toward the stock which had a right to run at large than it did toward the stallion. The cases heretofore decided by this court have arisen over injuries to animals during the closed season. They are then clearly trespassers. But it is contended that the provisions of section 1933, supra, making it lawful for cattle, horses, mules, etc., to run at large from the 1st day of December to the 1st day of April in each year, with certain exceptions, is in effect a license to owners to permit them to run at large upon the right of way and track of railway companies, thereby endangering the lives of passengers and trainmen and the safety of trains and freight, and that the duty of the company in such case is to use reasonable care to prevent the infliction of injury upon stock upon its right of way at all times after it becomes possible, by reasons of the nature of the track, the light, and other surrounding circumstances, to discover such animals; in other words, that it is the duty of the defendant to maintain a constant and uninterrupted lookout for animals upon its track, and that the failure to observe such animals, where there is no obstruction to the view, in time to stop the train and prevent the accident, is negligence in such a degree as to make the defendant liable. Respondent argues his case upon the theory that his rights were the same as though the horses had been running at large, and it was evidently tried upon that theory, so we assume for the purposes of this case that his rights were those of an owner who had permitted his stock to range during the open season. The evidence in which the slight conflict to which we have called attention arises is only material in case it is held that the railway company must keep a constant lookout during the open season. We are of the opinion that it is immaterial whether an accident occurs during the open or closed season; that, for the purpose of determining the liability of the railway company, animals upon its tracks are trespassing whether they are there during the open or closed season. The railway company owns its right of way. The Legislature cannot deprive it of its right to the exclusive occupancy of its own property, except at crossings, depot grounds, and like places; neither can it relieve it from liability for actual negligence, nor impose penalties upon it for negligence when it is not negligent. The object of the statute permitting stock to run at large during the months named is to permit it to feed upon commons and unoccupied lands,

and to relieve the owners of liability for injury by the stock if it strays upon the occupied and unfenced premises of others, and not to relieve the owners of premises where they are trespassing from liability for inflicting injuries on them while upon their premises. Addington et al. v. Canfield et al., 11 Okla. 204, 66 Pac. 355. If the owner of the premises is not relieved from liability, we see no reason why new liabilities should be imposed upon him, or why he should be held to a greater degree of care during the open season than at any other season of the year. This ought to be particularly true with reference to railways because they are not required to fence their tracks except under certain circumstances, and it would be an unwarranted hardship to require them to maintain a constant lookout for stock upon the track. The other imperative duties of the engineer and fireman render it impossible to maintain a constant lookout. The owner of the stock is the beneficiary of the law permitting it to run at large, and if additional care is imposed by this privilege upon any one, it ought to be cast upon the beneficiary under the law, rather than upon those with whose natural rights it interferes.

The authorities on this subject are not numerous, but the fundamental principles of law governing the right of individuals to the use and occupancy of their own property are controlling. The Legislature of this state has not undertaken to make any distinction between the liability of a railway during the closed and the open season, and the rule having been established as to the duty of the company during the closed season by numerous authorities in which the subject has been carefully considered, we see no reason why the courts should take it upon themselves to make an arbitrary distinction, as they would be doing if they held that a different rule applied during the open season. There is a marked distinction between the duty of railway companies to owners of stock on its track and its duty to passengers on its trains, and much confusion has arisen by failure to note the difference. Undoubtedly the company is required to be much more vigilant in the care of its train while running and in looking out for obstructions on the track for the purpose of insuring the safety of passengers who have submitted themselves to its protection, and who are dependent upon it and its servants for their lives and safety, than for the protection of stock upon its tracks.

In Bileu v. Paisley, 18 Or. 47, 21 Pac. 934, 4. L. R. A. 840, the Oregon Supreme Court, in a well-considered opinion delivered by Chief Justice Thayer, discusses the rule of the common law and of a state where stock is permitted to run at large, and the court, referring to the common law rule that stock may not run at large, uses this language: "The court intimated a doubt as to whether the rule ever did prevail here, but did not determine as to whether it did or not. The grounds upon which the decisions in the other states, which hold that said rule was not in force, are predicated upon its inapplicability to the circumstances and conditions of the people thereof, its being inconsistent with their habits, interests, necessities, and understandings, and its unsuitableness to a new country. These grounds seem to me to be more specious than sound. The rule was not founded on any arbitrary regulation of the common law, but was an incident to the right of property. It is a part of that principle which allows every man the right to enjoy his property free from molestation or interference by others; its is simply the recognition of a natural right. A person owning and occupying land is not vested with the right to enjoy it upon condition that he inclose it by a palisade strong enough to keep his neighbors and their stock from breaking into and destroying the fruits of his labors. Property is not held in civilized communities by so insecure a tenure; but the law surrounds it by an ideal, invisible palladium, more potent than any mechanical paling that can be constructed. The rule in question did not require to be adopted in order to be in force. It always exists where the right of private dominion over things real is recognized. It pertains to ownership. The Legislature, in the exercise of the police power of the state, may, no doubt, require the owners of lands to fence them in a certain manner, and in default thereof to withhold from them a remedy for a trespass committed thereon by animals running at large. In a sparsely populated section of the country, where there are extensive open commons, and stock raising is an important industry, it might be judicious to adopt such a regulation; but to hold that one man has a right to permit his stock to go upon the lands of another, if not protected by a material inclosure, would be holding, in effect, that a man did not own what belonged to him. The Legislature cannot legalize such a trespass. It cannot provide that the cattle of A. may lawfully go upon the land of B. against the latter's consent, whether his land is fenced or unfenced, though it may, as

before suggested, withhold from B. a remedy for damages occasioned by such a trespass, if his land is not inclosed in a prescribed manner. Legislation of the character refererred to goes only to the remedy, and no attempt to extend it further could be justified."

In Williams v. Mich. Cent. R. R. Co., 2 Mich 259, 55 Am. Dec. 59, the Supreme Court of that state, in passing upon a similar question, says: "This act provides merely: 'That no person shall recover for damages done upon lands by beasts, unless in cases where, by the by-laws of the townships, such beasts are prohibited from running at large, except where such lands are inclosed by a fence,' etc. Session Laws 1847, page 181. Thus far this act goes, but no farther, and it cannot be enlarged by implication or intendment. The suit is not brought under this act by the plaintiff to recover damages done on his lands by defendant's beasts; hence the act can have no legal bearing whatever on the case under consideration. This act does not require men to fence their lands, but merely precludes a recovery for damages done by beasts thereon unless they are fenced. Nor does it grant any right to one individual to trespass on the private property of another, or to depasture at will railroads any more than other lands owned and possessed by individual citizens; nor can the legislature, under the constitution, confer any such right. * * * If the plaintiff, under the acts referred to, had no affirmative right to graze his horses on the track of the railroad, it follows that they were there wrongfully, inasmuch as the common law gives him no such right. By way of illustration, suppose that the plaintiff's horses had gone into another man's wheat field, through a gate which had been left open by the owner, and killed themselves eating wheat, could the plaintiff have recovered of the owner of the wheat the value of the horses, under the provisions of the act of 1847? Clearly he could not. The horses would have been in the field without right; hence wrongfully there. Nor could the owner of the wheat, having left his gate open, recover under that act the damage done by the horses. Wheat fields are usually inclosed by fence, and in such a case the act would apply, and legally bar a recovery. * * * Horses in the township of Dearborn being free commoners under some township rule or regulation does not change the effect of this principle of common law, or the vested private rights of the defendants or other individual citi-

zens. The idea that because horses and cattle are free commoners, they have therefore the lawful right of trespassing on private property is absurd—preposterous in the extreme."

We find several authorities holding the contrary view. In 49 and 54 Federal Reporter are several cases decided by the Circuit Court of Appeals, the opinions having been written by Judge Caldwell, in which the negligence of railway companies in Indian Territory where the laws of Arkansas were in force, was passed upon. Reliance is placed upon several decisions of the Supreme Court of Arkansas as authority for the holding of the Circuit Court of Appeals, but it does not appear that they were based upon any distinction between the open and closed seasons, and it would seem that in Indian Territory no closed season existed, and one of the grounds on which the decisions rest is that the people of Indian Territory were grazing all unoccupied lands before the railways were constructed, and intimating that the railways entered the territory subject to the rights of the inhabitants to graze stock upon lands not belonging to them. In the case at bar, if this reason has any weight, the converse is true because section 1933, supra, was not enacted, and the common-law rule was in force until a time subsequent to the construction of the railroad in question.

In Ely v. Rosholt, 11 N. D. 559, 93 N. W. 864, it was said that animals were not trespassers when on the land of others than the owner during the open season, but that was said with reference to the determination of the right of others to recover damages for injuries done by the stock, and we are of the opinion that it was not intended to, and does not, apply to actions by the owner of the cattle against others for negligence resulting in injuring them. It follows from these observations that the only duty incumbent upon the defendant in the present instance was to use ordinary care to prevent injury after discovering the animals upon the track. The testimony of the engineer is persuasive that he did not discover the animals until too late to stop the train. No conflict is found on this question. The evidence submitted by the defendant completely overcame the presumption arising in plaintiff's favor under the statute cited. Under the rule in the authorities cited, the motion of the defendant, submitted at the close of the case for a directed verdict on the ground that the plaintiff had failed to make out a case, should have been granted. See, also. Memphis, etc., Ry. Co. v. Shoecraft, 53 Ark. 96, 13 S. W. 422;

Huber v. C. M. & St. P. Ry. Co., 6 Dak. 392, 43 N. W. 819; Macon & A. R. R. v. Newell, 74 Ga. 809; Ky. Cent. Ry. Co. v. Talbot, 78 Ky. 621; C., St. L. & N. O. R. Co. v. Paskwood, 59 Miss. 280.

The order denying a new trial is reversed, and a new trial granted. All concur.

ELLSWORTH, J. (concurring specially.) I concur in the result announced, but I cannot agree in the holding that horses, during the "open season" for ranging live stock, are trespassers when upon the right of way of a railway company. A holding the reverse of this is, as I read it, made in the case of Wright v. Minneapolis, etc., Railway Companay, 12 N. D. 159, 96 N. W. 324, and such principle is, I believe, sound and in accord with the current of authority, and should be observed in this case.

I am also unable to agree in the holding that the motion for a directed verdict, made by the defendant at the close of the entire testimony, should have been granted. I believe that the circumstances shown by the testimony with reference to a clear and unobstructed track for a distance of half a mile or more before the stock was struck by the engine, and the fact that it was daylight at the time, so conflict with the testimony of the engineer that he did not see the horses until within a few car lengths of the place where they were struck, and at a distance within which it was impossible to stop the train, as to require the submission of the case to a jury.

(125 N. W. 1054.)

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## A. T. JOHNSON v. SARAH A. SOLIDAY.

Opinion filed April 7, 1910.

**Mechanic's Lien — Words and Phrases — "Owner" of Real Estate.**

1. Under the provisions of the mechanic's lien law the "owner" of real estate on whose interest a mechanic's lien will attach is the person for whose immediate use and benefit the building, erection, or improvement, is made.

**Mechanic's Liens—Vendor's Interest Not Subject to — Possession.**

2. A mechanic's lien will not attach to the interest of a vendor under an executory contract of sale whose vendee is in possession, and who makes improvements by erecting buildings on the real estate covered by such executory contract.

**Mechanic's Liens — Interest of Vendor — Executory Contract.**

3. Where the vendee in an executory contract for the purchase of real estate is in possession and erects buildings thereon, in which the vendor has no interest except by reason of his holding the legal title as security for the purchase price, and when such vendor is not a party to the purchase of the material or the construction of the improvements, the question of his knowledge of or consent to the furnishing of material or the making of the improvements is immaterial.

Appeal from District Court of Foster County, *Winchester, Special Judge.*

Plaintiff had judgment. Action to foreclose a mechanic's lien, and Defendant Soliday appeals. Reversed.

*T. F. McCue,* for appellant.

*C. B. Craven* and *C. S. Buck* for respondent.

SPALDING, J. The only question to be settled on this appeal is whether a mechanic's lien, under our statute, will attach to the interest of a vendor under an executory contract of sale whose vendee is in possession, and who makes improvements by erecting buildings on such real estate, the lien being claimed for material for the erection of such buildings. This action was brought by the respondent, Johnson, against one Footitt and the appellant, Soliday. Appellant had sold to Footitt certain lots under an executory contract, on which partial payments only had been made. Respondent sold and delivered to Footitt certain material for the erection of a dwelling house, barn, and ice house upon the premises described in the executory contract, and filed a mechanic's lien therefor. This action was brought to foreclose such lien, not only as to the interest of Footitt in the property, but as to that of Soliday also. Plaintiff had judgment in the trial court, and defendant Soliday appeals. Section 6237, Rev. Codes 1905, as far as material, reads: "Any person who shall perform any labor upon or furnish any materials * * * for the erecting * * * of any building or other structures upon land * * * under a contract with the owner of such land * * * or with the consent of such owner, shall, upon complying with the provisions of this chapter, have * * * a lien upon such building, erection or improvement and upon the land belonging to such owner on which the same is situated * * * to secure the payment for such labor, material, machinery or fixtures. * * * The owner shall be presumed to have consented to the doing of any such labor or the making of any such improvement if, at the time, he had knowledge thereof, and did not give notice of his objection thereto

to the person entitled to the lien." Section 6243 provides that "the entire land upon which any such building, erection or other improvement is situated, or to improve which the labor was done or things furnished, including that portion of the same not covered therewith, shall be subject to all liens created by this chapter to the extent of the right, title, and interest owned therein by the owner thereof for whose immediate use or benefit such labor was done, or things furnished," etc. Section 6248 says: "Every person for whose immediate use and benefit any building, erection, or improvement is made, having the capacity to contract, including guardians of minors or other persons, shall be included in the word 'owner' thereof."

In the light of these provisions we must decide whether the appellant was the owner of the lots in question within the terms of the mechanic's lien law. We are of the opinion that she was not such owner. The two sections last quoted seem to indicate that the owner meant is the person who owns an interest therein, and for whose immediate use and benefit the improvement is erected, and with whom the contract is made. This question was decided in Salzer Lumber Co. v. Claflin, 16 N. D. 601, 113 N. W. 1036, and needs no extended discussion at this time. This court there said: "The materialman is simply subrogated to the interest that the vendee had in the contract, and no more. The vendor's rights are not at all to be affected." The vendor holds the legal title, and in relation to mechanics' liens is the holder of the legal title as security for the payment of the purchase price, and the vendee is the equitable owner. Their relations are analogous to those of a mortgagor and mortgagee, where the material or work is contracted for by the mortgagor after the recording of the mortgage. In such case the lien of the mortgagee is not affected by the mechanic's lien, and we see no reason why the person holding the legal title as security should be placed in a less secure position than if he only held a mortgage. Salzer Lumber Co. v. Claflin, supra; Revised Codes 1905, section 6242.

But it is contended that the last paragraph of section 6237 quoted modifies the statute as it stood prior to this paragraph being added, and that because it is shown that the appellant frequently drove past these premises while the buildings were being erected, and therefore must have had knowledge of the fact, and failed to give any notice that she objected thereto to the respondent, the lien attaches to her interest. This provision must be read in the light of the other sections which we have cited, and, when so

read and harmonized, we think it does not apply to this case. Had the appellant still retained possession or been engaged in the erection of the buildings, or had the parties been in joint possession or occupancy, and the building constructed for the immediate use or benefit of the appellant, although the contract was made by Footitt, then the terms of the provision quoted would undoubtedly apply. It was intended to provide for such cases, and particularly for those where the title to real property stood in the name of a wife or a member of the family, and the husband or some member of the family other than the holder of the legal title proceeded to contract for the erection of buildings when he and the holder of the title were occupying the premises, or where it was for the immediate use and benefit of the holder of the title, or both. In such cases the holder of the legal title cannot step in and defeat the lien on the ground that he never authorized the construction of the improvements. In such cases the holder of the legal title is deemed to have consented unless he makes objection. In Mahon et al. v. Surerus et al., 9 N. D. 57, 81 N. W. 64, the owner was defined as "the party residing on the land, and for whose immediate use the house was built."

These views necessitate the reversal of the judgment. It is reversed. All concur.

ELLSWORTH, J., having been of counsel, did not participate in the above decision; HON. W. C. CRAWFORD, Judge of the Tenth judicial district, sitting in his place by request.

(126 N. W. 99.)

NOTE—As to mechanic's lien on building erected by vendee see note to Zabriskie v. Greater America Exposition Company, 62 L. R. A. 380.

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W. H. ROUNSEVILLE AND JAMES H. DOTY, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF ROUNSEVILLE & DOTY, v. A. P. PAULSON.

Opinion filed April 11, 1910.

**Principal and Agent—Declarations of Agent as Evidence.**

1. The declarations of an agent, not made while acting within the scope of his agency, are not binding on the principal.

**Principal and Agent — Declarations of Agent — Evidence.**

2. Evidence considered, and *held* not to show that certain declarations by the agent were made while acting within the scope of the agency.

Appeal from District Court, Stutsman county; *Burke,* J.

Action by W. H. Rounseville and James H. Doty against A. P. Paulson. Judgment for defendant, and plaintiffs appeal.

Reversed.

*Geo. W. Thorpe* and *Davis & Olson,* for appellants.

*Lee Combs* and *Alfred Zuger,* for respondent.

MORGAN, C. J. This is an action in claim and delivery involving the ownership and right to the possession of certain grain purchased by the defendant from one MacDonald, a tenant of the plaintiffs, which grain is claimed by the plaintiffs to be their property. The complaint is in the usual form in such actions, and alleges plaintiffs' ownership and right to immediate possession, the wrongful taking by the defendant, and a demand for its return, and the full value of the grain—$500. The answer is a general denial. A return of the grain is demanded, or judgment for its value, if a return cannot be had. A jury was duly impaneled, and testimony taken and submitted by both parties. At the close of the testimony, each party moved for a directed verdict. Thereupon the trial court discharged the jury, and made findings of fact and conlusions of law favorable to the defendant. The plaintiffs moved for a new trial, which was denied. Judgment was entered upon the findings. The plaintiffs appeal from the judgment and from the order refusing a new trial. A statement of the case was duly settled in which the alleged errors are specified.

The pivotal question is the ownership and right to the possession of the grain. The trial court expressly found that the defendant was the owner of it, and entitled to its immediate possession. The question of such ownership is dependent upon the fact whether one Dunswell was plaintiffs' agent with authority to bind them by his acts and statements in reference to the grain. The trial court made no express finding as to agency, but, by finding the defendant to be the owner of and entitled to the immediate possession of the grain, necessarily found that Dunswell was plaintiffs' authorized agent. To show how these questions arise, a brief outline of the facts becomes necessary.

The grain in question was raised by MacDonald under a contract in writing. The material provisions of the contract are the following: MacDonald agreed to farm the land in a good and husbandlike manner, and to furnish the hired help, machinery, and teams at his own expense, and haul the grain to the elevator or

place it on the cars after threshing, if directed to do so by the second party. The second party agreed to furnish all the seed required each year. The contract also contained the following stipulations: "(a) And until the performance by him of every condition of this contract, the title and possession of all the products of said farm shall be and remain in the second party. (b) Each season, when the said first party shall have fully performed all his undertakings under this agreement for that season, then, upon reasonable request, the second party will give and deliver to the said first party at the place where they or any part of them may be stored, a share of all the products of said farm raised by him during the season, equal to one-half of the whole. (c) First party agrees to handle and haul second party's share of the crop to market. (e) It is understood and agreed that if, any season, the produce grown under this agreement, or any of it, shall be sold by either party previous to the final settlement, the proceeds thereof shall be accounted for instead of the produce sold, to the mutual advantage of the parties; and none of such produce shall be sold unless by consent of the second party previously obtained."

It is claimed by the appellants that the findings of fact are not sustained by the evidence, and the particulars in which the evidence fails to sustain the findings are pointed out and made a part of the statement of the case. The findings are attacked in two particulars: (1) That the evidence fails to show that the defendant was the owner of the grain in question; (2) that the evidence fails to show that the provision of the contract requiring a division was carried out, and that, in consequence of that fact, the title and right to the possession of the grain are still in the plaintiffs. It is a question in the case whether Dunswell was the agent of the plaintiffs for the purpose of settling with the tenant, MacDonald, under the contract. The plaintiffs had no negotiations personally with MacDonald as to the settlement of the contract for the year 1907, and all the negotiations relative to the delivery of the grain during that year were had with Dunswell. He was the agent of the plaintiffs for certain purposes. He was in charge of their grain elevator and lumber yard at Spiritwood, N. D., and was in charge of such elevator at the time that MacDonald delivered the grain during the season of 1907. Besides being in charge of the elevator and lumber yard, as plaintiffs' agent, he was also, at times, specially authorized to make settlements with

plaintiffs' tenants in regard to crop matters. MacDonald was delivering the grain at the elevator, as he was required to do by the contract, and after he had delivered about one-half thereof, as estimated, MacDonald asked the agent for money with which to pay some bills. The agent computed the number of bushels already at the elevator, and gave MacDonald a check for $700, which represented the price of the grain that he had already delivered only. In respect to what transpired between Dunswell and the defendant thereafter is stated by the defendant in the following language: "I saw Dunswell after I saw MacDonald on the 26th, before I paid for the wheat; told him I had purchased from MacDonald, and was going to buy 500 bushels of durum and 200 bushels bluestem. Dunswell said that was all right, that he had bluestem and durum grain on the farm, and it was perfectly satisfactory to him; and I also asked him if it could be stored there until spring, or until such time as I wanted it, and he said that it would be all right, to go ahead and buy it; I told him I would require about 500 bushels durum and 200 bushels of bluestem; he told me on the following Sunday that MacDonald had told him how much was there. He did not tell me that I could have any of Rounseville & Doty's share of the grain; he told me that he had settled up with MacDonald for Rounseville & Doty. * * * I saw Dunswell in control of the elevator, lumber yard and hardware business of Rounseville & Doty; did not see him at the farm; went with him to farm the first time September 29th. * * * Dunswell told me on the 26th that one-half the grain belonged to MacDonald. The statement of Dunswell and the transaction which I saw led me to believe that a settlement had been made. I would not have bought the grain if I had known or had been led to believe that Rounseville & Doty claimed it. I relied upon the statement and the check and the evidence before me, believing that the settlement had been made."

It is not claimed that a division of the grain grown at the farm had been made at this time. It is also true that MacDonald had not, at this time, hauled plaintiffs' share of the grain to the elevator, and that no provision was made in reference thereto by MacDonald. Defendant was not at the elevator when MacDonald delivered the grain and received the check for $700. The conversation which the defendant relies on was had with Dunswell after what transpired between MacDonald and Dunswell at the ele-

vator. This was a day or two after what had transpired between these parties at the elevator. What defendant relied on was the declaration of Dunswell in reference to the contract with MacDonald, but these declarations were not made in MacDonald's presence, and were made after the delivery of the wheat at the elevator. There was no express waiver of the contract, but that would be immaterial if Dunswell settled with MacDonald and released him from all his obligations under the contract, and had authority to do so. There was nothing said at the interview between MacDonad and Dunsewell showing that the contract and the obligations under it were under consideration. The talk between them was solely in reference to payig MacDonald some money for wheat already delivered. There was nothing said about the delivery of the balance, or whether the contract had been fully complied with on MacDonald's part. There is no basis for the claim that Dunswell was a general agent for the plaintiffs, having full authority to speak for them at all times. The most that could possibly be claimed from defendant's showing is that Dunswell had authority to settle with MacDonald under previous, limited instructions. It is clear that he was not authorized under the showing made, to settle with MacDonald upon his own judgment or responsibility.

However, it is not necessary to determine whether the evidence would sustain a finding that Dunswell had authority to settle with MacDonald. There is no evidence that he did settle with him, and there is no evidence that he was authorized to waive the conditions of the contract, and there is no evidence that he did waive their fulfillment. The payment of the $700 was not a final settlement of the matters between the plaintiffs and MacDonald. Dunswell's evidence shows that it was only payment for the grain actually delivered, and he is the only witness testifying on that subject. Under the express terms of the contract, such payment was simply an advancement "solely for his convenience, and that in making such advance the second party does not waive its title to, or possession in part of, the remaining grain or any products of said farm, but such title and possession shall be and remain in the said second party until the complete performance of this agreement in the time and manner aforesaid." Under this provision of the contract, it is clear that the payment of the $700 was not a waiver of full performance of the contract. No other act

between MacDonald and Dunswell can be claimed to be, or is claimed to be, a settlement of the contract or waiver of its terms. The defendant's claim to the grain is based upon a purchase from MacDonald under what he asserts to be the express sanction of Dunswell, who, he claims, stated to him that he had settled with MacDonald, and that it was all right for him to buy the grain. In other words, the claim of a waiver of the contract by Dunswell as agent is based upon his declarations made to the defendant after the payment of the $700. If Dunswell had such authority from the plaintiffs, defendant's right to the grain cannot be denied, as he did not pay for the grain until told by Dunswell that a settlement had been made between the plaintiffs and MacDonald. Plaintiffs themselves could waive all the terms of the contract, if they so elected, and they could authorize an agent to do whatever they themselves might do. The question is, Did they authorize Dunswell to act for them to this extent? If he had authority to waive the terms of the contract, the plaintiffs cannot recover. If he had no such authority, the defendant cannot recover. The evidence does not show that Dunswell had actual authority to waive any of the terms of the contract. Dunswell denies that he made any settlement with MacDonald, and denies making any of the declarations which defendant claims were made as to the settlement with MacDonald, and denies that he consented that the wheat might be purchased by the defendant. Everything which the plaintiffs authorized Dunswell to do in this matter was to take the wheat delivered and take security for the balance due. As stated before, there was no settlement between MacDonald and plaintiffs through Dunswell. If the defendant had been present at the elevator when the conversation took place between the agent and MacDonald, when the $700 check was delivered, he would not have been justified in relying upon what took place there as a settlement of the MacDonald contract. The question, therefore, is, Are the plaintiffs bound by the statements alleged to have been made by Dunswell to defendant that the contract was settled, and that he had a right to purchase and pay for the grain left at the MacDonald place? It will be noticed that this conversation was made long after the delivery of the wheat at the elevator for which the $700 was paid. No express authority was given Dunswell to make this statement. He was not, at that time, acting in the course of his agency in regard to the settlement of the contract un-

der special instructions. It is settled in this state that the declarations of an agent are not competent proof of his authority to act, and that the principal is not responsible or bound by the declarations of an agent not made in the course of an agency.

In Short v. N. P. Elev. Co., 1 N. D. 159, 45 N. W. 706, the court said: "It is elementary that a principal in a transaction may, by his admission or confession made at any time, either before or after the event, render himself liable for the legal consequences of his acts, both in civil and criminal cases; but the legal liability of a principal for the acts of his agent cannot be fixed by the declarations or statements of the agent except in certain well-defined classes of cases. (Citing cases.) Applying the rule as stated by these authorities to the facts of this case, we have no difficulty in reaching the conclusion that Lighthall's statements and declarations, which were made to the plaintiff some hours after the transaction with McCann had closed, and after McCann had departed, did not constitute any part of the act of receiving the wheat into the defendant's elevator, and were not contemporaneous with the act; but, on the contrary, such declarations were a mere isolated narrative of a closed and past transaction, and hence were not a part of the res gestæ, and therefore were inadmissible in evidence under the rule." This case has been followed in many subsequent cases in this court, and the principle announced is so well established that further citations are unnecessary.

From the evidence, and on applying the principle laid down in that case, it is clear to us that the plaintiffs are not responsible for the declarations of Dunswell, which were made while not engaged in carrying out any of his duties as agent of the plaintiffs. These statements, some of them made on Sunday at the farm, were not made in connection with any of the agent's duties. In other words, they were not made while the subject-matter of the agency was being carried out.

There is no evidence of ratification by the plaintiffs of the acts of Dunswell. Plaintiffs are therefore entitled to the possession of the grain for the purpose of securing their rights under the contract. See Wadsworth v. Owen, 17 N. D. 173, 115 N. W. 667.

The order and judgment are reversed. All concur.

(126 N. W. 221.)

## FRANK WEBER v. W. J. LEWIS.

Opinion filed April 9, 1910.

**Pleading — Liberal Construction — Demurrer.**

1. A complaint, when attacked by demurrer upon the ground that it fails to state facts sufficient to constitute a cause of action, will be liberally construed and upheld, where it contains allegations of facts sufficient to reasonably and fairly apprise the defendant of the nature of the claim against him.

**Pleading — Motion to Make More Definite — Amendment.**

2. If the substantial facts which constitute a cause of action are stated in a complaint or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete and defective, such insufficiency, pertaining, however, to form rather than substance, the proper mode of correction is not by demurrer, but by motion to make the averments more definite and certain by amendment.

**Pleading — Code System — Legal Conclusion — Demurrer.**

3. Under the Code system of pleading, the allegation of a legal conclusion, instead of the facts upon which it is based, does not usually render a pleading bad on general demurrer.

**Contracts — Pleading — Allegation of Promise to Pay Unnecessary.**

4. Under the Code system of pleading, in actions to recover on implied contracts, it is neither necessary nor proper to allege a promise to pay on defendant's part.

**Pleading—Common Counts—Good Declaration at Common Law, Sufficient Against Demurrer.**

5. The function of a complaint is to inform defendant of the nature of plaintiff's demand to the end that he may prepare for his defense; and, if sufficient facts are alleged or may reasonably be inferred to constitute a good declaration under the common counts at common law, the same will be sustained as against an attack by general demurrer.

Appeal from LaMoure County Court; *Baker*, J.

Action by Frank Weber against W. J. Lewis. From an order overruling a demurrer to the complaint, defendant appeals.

Affirmed.

*Davis, Warren & Hutchinson*, for appellant.

Essential facts must be stated in unequivocal language, not left to be inferred. I Estee's Pl. (4th Ed.) 166; Moore v. Besse, 30 Cal. 570; Hicks v. Murray, 43 Cal. 522; Elwood v. Gardner, 45 N.

Y. 349; First National Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473; Jasper v. Hazen, 2 N. D. 401, 51 N. W. 583; I Estee's Pl. (4th Ed.) 218; Green v. Palmer, 15 Cal. 412; Northern Railway Co. v. Jordan, 87 Cal. 322; Cordier v. Schloss, 12 Cal. 147; Riddle v. Baker, 13 Cal. 302; Buena Vista, etc., Co. v. Tuohy, 107 Cal. 243; 4 Cyc. Pl. & Pr. 600; McConnoughey v. Weider, 2 Iowa, 408; Miller v. Van Tassel, 24 Cal. 49; Baltzell v. Nosler, 63 Am. Dec. 466; Thompson v. Munger, 65 Am. Dec. 176; Conaughty v. Nichols, 42 N. Y. 86; Addison v. Lake Shore & M. S. R. Co., 48 Mich. 155.

*W. C. Lasell,* for respondent.

If complaint is good on any theory, demurrer will be overruled. 10 Cur. Law, 1204; Douglas, etc., Ry. Co. v. Swindle, 2 Ga. App. 550, 59 S. E. 600; Oolitic Stone Co. v. Bridge, 80 N. E. 441; Dresser v. Mercantile Trust Co., 108 N. Y. S. 577; Thompson v. Mills, 101 S. W. 560; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Morse v. Swan, 2 Mont. 306; Smith v. Jordan, 13 Minn. 264, 97 Am. Dec. 232; Bliss Code Pleading (3d Ed.) section 417; Waggy v. Scott, 29 Ore. 386, 45 Pac. 774; Jackson v. Stearns, 84 Pac. 798; George v. Thomas, 16 Tex. 74, 67 Am. Dec. 612.

Uncertainty is not ground for demurrer, but for motion to make more definite. Snowden v. Wiles, 19 Ind. 10, 81 Am. Dec. 370; Williamson v. Yingling, 80 Ind. 371, also 93 Ind. 44; City of Connorsville v. Connorsville Hyd. Co., 86 Ind. 235; Hart v. Crawford, 41 Ind. 197; Lewis v. Edwards, 44 Ind. 333; Busta v. Wardall (S. D.) 52 N. W. 418; Morse v. Gilman, 16 Wis. 504; Clark v. Langworthy, 12 Wis. 441; Akerly v. Vilas, 25 Wis. 703 (Appx.); Sentinel Co. v. Thomson, 38 Wis. 489; Riemer v. Johnke, 37 Wis. 258; Pom. Rem. & Rem. Rights (2d Ed.) Art. 451, page 494; Emerson v. Nash, 102 N. W. 921, 70 L. R. A. 326; Milwaukee Trust Co. v. Van Valkenburgh, 112 N. W. 1083; Wilcox et al. v. Scanlon et al., 113 N. W. 948.

Every reasonable intendment and presumption must be made in favor of the pleading. 11 Cur. Law, 1258; Emerson v. Nash, supra; Manning v. School District No. 6, 102 N. W. 356; Morse v. Gilman, supra; Miller v. Bayer et al., 94 Wis. 123, 68 N. W. 869; Ean v. Chicago, M. & St. P. Ry. Co., 95 Wis. 69, 69 N. W. 997; Miles v. Mutual Reserve Fund L. Ass'n, 108 Wis. 421, 84 N. W. 159; Bassett v. Warner, 23 Wis. 673; Koepke v. Winterfield, 116 Wis. 44, 92 N. W. 437; Klieforth v. N. W. Iron Co., 74

N. W. 356; Milwaukee Trust Co. v. Van Valkenburgh, 112 N. W. 1083; Emerson v. Nash, supra; Donovan v. St. Anthony & Dak. El. Co., 75 N. W. 809.

If complaint presents facts sufficient for a recovery, though inartificially stated, it will stand as against a demurrer. 4 Am. & Eng. Enc. Pl. & Pr. 744; Spottswood v. Herrick, 22 Minn. 548; Casey v. American Bridge Co., 103 N. W. 623; Warren Bros. Co. v. King, 104 N. W. 816.

FISK, J. This is an appeal from an order overruling a demurrer to the complaint, and the sole question presented is the correctness of such ruling.

The complaint, omitting formal parts, is as follows: "The plaintiff complains and alleges: (1) That on the 14th day of October, A. D. 1904, the above-named plaintiff and defendant made and entered into a written contract, an agreement in writing, wherein and whereby this plaintiff rented from the above-named defendant the northwest quarter of section twelve (12) in township one hundred thirty-five (135) north of range sixty-two (62) west of the Fifth principal meridian, and also the west half of section seven (7) in township one hundred thirty-five (135) north of range sixty-one (61) west, for the period of three (3) years. The same ending on or before April 1, A. D. 1908. This contract also included the rental of some stock, and the doing of various work. (2) That by reason of the rental of the said land, and the work performed by this defendant, and the use of this plaintiff's machinery, and the sale of cattle belonging to this plaintiff and the defendant jointly, by the defendant, and the storing of grain of defendant by plaintiff, and for the furnishing of twine, this defendant is indebted to this plaintiff in the sum of four hundred fifty-four and 50-100 ($454.50) dollars; no part of which has been paid save and except the sum of forty-one and 85-100 ($41.85) dollars by reason of flax and barley furnished and the labor performed by said defendant. That there is now due said plaintiff by reason of said account the sum of four hundred twelve and 65-100 ($412.65) dollars from this defendant. Wherefore, plaintiff prays judgment against the defendant for the sum of four hundred twelve and 65-100 ($412.65) dollars, and interest from and since October 31, A. D. 1907, together with his costs and disbursements herein."

The sole ground of the demurrer is that the complaint fails to state facts sufficient to constitute a cause of action.

While the complaint is very inartistically drawn, and is, no doubt, subject to attack by motion to make more definite and certain, we are of opinion that, under the liberal rule to be applied in testing its sufficiency as against such an attack, it should be upheld, although the author thereof cannot, with pride, point to the same as a model of scientific pleading. The rule is firmly established that a complaint, when attacked by demurrer upon the ground that it fails to state facts sufficient to constitute a cause of action, will be liberally construed in favor of such pleading, and the same will be upheld when it contains allegations of fact sufficient to reasonably and fairly apprise the defendant of the nature of the claim against him.

Prof. Pomeroy, in his valuable work on Code Remedies (section 549), gives a very clear and correct statement of the rule as follows: "The true doctrine to be gathered from all the cases is that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective, such insufficiency pertaining, however, to the form rather than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment. From the citations in the footnote, it is clear that the courts have, with a considerable degree of unanimity, agreed upon this rule, and have in most instances applied it to defects and mistakes having the same general features, and have sometimes severely strained the doctrine of liberal construction in order to enforce it. Thus, if instead of alleging the issuable facts the pleader should state the evidence of such facts, or even a portion only thereof, unless the omission was so extensive that no cause of action at all was indicated, or if he should aver conclusions of law, in place of fact, the resulting insufficiency and imperfection would pertain to the form rather than to the substance, and the mode of correction would be by a motion, and not by a demurrer."

Dixon, C. J., in Morse v. Gilman, 16 Wis. 504, stated the rule as follows: "A complaint to be overthrown by demurrer, or by objection to evidence, must be wholly insufficient. If any portion

of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially these facts may be presented, or, however defective, uncertain, or redundant may be the mode of their treatment. Contrary to the common-law rule, every reasonable intendment and presumption is to be made in favor of the pleading; and it will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever."

In the more recent case of South Milwaukee Co. v. Murphy, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82, Marshall, J., said: "Under the liberal rules of pleading prescribed by the Code, facts which are inferable with reasonable certainty when stated according to their legal effect, if so alleged, do not render the pleading bad upon a challenge for insufficiency, though it may be open to a motion to make more definite and certain."

Prof. Sunderland, in his valuable article on Pleading in 31 Cyc. at page 280, says: "Under the Codes, the allegation of a legal conclusion, instead of the facts upon which it is based, does not usualy make a pleading bad on general demurrer"—citing City of Santa Barbara v. Eldred, 108 Cal. 294, 41 Pac. 410; Lambe v. McCormick, 116 Iowa, 169, 89 N. W. 241; Union, etc., Co. v. Stone, 54 Kan. 83, 37 Pac. 1012; Newport Light Co. v. City of Newport (Ky.) 19 S. W. 188; Harris v. Halverson, 23 Wash. 779, 63 Pac. 549; and other cases.

It is, of course, a well-settled general rule that facts, not legal conclusions, must be alleged in pleadings; but it is equally well settled that a pleading is not rendered insufficient because it contains legal conclusions in addition to the facts which properly belong in it. 31 Cyc. 49-51, and cases cited. For illustrations of the rule, see Id. 52 et seq.

Applying the foregoing rules to the complaint in the case at bar leads us to the conclusion that the demurrer was properly overruled. The complaint alleges that a certain written contract was entered into between plaintiff and defendant, wherein and whereby plaintiff leased from defendant certain real property in 1904 for the period of three years, and that such contract also included the rental of certain stock and the doing of various work. Then follows allegations by way of recital, but to the effect that work was performed by the plaintiff under such contract, and that defend-

ant had the use of plaintiff's machinery, also, that defendant sold certain cattle belonging jointly to plaintiff and the defendant, also, that plaintiff stored certain grain for defendant and furnished him certain twine, for all of which defendant is indebted to the plaintiff in the sum of $454.50, no part of which has been paid except the sum of $41.85, and that there is now due plaintiff from defendant by reason thereof the sum of $412.65. There are sufficient facts alleged to apprise defendant, in a general way, what plaintiff's claim is. It is true defendant is not informed of the amount claimed by plaintiff for each of the various items, but defendant's remedy is by motion to require plaintiff to make the complaint more definite and specific in this particular. His remedy is not by demurrer. This is elementary. The facts alleged are, we think, sufficient from which the law raises an implied promise on defendant's part to pay for the work performed, the machinery used, the twine furnished, and for the grain stored.

It is well settled that under the Code system of pleading as contradistinguished from that of the common-law system, it is neither necessary nor proper to allege a promise on defendant's part in actions to recover upon implied contracts. Pomeroy's Code Remedies (3d Ed.) section 540.

We think that the complaint at least as to some of the alleged causes of action therein contained, would be sufficient under the common counts in indebitatus assumpsit at common law. 2 Chitty on Pleadings (16 Am. Ed.) pp. 27-35; 2 Enc. of Forms, page 297. This being true, it is firmly settled that the complaint is good under the Code. As said in Pomeroy's Code Remedies, section 542: "The courts have almost unanimously * * * held that such complaints or petitions sufficiently set forth a cause of action in the cases where the declarations which they imitate would have been proper under the former practice"—citing many authorities. The learned author of this valuable work further says: "Notwithstanding the imposing array of judicial authority shown by the citations in the footnote, the courts of one or two states have refused to follow this course of decision and have pronounced such forms of complaint or petition to be in direct conflict with the correct principle of pleadings established by the Codes. Although these few cases cannot be regarded as shaking, or as throwing any doubt upon, the rule so firmly established in most of the states, they may be properly cited in order that all the light possible may

be thrown upon this particular question of interpretation"—citing two very early cases, one in Minnesota and the other in Oregon. Notwithstanding the criticism by Prof. Pomeroy of the majority rule thus announced, we consider it the safer and better rule to adopt. The function of the complaint is to inform defendant of the nature of plaintiff's demand so that he may not be misled in the preparation of his defense. If the complaint does this in a general way, it is sufficient as against an attack by demurrer, although inartificially drawn. 31 Cyc. 101, and cases cited.

Under the common counts it is, in most instances, averred that the thing furnished and labor performed were thus furnished or performed at defendant's request, and also that defendant promised to pay for the same; but, in most instances, these averments are not required under the Code, for a succinct and accurate statement of the principle here involved, together with the citation of many authorities in support of our views as above expressed, see 1 Bates, Pl., Pr. & Forms (1908 Ed.) pp. 208-212.

For the foregoing reasons, the order appealed from is affirmed. All concur, except SPALDING, J., dissenting.

SPALDING, J. (dissenting). I cannot concur in the result arrived at in the foregoing opinion. That there are two lines of authorities on the subject is beyond question, and this is the first case, as far as I can judge, requiring this court to pass on the question here involved. Assuming, which I do not concede, that the majority opinion is in harmony with the decisions of the greater number of courts, I feel that, when a question arises for the first time in this state which relates solely to matters of procedure, we should not hesitate to adopt the clearer and better rule, even though it may not be supported by precedent. Precedent is not always a safe guide. Courts are justly subject to criticism for adhering too blindly to rules of procedure adopted by other courts under different conditions and in former ages. The courts of new states, when bound by no precedents of their own, would do better to be governed by the correct principle, rather than by the unsound precedent. The case of Allen v. Patterson, 7 N. Y. 476, 57 Am. Dec. 542, is the authority which has been followed in several states in holding that a complaint similar to this is sufficient under the Code system of pleading; but it has been the subject of ridicule, and courts which have followed it have suggested that, if it were an open question in their own jurisdiction, it would not

be regarded as a controlling precedent. That case differed from this, as it appears to have been decided with reference to a statute not applicable in the present instance. The New York case was decided in 1852, when the Code procedure was in its infancy. Many courts were then impregnated with the atmosphere of the common-law practice and yielded to the new procedure with great reluctance. This fact undoubtedly has some bearing upon the New York authority. Indiana and Ohio cases are cited as authorities in harmony with New York; but an examination discloses that the statutes of these states prescribe that the common-law counts shall be deemed sufficient under the Code.

Were it not for the precedents, it is plain to me that the construction of our Code regarding the sufficiency of a complaint and its allegations would be perfectly clear, for it says that "it must contain a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." Rev. Codes 1905, section 6852. I think it somewhat difficult, if not impossible, to untangle from the numerous allegations of the complaint either a plain or a concise statement of the facts upon which the plaintiff relies for recovery. I had supposed it to be elementary under the Code system that facts, and not conclusions of law, must be pleaded as a basis for a recovery. An analysis of this complaint resolves it down to allegations that on the 14th day of October, 1904, a contract was entered into between the parties for the rental of certain land and stock and the doing of various work; that by reason of the rental of said land, work done, use of machinery, etc., defendant is indebted to plaintiff in the sum of $454.50, no part of which has been paid. It does not show whether the work was to be done by the plaintiff or the defendant, or any promise, express or implied, to pay, or that there has been any breach of obligation. The whole cause of action is predicated upon two conclusions of law, namely, "That by reason of," etc., and that "defendant is indebted to plaintiff;" and these conclusions are unsupported by statements of any tangible facts. It was doubtless an attempt to copy the common counts, and assuming that the theory of the opinion of Judge Fisk is correct, namely, that this complaint states a good cause of action at common law, the question arises whether because a complaint of this kind may state sufficient facts to make it sustainable as against a demurrer, at common law, it does so under the Code.

As before indicated, there are many authorities on the subject, some of them clearly conflicting, others clearly distinguishable, and many which I am unable to distinguish between, but holding diversely. The question was passed upon in Bowen & Chambers v. Emmerson, 3 Or. 452. That court says: "A fault with the complaint in this case is that it neither states a promise to do any certain act at any specified time, nor states facts from which a duty to do so necessarily arises or from which a promise is necessarily inferred. It is not probable that any method of pleading in actions for money due upon contract will ever be discovered that is more simple and easily in practice or better calculated to apprise the court and the parties of the grounds and nature of the action or more likely to leave a clear and concise record of what has been done than that which is now prescribed in the Code. Notwithstanding this conceded truth, we sometimes meet with pleadings in this class of action that neither conform to the common law nor to the requirements of the Code. In actions for money due on contract, the common law required a concise statement of the facts, and in some particulars the employment of technical language; the Code requires a plain and concise statement of the facts. In other words, the common law required the facts to be stated concisely and sometimes in technical language; the Code requires the facts to be stated concisely and in plain or ordinary language. In this class of actions the pleader is required to state the facts that show that a contract existed between the parties, that it has been broken, and in what particulars, and the amount of damages the breach has caused. Facts only must be stated, as contradistinguished from the law, from argument, from conclusions, and from the evidence required to prove the facts. Coryell v. Cain, 16 Cal. 571." The complaint in the Oregon case alleged that "on or about the 18th day of February, 1868, plaintiff sold and delivered to the defendant 4,000 pounds of flour and that the same was worth $212," and the court says: "It does not show that the defendant undertook or became obligated to pay for the flour within a designated time, or within a reasonable time, or when requested; nor that the time of payment had arrived before the commencement of the action. For aught that appears from the facts stated, the property might have been sold on credit, the time of which has not yet expired, or it might have been sold and delivered to the defendant

upon the request and credit of another, with a full understanding that the defendant was not to pay for it."

Minnesota has had the question under consideration in several cases. In Foerster v. Kirkpatrick, 2 Minn. 210 (Gil. 171), where the complaint alleged that "the defendants are justly indebted to the plaintiff in the sum of, etc., on account of goods, wares, and merchandise sold and delivered by the plaintiff to the defendant at the special instance and request of the defendants, wherefore, etc.," the court held it fatally defective because containing no statement of the time of sale, and no averment that the goods were of the price or value of the sum mentioned, or that the defendants promised to pay for the same, and the court says: "In actions for goods sold and delivered, it is essential that one or the other of these allegations should be made. Without it the allegation of indebtedness is a mere conclusion of law unsupported by any fact. The defendant's liability grows out of the fact that the goods were either worth the amount of the claim, or else that they promised to pay that amount. If they were worth the amount, the law implies a promise. Without one or the other of these allegations, there appears no consideration to support the pretended indebtedness." This was followed in Holgate v. Broome, 8 Minn. 243 (Gil. 209). These cases were overruled in a dictum in Rogstad v. Railway Co., 31 Minn. 208, 17 N. W. 287; but in Keller v. Struck, 31 Minn. 446, 18 N. W. 280, a complaint in effect identical with the one in the case at bar was held bad. The court, in concluding its opinion, said: "The complaint must show an express obligation assumed, or facts from which would arise the legal implication of an obligation. The allegation here is not of a sale, nor even of indebetedness for property sold, but referring to the transaction particularly set forth, and which, as stated, does not import a sale. The complaint alleges an indebtedness on account of such sale and delivery and the furnishing of such material as aforesaid." It will be noted that the allegation was an indebtedness "on account of," which is synonymous with the allegation of the complaint in the case at bar "that by reason of." In Pioneer Fuel Co. v. Hager, 57 Minn. 76, 58 N. W. 828, 47 Am. St. Rep. 574, that court again held a similar complaint bad and very properly remarks that "courts in the Code states have sacrificed the principles of Code pleading more than they ought to have done in adopting this common-law formula at all."

In Moore v. Hobbs, 79 N. C. 535, I find another authority, and still others might be cited from different courts.

Mr. Freeman, in his note to Allen v. Patterson, supra, 57 Am. Dec. 544, summarizes the doctrine and quotes from Pomeroy's Code Remedies, section 544, as follows: "In the face of this overwhelming array of authority, it may seem almost presumptuous even to suggest a doubt as to the correctness of the conclusions that have been reached with so much unanimity. I cannot, however, consistently with my very strong convictions, refrain from expressing the opinion that, in all these rulings concerning the common counts, the courts have overlooked the fundamental conception of the reformed pleading, and have abandoned its essential principles. This position of inevitable opposition was clearly, although unintentionally, described by one of the judges in language already quoted, when he says: 'We are inclined to sanction the latter view and to hold that the facts which, in the judgment of the law, create the indebtedness or liability, need not be set forth in the complaint.' Now, the 'facts which create the liability' are the 'facts constituting the cause of action,' which the Codes expressly require to be alleged. The two expressions are synonymous; and the direct antagonism between what the court says need not be done and what the statute says must be done is patent. But the objection to the doctrine of these decisions does not chiefly rest upon such verbal criticisim; it is involved in the very nature of the new theory when contrasted with the old methods. In every species of the common count, the averments, by means of certain prescribed formulas, presented what the pleader considered to be the legal effect and operation of the facts, instead of the facts themselves, and the most important of them was always a pure conclusion of law. The count for money had and received well illustrates the truth of this proposition. In the allegation that 'the defendant was indebted to the plaintiff for money had and received by him to the plaintiff's use,' this technical expression was not the statement of a fact in the sense in which that word is used by the Codes; if not strictly a pure conclusion of law, it was at most a symbol to which a certain peculiar meaning had been given. The circumstances under which one person could be liable to another for money had and received were very numerous, embracing contracts express or implied, and even torts and frauds. The mere averment that the defendant was indebted for money had and received admitted any of these cir-

cumstances in its support; but it did not disclose nor even suggest the real nature of the liability, the actual cause of action upon which the plaintiff relied. The reformed theory of pleading was expressly designed to abrogate forever this general mode of averment which concealed rather than displayed the true cause of action; it requires the facts to be stated, the facts as they exist or occurred, leaving the law to be determined and applied by the court. The same is true of the common count in every one of its phases. A careful analysis would show that the important and distinctive averments were either naked conclusions of law, or the legal effect and operation of the facts expressed in technical formulas to which a peculiar meaning had been attached, and which were equally applicable to innumerable different causes of action. The rule which permitted the general count in assumpsit to be sometimes used in an action upon an express contract was even more arbitrary and technical, and was wholly based upon fictitious notions. The conception of a second implied promise resulting from the duty to perform the original express promise has no foundation whatever in the law of contract, but was invented, with great subtlety, in order to furnish the ground for a resort to general assumpsit instead of special assumpsit in a certain class of cases. All the reasons in its support were swept away by the legislation which abolished the distinctions between the forms of action, since it was in such distinction alone that those reasons had even the semblance of an existence. * * * The Legislature certainly intended that the facts constituting each cause of action should be alleged as they actually happened, not by means of any technical formulas, but in the ordinary language of narrative; and it is, as it appears to me, equally certain that the use of the common counts as complaints or petitions is a violation of these fundamental principles."

While pleadings should be liberally construed with a view of substantial justice between the parties (Rev. Codes, Sec. 6889), liberality may be so extended as to become oppression and defeat the very purpose sought to be conserved. See, also, Cal. State Tel. Co. v. Patterson, 1 Nev. 150; Penn Mutual Life Ins. Co. v. Conoughy, 54 Neb. 123, 74 N. W. 422; 1 Bates, Pleading, 258-261.

The members of the bar of this state have been distinguished for the clearness and directness of their statements of fact in pleadings. I fear that the effect of the majority opinion will be to

cause a relaxation in the practice in this respect, and that it will result in a careless and sloppy method of stating what might as readily be stated with clearness and precision and a virtual abandoment of the letter as well as the spirit of the requirement of the statute and Code system that facts must be plainly and concisely stated, which will work to the detriment of litigants and to the discredit of the profession and the courts, and afford a fruitful excuse for unnecessary motions, resulting in needless uncertainty and delay in the conduct of litigation.

(126 N. W. 105.)

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SECOND NATIONAL BANK OF BUCYRUS, OHIO, AND THE CENTRAL NATIONAL BANK OF BATTLE CREEK, MICHIGAN, v. G. H. WERNER.

Opinion filed April 1, 1910.

**Bills and Notes — Innocent Purchaser for Value — Indorsement Before Maturity.**

1. The indorsee before maturity of negotiable paper as collateral security to an indebtedness created concurrently with the indorsement and delivery of such paper, and in consideration thereof, in good faith, and without notice of infirmities, is an innocent holder for value within the meaning of our negotiable instruments law.

**Bills and Notes — Bona Fide Purchaser — Evidence.**

2. Evidence examined, and *held*, that each plaintiff took the note indorsed and assigned to it in the regular course of business in good faith, before maturity, and for a valuable consideration.

Appeal from District Court, Wells County; *Burke*, J.

Action by the Second National Bank of Bucyrus, Ohio, and another against G. H. Werner. Judgment for defendant, and plaintiffs appeal.

Reversed and judgment ordered for plaintiffs.

*Turner, Wright & Lewis*, for Appellants.

Endorsee who takes notes as collateral to secure a previous debt, is not a bona fide purchaser, etc. Porter v. Andrus, 10 N. D. 558, 88 N. W. 567. Note taken as collateral for debt created at that time is "in due course of business." Banks v. Eubanks, 101 S. W. 687; Stewart v. Givens, 107 S. W. 122; Brown v. James, 114 N. W. 591; Galliher v. Galliher, 10 Lea 23, 29; Martin v. Bank, 102 S. W. 131; Belanger v. Robert, 21 Quebec Sup. Ct. 518.

Unless notice was in writing or by registered mail it was void. Fahey v. Esterly Harv. Mch. Co., 3 N. D. 220, 55 N. W. 580; Minn. Thresher Co. v. Lincoln, 4 N. D. 419, 61 N. W. 145; Case Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826.

*Fred Jansonius* (*Youngblood & Whipple*, of counsel), for Respondent.

Form of notice of breach of warranty immaterial if responded to. Fahey v. Esterly Harvesting Co., 3 N. D. 220; Minnesota Thresher Mfg. Co., v. Lincoln, 4 N. D. 419, 61 N. W. 145; Case Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826; Buchanan v. Minneapolis Thresher Mch. Co., 116 N. W. 335.

CARMODY, J. The plaintiffs have joined in bringing this action to forclose a chattel mortgage, and to recover judgment for the two promissory notes, to secure which the mortgage was given. Each plaintiff holds one of the two notes as collateral to an indebtedness due it from the Marion Manufacturing Company of Ohio, the payee named therein. Each note was indorsed and transferred before maturity, and to secure an advancement or loan of money made at the time to the said Marion Manufacturing Company of Ohio, the holder thereof. The loan by the Central National Bank of Battle Creek, Mich., was $5,000, upon which there was due and unpaid at the time of the trial of this action $3,800. On the loan by the Second National Bank of Bucyrus, Ohio, there was due and unpaid at the time of the trial of this action the sum of $2,478. The proof shows the indorsement of the notes by the payee through its treasurer, and the delivery thereof to the respective plaintiffs on September 26, 1906, and the consideration therefor.

The testimony of the officers of the plaintiffs shows that the notes were taken in the regular course of business in good faith, before maturity, and for a valuable consideration. This testimony is undisputed. The defense interposed was a breach of warranty of a threshing machine purchased from the Marion Manufacturing Company, for which the notes were given, and that a return of the threshing machine to the Marion Manufacturing Company at Bowdon, N. D., was made before the commencement of this action. The note held by the plaintiff bank of Battle Creek was due on or before December 1, 1907. The note held by the plaintiff bank of Bucyrus, Ohio, was due on or before the 1st day of December, 1906. Each note contained a provision that a failure to pay any one of which, or the interest thereon, when due rendered the entire

series due and collectible at option of the payee or legal holder. This action was commenced October 2, 1907. Before the commencement of this action, the Marion Manufacturing Company became bankrupts, and a trustee in bankruptcy was appointed therefor. It also appears that before the commencement of this action, and after the notes were indorsed and transferred to plaintiffs, alleged collectors for the Marion Manufacturing Company demanded payment of these notes from defendant. On or about October 23, 1906, a letter, purporting to be written at Fargo by the Marion Manufacturing Company of Ohio by M. R. Archer, was received by the defendant, calling his attention to the fact that such manufacturing company understood that he had pulled the machine back to Bowdon, but that the company would not receive it, and that his note was due December 1, 1906. On the 13th day of September, 1907, an action was commenced by the trustee of the Marion Manufacturing Company against the defendant on these same notes by Turner & Wright, the attorneys for the plaintiff in this action. The action commenced in favor of the trustee was dismissed on the commencement of this action. This action was tried before the court without a jury, who made findings of fact and conclusions of law in favor of the defendant, on which findings and conclusions a judgment was entered, from which judgment plaintiffs appeal to this court and desire a review of the entire case.

The evidence of the defendant as to the breach of warranty of the Marion Manufacturing Company as to the threshing machine, and as to the attempts to collect these notes by other parties than the plaintiffs, and as to the commencement of the action by the trustee of the Marion Manufacturing Company was objected to by the plaintiffs. At the time of the trial, and before the commencement thereof, the defendant called for a jury on the ground that the question at issue was whether the notes were assigned in due course of business before maturity, and that there was nothing in the pleadings that would make it an equitable action; and, further, that this was not an action for foreclosure, and could not be sustained under the pleadings for the reason that the complaint does not state that no proceedings at law or otherwise have been had for the foreclosure of this debt as provided by statute. This request was denied. In this ruling there is no error. It is not necessary to allege in the complaint in an action to foreclose a chattel mortgage that no proceedings at law or otherwise have been had for the recovery of the

debt secured by such mortgage. See article 5, c. 30 (Code Civ. Proc.) Rev. Codes 1905 .

If the plaintiffs are good-faith holders of the notes in question before maturity and for value within the meaning of our negotiable instruments law, then the judgment must be reversed, and the plaintiffs awarded the relief demanded. The trial court found that the notes were given for a threshing machine under a warranty, of which there was a breach, and that the defendant, with the consent of the Marion Manufacturing Company, returned the threshing machine to Bowdon, where the defendant received the same. The trial court also made the following findings of fact: "That the plaintiff, the Second National Bank of Bucyrus, thereafter, and after the maturity of said note, and with notice and knowledge of the breach of warranty and failure of consideration, obtained possession and control of said the first-mentioned note and mortgage, but not in good faith or as an innocent purchaser. That the plaintiff, the Central National Bank of Battle Creek, Mich., thereafter, and after the maturity of the second mentioned note, obtained possession and control of said second mentioned note, but not in good faith as an innocent purchaser, but with full notice and knowledge of the breach of warranty and failure of consideration" —and among other conclusions of law, made the following: "That the plaintiff, the Second National Bank of Bucyrus, Ohio, was not an innocent purchaser in good faith and before maturity of its said note in the premises described. That the plaintiff, the Central National Bank of Battle Creek, Mich., was not an innocent purchaser in good faith and before maturity of its said note in the premises described."

The two last-mentioned findings of fact are wholly unsupported by any competent evidence. The evidence conclusively shows that the plaintiffs were good-faith holders of the notes before maturity and for value. The cashier of each of the plaintiffs testified that on the 26th day of September, 1906, his bank made the loan hereinbefore stated to the Marion Manufacturing Company of Ohio, the Second National Bank of Bucyrus taking the $469 note with other bills receivable of the Marion Manufacturing Company as collateral security, and the Central National Bank of Battle Creek taking the $400 note with other bills receivable of the Marion Manufacturing Company of Ohio as collateral security. This testimony is undisputed. There is nothing inconsistent with plaintiffs' claim

in the fact that the Marion Manufacturing Company was looking after the collection of these notes. It had still an interest in them. It was depending on the payment of these and other notes to pay its indebtedness to plaintiffs. It is not unusual for the payee of a note put up as collateral to look after its collection. Neither is it a suspicious circumstance that plaintiffs' attorneys, Turner and Wright, commenced an action in the name of the trustee of the Marion Manufacturing Company against the defendant for the collection of these notes and the foreclosure of the chattel mortgage, mentioned in the complaint in this action. E. H. Wright, one of such attorneys, testified that, at the time they commenced the first action, they commenced about a dozen actions, most of them in the name of the trustee, and that the action on these notes was inadvertently commenced in his name. As soon as they discovered the mistake, they dismissed that action and commenced the one at bar. Six days before the commencement of the first action, plaintiffs' attorneys on behalf of the Second National Bank of Bucyrus, Ohio, wrote defendant a letter, asking for payment of the $469 note held by such bank. At that time plaintiffs' attorneys had in their possession a large amount of paper, in which the Marion Manufacturing Company was payee; some of it owned by the trustee, and some of it held by different banks.

It follows from what we have said that each plaintiff is the holder of the note assigned and indorsed to it in due course and for value.

The judgment of the district court is reversed, and that court directed to enter a judgment in favor of plaintiffs for the relief demanded in the complaint. All concur.

(126 N. W. 100.)

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THE CITIZENS' NATIONAL BANK OF SISSETON, SOUTH DAKOTA, A CORPORATION, v. P. BRANDEN.

Opinion filed March 31, 1910.

**Appeal and Error — Failure to Open Default — Discretion — Liberal Construction.**

1. Courts favor the trial of cases upon their merits, and, in a case where a trial court has refused to open a default and permit a defense to be made, the reviewing court will not only inquire as to whether the discretion of the trial court in denying the application has been soundly exercised, but will examine the facts shown for the

purpose of determing whether or not, in the interests of justice and right, and under the liberal construction generally given the statute permitting a court to open a default upon a proper showing, the default should not be set aside, and a defense upon the merits permitted.

**Re-Opening Default — "Surprise" — Neglect of Counsel.**

2. 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.

**Opening Default — Excusable Neglect of Counsel.**

3. The neglect of an attorney regularly retained to prepare and serve an answer in a case before the time for answering expires, when occasioned by intense absorption of mind in the conduct of the trial of another case, involving a charge of murder in the first degree, is "excusable neglect," within the meaning of the statute providing for the opening of a judgment entered on default of answer.

**Vacating Judgment — Showing of Good Defense on Merits — Prejudice.**

4. Upon application to vacate a judgment entered by default, where the answer presented discloses a good defense upon the merits, and a reasonable excuse for delay occasioning default is shown, and no substantial prejudice appears to have arisen from the delay, the court should open the default and bring the case to trial.

**Discharge in Bankruptcy as Defense.**

5. The defense of a discharge under the law of bankruptcy of a claim upon which action is brought is not regarded with any greater disfavor by the courts than any other legitimate and meritorious defense.

**Opening Default — Doubt Resolved in Favor of Application.**

6. Where the circumstances shown upon an application to vacate a judgment entered by default are such as to lead a court to hesitate before it refuses to open the judgment, it is better, as a general rule, that the doubt should be solved in favor of the application.

Appeal from District Court, Richland County; *Allen*, J.

Action by the Citizens' National Bank of Sisseton, S. D. against P. Branden. From an order denying defendant's application to open a default judgment against him and permit him to interpose a defense, defendant appeals.

Reversed, with directions.

*W. S. Lauder* and *W. S. Lowry*, for Appellant.

*J. A. Dwyer*, for Respondent.

ELLSWORTH, J. A summons and a complaint, alleging causes of action upon three promissory notes, were served upon defendant and appellant on October 23, 1908. Shortly thereafter he employed W. S. Lowry of Hankinson, as his attorney, and directed Mr. Lowry to arrange for the services of and associate with him in the defense of the action W. S. Lauder, an attorney of Wahpeton. Mr. Lowry made the arrangement directed by his client with Mr. Lauder, and paid him a retaining fee. The understanding, between the two attorneys was that Mr. Lauder should have exclusive charge of the preparation and service of an answer. Mr. Lauder avers that he intended in good faith, within the time allowed by law, to prepare and cause to be served on plaintiff's counsel a formal answer to the complaint. On November 17, 1908, in the course of his professional duties, he went to Napoleon, Logan county, and entered upon the defense of a criminal action, in which the charge against the defendant was murder in the first degree. He was continuously occupied in the trial of this case until December 4, 1908, during which period the entire labor of the defense devolved upon him, and his attention was so absorbed in this work that he forgot about this action, and entirely overlooked the fact that the time for answering therein expired on November 22, 1908, and failed to prepare or serve an answer in this case, or to give the matter attention in any particular whatever, until after the close of the murder trial. In the meantime, on November 27, 1908, the plaintiff in this case applied to the district court for judgment in default of answer, and pursuant to an order for judgment dated as of that day final judgment herein was entered on November 30, 1908. This judgment was docketed, and plaintiff caused execution to issue, and levied it upon certain property of the defendant held under attachment, and proceeded to sell the same. On December 5, 1908, Mr. Lauder was informed for the first time that judgment by default had been entered against the defendant. On the 7th of December thereafter he served upon plaintiff's attorney affidavits showing facts substantially as narrated above, and on an order to show cause applied to the district court to vacate and open up the judgment and permit defendant to interpose a defense to the action. With the affidavits was served a proposed answer in the action verified by the attorney, which alleged as a defense to all the notes declared upon that, on the 18th day of June, 1908, after due and regular proceedings under the bankruptcy laws of the United States in

the United States District Court for the Northern Division of the District of South Dakota, a final order and decree of said court was entered whereby defendant was duly and completely discharged from all debts, claims, and liabilities contained in his schedules in said bankruptcy action, including, among others, the three notes sued upon in this case. The motion to open the judgment was strongly opposed by plaintiff, on the general ground of insufficiency of the application to warrant the relief applied for. Much stress was laid upon the point that no sufficient affidavit of merits was made on the application. A hearing was had before the district court on December 21, 1908, and thereafter, on December 29th, an order was made denying the relief prayed for by appellant. Afterward, on January 30, 1909, on application of appellant, the district court made an order granting leave to appellant to renew his application to open up and defend against the judgment in question. The showing made upon this application was the same as upon the former hearing, except that it included an affidavit of appellant containing, among other averments, one with reference to the merits of the defense that seems to be regarded as sufficient upon that point. A hearing on this second application was had on February 8, 1909, and the district court, on May 14, 1909, made its order, again denying the motion of appellant to open up and permit a defense upon the merits to plaintiff's action. From this order an appeal is taken; the single point of exception being that the court erred in making this final order.

Plaintiff contends, so far as the first order in concerned, that the showing made by appellant was entirely insufficient to warrant the opening up of a judgment entered by default under the conditions shown, and that all material points presented upon the second application were res adjudicata by reason of the order first made. But, aside from this point, and of that presented on the first application of the insufficiency of the affidavit of merits, appellant contends there was on neither application a sufficient showing of cause to warrant any action other than that taken by the district court. We have no doubt of the power of the district court to set aside its order of December 29, 1908, and to permit appellant to renew his motion as though made in the first instance. Whether or not the affidavit of merits made on the first application is sufficient we need not consider, as any deficiency that might then be said to exist was corrected upon the second application. We will therefore con-

sider whether or not the order of the district court of May 14, 1909, is warranted by the considerations presented upon the second hearing.

The district court is authorized, "in its discretion and upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." Rev. Codes 1905, Sec. 6884. In New York, Wisconsin, Vermont, California, Indiana, North Carolina, and several other states statutes in terms exactly or substantially similar to this have been in force for many years; and the courts of these states are in substantial agreement in a general view of the spirit in which they are to be administered, which may be thus expressed: "That the statutes are remedial in character, intended to furnish a simple, speedy and efficient means of relief in a most worthy class of cases; that the 'discretion' referred to is not a mental discretion to be exercised ex gratia, but is a legal discretion, to be exercised in conformity to law." Freeman on Judgments (4th Ed.) Sec. 106. Or, in other words, it is a "legal discretion" which as declared by Chief Justice Marshall, is to be exercised in discerning the course and spirit of the law, which, when discerned, it is the duty of the courts to follow. "It is to be exercised, not to give effect to the will of the judge, but to that of the law." Tripp v. Cook, 26 Wend. (N. Y.) 152.

Pursuant to this construction, an appellate court will first examine a case for the purpose of determining whether or not under the facts shown the discretion vested in the district court has been arbitrarily or oppressively exercised; or, in other words, whether or not its order evinces an abuse of discretion. Unless such abuse of discretion appears, the order, if it opens and vacates a judgment entered by default for the purpose of permitting a meritorious defense, will not as a rule, be disturbed. In a case such as this, however, where the court has refused to open up a default and permit a defense upon the merits, even though the discretion of the trial court does not seem to have been exercised intemperately, arbitrarily, or in a manner palpably erroneous, the reviewing court will extend its inquiry further, and determine whether or not upon the facts shown, in the interests of justice and right under the liberal construction which the spirit of the statute seems to commend, it should disturb an order which has the effect of preventing a de-

termination upon the merits. "Courts almost universally favor a trial on the merits; and, when there has been a reasonable excuse shown for the default, there should be no objection to such a trial to those who are reasonably diligent." Barto v. Sioux City Electric Co., 119 Iowa, 179, 93 N. W. 268.

It is readily apparent that from the very nature of the case it is impossible, except in the most general terms, to frame a rule of procedure applicable to every state of fact presented by an application of this character. A general rule having unanimous support seems to be that, if the moving party makes a clear and unquestionable showing that he has a good defense or cause of action on the merits, of the benefit of which he has been deprived without fault on his part, the trial court cannot, in the exercise of a sound judicial discretion, deny him the relief prayed for; and, if it has done so, its action will be reversed. On the point, however, of what constitutes fault on the part of the moving party, and what may be said to constitute surprise, mistake, inadvertence, and excusable neglect, the cases are in irreconcilable conflict. The New York and North Carolina courts hold that, if the party himself is free from fault, the ignorance, forgetfulness, or neglect of his attorney will not be imputed to him to such degree as to prevent relief. The liberality of the courts of New York particularly in the matter of opening judgments has been so great as to provoke criticism by a learned text-writer, who declares that judgments in that state "seem to be regarded not as inviolate and enduring testimonials, but as temporary structures to be torn down, remodeled, or rebuilt whenever the builders feel competent to improve the original workmanship or design." Freeman on Judgments (4th Ed.) Sec. 111. In the courts of states other than the two named the neglect of counsel regularly employed and having charge of the case is uniformly treated as the neglect of the party, and no mistake, inadvertence, or neglect attributable to the attorney can be successfully used as a ground for relief, unless it would have been to the same degree excusable in the client. Some of the North Carolina cases regard ignorance or neglect on the part of the attorney as in the nature of "surprise" within the meaning of the statute, and afford relief from the judgment on that ground. Griel v. Vernon, 65 N. C. 76; Taylor v. Pope, 106 N. C. 267, 11 S. E. 257, 19 Am. St. Rep. 530.

It will be observed that the facts of this case do not show ignorance of rights, mistake of law, or wanton neglect, either on the

part of attorney or party. Appellant himself is without fault, as he diligently proceeded, on being served in the action, to employ experienced and competent attorneys, and placed the matter of preparing and presenting his defense entirely in their hands. Mr. Lowry, after making the arrangement shown to have been made with Mr. Lauder, might, we think, depend with reasonable assurance on the fact that the elder and more experienced counsel would, within the proper time, see to the preparation and service of an answer. Mr. Lauder, as is well known, is an attorney of high professional character and large experience, having an extended and widely diversified general practice. While it is urged that he might and should have prepared the answer, and served it before he entered on the trial of the case of homicide on November 17, 1908, yet it is apparent that in the discharge of the manifold duties of his practice he might, without undue hazard of his client's rights, have postponed such work to within five days of the expiration of time for answering. After that time his failure to prepare and serve the answer resulted not from carelessness or neglect on his part, but by intense absorption of mind in a matter which, from its nature, not only stirred his sympathies, and appealed strongly to his sense of humanity, but called as well for the undivided exercise of all his professional powers. While his failure to perform within the proper time the work he had undertaken in this case was still neglect, under the peculiar circumstances we think, in the exercise of a just and liberal discretion, it should be regarded as excusable. As suggested by counsel for appellant, neglect occasioned by guarding the life of a client is no less excusable than that resulting from watching at the bedside of a sick relative, or from the serious illness of the attorney himself, as in Nye v. Swan, 42 Minn. 243, 44 N. W. 9, and Tidwell v. Witherspoon, 18 Fla. 282. Further than this there is little question but that under the theory of the cases above referred to, any neglect in the ordinary procedure of the case, after a party had shown solicitude sufficient to impel him to employ counsel of Mr. Lauder's character, may be said to be a surprise to the party, from which he is entitled to relief by express terms of the statute. The rule of procedure announced by the Supreme Court of Minnesota in a case such as this appeals to us as liberal, sound, and calculated to promote justice; such rule being "that, where the answer discloses a good defense upon the merits, and a reasonable excuse

for delay occasioning default is shown, and no substantial prejudice appears to have arisen from the delay, the court should open the default and bring the case to trial." Barrie v. Northern Assurance Co., 99 Minn. 272, 109 N. W. 248.

The contention that a discharge of the debt sued upon by a court of bankruptcy is not a meritorious defense is in this state disposed of. Such defense is not more technical or less favored by the courts than that of the statute of limitations which is held by this court to be a meritorious defense. Wheeler v. Castor, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746. The plaintiff in a trial upon the merits will be given opportunity to show a subsequent promise to pay the debt. In any event, the court could not, in an application of this character, inquire into the merits of the defense. Kitzsman v. Minn. Threshing Co., 10 N. D. 26, 84 N. W. 585. As the proceeds of the property taken upon attachment have been paid into court, and are held subject to the event of this action, no substantial prejudice can accrue to plaintiff by a trial on the merits. While the facts shown cannot be said to afford strong and unmistakable ground for relief, and the discretion of the trial court in denying the motion does not seem to have been harshly or arbitrarily exercised, we regard it as a case in which the circumstances are such as to lead a court to hesitate before it refuses to open the judgment; and in such case "it is better, as a general rule, that the doubt should be solved in favor of the application." Grady v. Donahoo, 108 Cal. 211, 41 Pac. 41.

The order of the district court is reversed, and it is directed to vacate the judgment dated November 27, 1908, and to permit the defendant and appellant to file the answer served herein, and to defend the action. The costs of this appeal will abide the event of the action. All concur.

MORGAN, J., concurs in the result.

(126 N. W. 102.)

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F. MAYER BOOT & SHOE COMPANY v. R. J. FERGUSON.

Opinion filed March 24, 1910.

**Bankruptcy — Attachment of Exempt Property — Discharge.**

1. On authority of Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770, *held*, that the lien of an attachment on personal property of a bankrupt, set aside as exempt in bankruptcy

proceedings, is not discharged by a discharge in bankruptcy and may be enforced through a modified form of judgment as against the property on which it has been created.

**Discharge in Bankruptcy — Effect upon Attachment of Exempt Property — Effect upon Balance.**

2. The judgment in such case, although in form a judgment for money, but providing that it shall be satisfied out of the property attached and not otherwise, protects the defendant against any balance which may remain unpaid after sale of the attached property under execution.

**Attachment — Verdict — Judgment Against Property Attached — Objections.**

3. In an action brought in the district court and having for its purpose the ascertainment of the amount due the plaintiff from the defendant and the satisfaction thereof out of the property for the purchase price of which the debt was created, a verdict in accordance with the issues made by the pleadings and identifying the property attached for the purchase price, the complaint having contained an allegation regarding the attachment and that the property attached was the identical property for which the debt was incurred, and no motions having been submitted in the trial court to strike out or in any way directed toward the complaint, and the case having been tried on the theory that the identity of the property was an issue, an objection to a verdict containing such finding, made after it is ordered and renewed after it is returned, comes too late.

**Sales — Action for Price — Sufficiency of Evidence.**

4. Conceding, but not holding, that certain evidence of a witness M. should not have been received or considered by the court, it is held that, disregarding the evidence of such witness entirely, the personal property described in the complaint was fully identified as property purchased from the plaintiff by the defendant and for the purchase price of which the indebtedness sued upon was contracted.

**Trial — Inadequacy of Objections — Verdict.**

5. General objections to questions and to a verdict that fail to point out the specific grounds of the objections are inadequate.

Appeal from District Court, Cass County; *Goss*, Special J.

Action by the F. Mayer Boot & Shoe Company against R. J. Ferguson. Judgment for plaintiff, and defendant appeals.

Affirmed.

*M. A. Hildreth*, for Appellant.

*A. G. Lacy*, for Respondent.

SPALDING, J. This is an appeal from a judgment of the district court in plaintiff's favor. The complaint alleges that the plaintiff

is a foreign corporation; that on the 6th day of June, 1906, and the 19th day of July, 1906, it sold and delivered to the defendant certain goods, wares, and merchandise which were of the agreed value of $621.60; that no payment has been made except the sum of $50, paid October 25, 1907. Then follows a description of the goods sold. The fourth paragraph of the complaint alleges that this action is brought to recover the purchase price for personal property sold and delivered by plaintiff to defendant, and that the defendant has on hand certain property, the description of which follows, which property was sold by plaintiff to defendant, and that the defendant claims the same exempt from the operation of the acts of Congress relating to bankruptcy and by virtue of the laws of North Dakota. The prayer is for judgment for the sum of $571.60 and interest thereon from the 19th day of July, 1906. The defendant answered admitting the incorporation but denying each allegation except as expressly admitted, qualified, or explained, and pleaded that the property described in the fourth paragraph was exempt under the laws of the state of North Dakota, and, further, that prior to the commencement of the action the defendant had been duly adjudged a bankrupt in the federal court for the Southeastern district of North Dakota pursuant to the federal bankruptcy law, and that he had been duly discharged from all his debts and obligations, including the debt and obligation set forth in the complaint. No motions were submitted with reference to the complaint, and the parties went to trial on the 13th day of February, 1908, whereupon evidence was submitted showing the contract price of the goods, which consisted of shoes; that an attachment had been levied thereon in accordance with paragraph 8 of section 6938, Rev. Codes 1905, which provides that, in an action to recover the purchase price for personal property sold to the defendant, an attachment may be issued and levied upon such property, and section 7126, Rev. Codes 1905, which provides that no property shall be exempt from execution or attachment in an action brought for its purchase price or any part thereof. The plaintiff submitted the evidence of several witnesses to show the identity of the goods attached and the purchase price thereof. The defendant submitted no evidence. It was also shown that in the bankruptcy proceedings the goods in question had been set aside as exempt to the defendant prior to the attachment. On both parties resting, counsel for plaintiff submitted a motion to instruct the

jury to return a verdict in favor of the plaintiff and against the defendant for the sum of $571.60, and interest at the rate of 7 per cent. per annum from the 19th day of July, 1906, and for a special finding that the property described in the complaint and in the sheriff's notice of levy was the identical property purchased by defendant from plaintiff. The motion was based upon the ground that the undisputed evidence showed that the defendant purchased from the plaintiff the goods mentioned, and that they amounted to $621.60; and that no part of the same had been paid except the sum of $50, and that the testimony regarding the identity of the property was uncontradicted. The court granted the motion, to which the defendant excepted. After it was granted, the defendant objected to any special finding being made by the direction of the court, because the issue involved the credibility of witnesses who had testified as to the identity of the property, and that that was a question of fact for the jury to pass upon. After the verdict was returned, counsel for defendant objected to its form and to the special finding on the ground that the court had no power to direct a special finding of the character described in the verdict, and that such finding was no part of the verdict. These objections were overruled and exceptions allowed.

The facts disclosed with reference to the commencement of this action and the bankruptcy proceedings are as follows: Defendant filed his petition to be adjudged a bankrupt on the 29th day of December, 1906, and was adjudicated a bankrupt on the 2d day of January, 1907. This action was commenced on the 24th of April, 1907. Defendant's petition for his discharge in bankruptcy was filed on the 25th day of April, 1907, and he was discharged on the 25th day of May, 1907. It will thus be seen that the relative dates regarding the commencement of this action and the different acts in the bankruptcy proceedings were identical with the respective dates in the case of Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770. The record contains a notice of motion for security for costs on the ground that the plaintiff is a foreign corporation, which motion bears date March 23, 1908; but no service is shown in the abstract, which shows the entry of an order denying the application. The denial of this application is assigned as error. In view of the decision of this court and that of the trial court, and without considering the question of waiver which was argued, we fail to see any prejudicial error to the de-

fendant by the denial of such application, and, in the absence of service of notice of the application, it was not error to deny it.

A motion for a new trial was submitted and denied on the 30th day of June, 1908, and on the 12th day of September, 1908, judgment was entered in favor of the plaintiff and respondent, wherein it was adjudged that the property levied on in the attachment proceedings was the identical property described in the complaint and sold by plaintiff to defendant. It was also adjudged and determined that the plaintiff have and recover of the defendant $627 damages and $22.87 costs to be satisfied out of the property attached and then in the custody of the sheriff of Cass county, so far as said property will satisfy the amount, and not otherwise, and personal judgment for the costs. No point is made on the fact that personal judgment was entered for the costs. With reference to the legality of such a judgment, the right of the plaintiff to an attachment for purchase money and as to the property levied on for the purchase price not being exempt under our statute and the procedure followed in this case generally, Powers Dry Goods Co. v. Nelson, supra, is authority. The lien of attachment on personal property of a bankrupt set aside as exempt in the bankruptcy proceedings is not discharged by a dischage in bankruptcy, and such lien may be enforced through a modified form of judgment as against the property on which it has been created; and the judgment in this case, although in form a judgment for money against the defendant providing that the indebtedness found by the court should be satisfied out of the property attached so far as such property would satisfy the amount found due, and not otherwise, is adequate to protect the defendant as against any balance which may remain unpaid after the sale of the attached property under execution, in case of plaintiff's failure to satisfy the judgment for such balance. After sale on execution and application of the proceeds, the defendant is entitled to a complete satisfaction of the judgment. The judgment in this case amounted, in effect to a judgment that the defendant purchased of the plaintiff goods at the agreed price stated, and that no part of it had been paid except the sum of $50, and that on the sale of the attached property and the application of the proceeds toward the liquidation of the purchase price plaintiff's remedy would be exhausted. While it may have been unnecessary for the plaintiff to plead the fact of attachment and the description of the goods attached, this was only an irreg-

ularity or surplusage which cannot be objected to for the first time in this court. Jewett Bros. v. Huffman et al., 14 N. D. 110 103 N. W. 408. After the case had been tried on the theory that the identity of the property was in issue, an objection to a finding on that fact came too late. In addition to the authority of the Nelson Case cited, we may say that the rights of the parties are analogous to those of a nonresident defendant having property in this state, against whom an action is brought for money, on a contract, and jurisdiction acquired by attachment of such property and not otherwise. It is well settled that in such case the judgment is satisfied by the sale of the attached property. Anderson v. Goff, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34; Blanc v. Paymaster Mining Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Kemper-Thomas Paper Co. v. Shyer, 108 Tenn. 444, 67 S. W. 856, 58 L. R. A. 173; Salomonson v. Thompson, 13 N. D. 182, 101 N. W. 320, and cases cited.

Appellant contends that this is an action to recover specific property, and that, having elected to take a money judgment against the defendant, plaintiff waived its right to recover the specific property mentioned in the complaint, and that the verdict is fatally defective in not passing upon the value of the property. In these contentions he is in error. This is not an action for the recovery of specific personal property. While the proceedings were somewhat irregular under the authority of Jewett Bros. v. Huffman et al., supra, yet the purpose of the allegations of the complaint relating to the property was to anticipate and defeat the defendant's defense based upon his discharge by the bankruptcy court, and the irregularity, if any, was not of such a nature as to be fatally prejudicial when suggested for the first time in this court. Substantially every question asked by the plaintiff on the trial was objected to by the defendant, and a great number of errors are assigned in overruling such objections. A great majority of these objections are too general, in that they fail to point out specifically wherein the questions are objectionable, and, to such objections upon which error is assigned, no further reference need be made, as this court has repeatedly held that general objections will not be noticed. A large number of other objections went to the competency of the evidence as to the identity of the goods, and with reference to those appellant changes his attitude, and, after objecting to showing the identity, says that the verdict does

not pass upon the issue as to this being the specific property sold defendant and unpaid for. We have passed upon some of these objections already, and it is only necessary in this connection to refer to the question of the value of the property. Its value was not in issue. The question was whether there had been an agreed purchase price, and the evidence of the witness Rosenquist who sold the property is conclusive on that subject. The testimony shows that the price was made with reference to the day on which the orders were given, but that it was agreed between him and the defendant that the prices were subject to change when the goods were shipped; that the quoted prices were those current when the goods were ordered (that is, that he made a price with the understanding that it was subject to change by the house to whatever the price might be at the time of delivery); and that in accordance with this agreement certain changes were made from the specific prices quoted to the defendant on a few articles. We think the evidence of an agreed price is adequate. The changes, in any event, were only trivial. No claim was made that the property belonged to the plaintiff because it had not been paid for.

Error is assigned upon the reception and consideration of the testimony of one Mead. Without passing upon it in detail, it is sufficient to say that Mead was in the employ of the attorneys for the plaintiff; that he went to the defendant's store, and he testified that he made a list of the stock which he found there, and which had been purchased from the plaintiff, and which corresponded to the list which he previously had of such property, upon a piece of an old paper sack. When inquired of regarding the production of the piece of sack, he testified that he had made a copy of it, and that the piece of sack had been destroyed because it was too large to place in the files of the case. His testimony on this subject was positive. Objection was interposed to the admission of the copy in evidence and sustained by the court. The next morning, on the trial being resumed, he produced what he testified was the identical piece of sack with his original figures, and testified that in examining the files in the bankruptcy case, to which reference has been made, he had found this piece of paper folded inside another paper, and that he was mistaken about having destroyed it. Counsel for appellant sought to reflect upon the veracity of Mead on this subject by reason of these facts, and insisted that the court had no legal right to consider his testimony; in substance,

that Mead impeached himself. We do not regard his testimony in that light. He may have been unduly positive of having destroyed it, but the paper produced conformed exactly to the description which he had given on the previous day of the paper on which he made the original figures, and we are satisfied that he was simply mistaken in his evidence on the first day. He had been unable to find the paper where it belonged, or elsewhere, and had concluded that he had destroyed it.

With reference to the identity of the goods as a portion of those sold and for which recovery is sought, we may summarize the evidence as showing the identity by showing the abbreviations peculiar to the shoe trade and which were extended by the salesmen and others, and the identity was sufficiently and conclusively established by his testimony, that of the deputy sheriff, of Hagen, a disinterested shoe man, and others. Finally, if the testimony of Mead should be entirely disregarded, there remains adequate and uncontradicted evidence of the identity of the goods. The deputy sheriff took Hagen to the store of appellant and inquired where the Mayer goods were and was directed to the shelves on one side of the store. The evidence shows that these shelves contained no goods of the kind except the Mayer goods. They were removed from the shelves and placed upon the counter and checked over and compared with the descriptions which the sheriff had in his notice of levy. The plaintiff never sold the defendant anything except the two bills in question, so no difficulty arose from his having in possession other goods purchased from the respondent for which he had paid.

We find no material conflict in the evidence submitted by the plaintiff, and the court was justified in taking the case from the jury. It is unnecessary to pass upon the form of the verdict. If its form was material, in view of the case having been taken from the jury, the objections are not specific as to its defects. They should have pointed out to the court wherein it was improper in form or defective. The verdict was in harmony with the issues raised by the pleadings and the theory on which the case had been tried, and, if not in proper form, was cured by the judgment.

The judgment of the district court is affirmed. All concur.

(126 N. W. 110.)

## J. E. MARTIN v. JESSE E. ROYER AND LOVINA ROYER.

Opinion filed March 18, 1910.

**Landlord and Tenant — Cropping Contract — Rights of Purchaser of Property.**

Under a contract whereby the owner of land agreed to let the same to another to be farmed on shares pursuant to a written contract, the lessee or cropper went into possession of the land for cropping purposes. Thereafter, and before any rights under the contract had accrued to the owner of the land, he conveyed the same to the defendant without any reservation as to matters connected with the contract. There were 235 acres plowed on the land when the contract was entered into. In the contract it was agreed that the same number of acres should be plowed after the crop was removed, or, if the owner did not desire to have the plowing done, the cropper should pay him $1.25 per acre from his proceeds of the crop in lieu of such plowing. The cropper or tenant did not plow the land. The owner of the land brought an action against him for a recovery of the money to be paid in lieu of the plowing, and recovered judgment and the cropper paid the same to the owner of the land, the plaintiff in this suit. The defendant pleads, as a counterclaim to the amount due on a mortgage given to the plaintiff for the purchase price of the land, the amount paid to plaintiff, which he claims should have been paid to him. *Held*, (1) That the collection of the money was wrongful on the plaintiff's part. (2) That the defendant is entitled to recover it as money had and received, which in equity and good conscience should not be retained; and also under section 4802, Rev. Codes 1905. (3) That defendant is entitled to recover same in this action notwithstanding there was no express promise to pay the same by the plaintiff. (4) That the money to be paid if the plowing was not done was compensation for the use of land or rent, and passed to the defendant as an incident to the deed, although the technical relation of landlord and tenant may not have existed between the parties to the contract. (5) Whether the contract was a lease or a cropping contract, not decided.

Appeal from District Court, Foster county; *Burke*, J.

Action by J. E. Martin against Jesse E. Royer and another. From a judgment granting inadequate relief, plaintiff appeals.

Affirmed.

*C. B. Craven*, for appellant.

There is a distinction between cropper and tenant. 8 Am. & Eng. Enc. Law, 324, and cases cited; Lewis v. Owans, 124 Ga. 228, 52 S. E. 333; Garrick v. Jones, 2d Ga. App. 382, 58 S. E. 543; Bourland v. McKnight, 79 Ark. 427, 96 S. W. 179; Goodson v. Watson, 54 S. E. 84; Moore v. Linn, 91 Pac. 910; Loveless v. Gil-

lian, 70 S. C. 391, 50 S. E. 9; Morgan v. Rummerfield, 117 Wis. 620, 98 Am. St. Rep. 951; 12 Cyc. 979, and cases cited under note 17; 12 Cyc. 980, and cases cited under note 20; Whithed v. St. Anthony & D. El. Co. et al., 83 N. W. 238.

Transfer of lease does not carry right to accrued rent. 24 Cyc. 1173, 1175; Tremont and W. Hotel Co. v. Gammon, 91 S. W. 337; Kingsley v. Sauer, 4 N. Y. App. Div. 507; Cobb v. Johnson, 126 Ala. 618; 24 Cyc. 928; Payton v. Kennedy, 70 Miss. 865; Miners Bank v. Heilner, 47 Penn. St. 452; Miller v. Winchell, 70 N. Y. 437.

Where a debt is claimed by two persons not in privity with each other, and the debtor pays to one, while the other is entitled to it, the latter cannot recover of the former. Hathaway v. Town of Cincinnatus, 2 N. Y. 444; Butterworth v. Gould, 41 N. Y. 450; Patrick v. Metcalf, 37 N. Y. 332; Corey v. Webber et al., 55 N. W. 982.

*T. F. McCue,* for respondents.

Unaccrued rent passes with sale of rented premises unless specifically reserved. Whithed v. St. Anthony & Dak. El. Co., 9 N. D. 224, 83 N. W. 238.

Royer can recover from Martin, who converted the amount due for plowing. Cutler v. Fanning, 2 Iowa, 580; Allison & Crane v. King, 25 Iowa 56; 2 Enc. of Law, 1079; Olston v. Gillespie, 78 Ga. 665; Chamberlin v. Gilman, 14 Pac. 107; Brand v. Williams, 13 N. W. 42.

Where a party who retains money to which he is not entitled, the law creates a promise to pay. Abel v. Love, 17 Cal. 234; People v. Houghtaling, 7 Cal. 348.

MORGAN, C. J. This is an action to foreclose a real estate mortgage. In April, 1903, the plaintiff was the owner of the land described in the complaint, and entered into a contract in writing with one Southerland, under which the land was to be farmed during the season of 1903. After the execution and delivery of the contract for the farming of said land, the plaintiff conveyed it to the defendant, and, to secure payment of a part of the purchase price, he executed a mortgage upon the land to the plaintiff, and this action is brought to foreclose the mortgage given to secure the note representing the balance due upon the purchase price of the land.

There is no dispute or controversy between the parties as to the amount due upon the mortgage. The controversy relates to a question as to the construction of the contract between the plaintiff and Southerland for the farming of the land during the farming season of 1903, and whether certain money due thereunder belongs to the plaintiff or to the defendant. The contract was what is commonly denominated a "cropping contract." It provided that the party of the first part (Southerland) was to well and faithfully till and farm the land during that season, according to the usual course of husbandry, and sow or plant it as the second party should direct, and was to furnish all the machinery and hired help used in the cultivation of the same. The owner of the land agreed to furnish all the seed and to pay one-half of the threshing bill. There were other stipulations in the contract covering the shipment of the grain raised and the title thereto until division, and as to other matters which we deem it unnecessary to set forth here. The contract also contained the following stipulation: "It is expressly agreed and understood that there is now plowed and ready for crop 235 acres, which the party of the first part agrees to plow an equal number of acres as soon as the crop is removed in the fall, and if the party of the second part desired it to be plowed, if not plowed, said first party shall pay said second party $1.25 per acre from the proceeds of the crop aforementioned, for the 235 acres now plowed."

It is in reference to the latter clause of the contract that there is any dispute or issue raised in this suit. Southerland did not plow back the 235 acres referred to in the contract. The plaintiff brought an action against him to recover the stipulated sum to be paid if such plowing was not done, and recovered judgment in said action. Southerland paid the amount of said judgment to the plaintiff. It is the contention of the defendant that the collection of said money was wrongful, and that the same should have been paid to him by Southerland. It is the contention of the plaintiff that he was entitled to the money under said contract. The sole question, therefore, for our consideration, is whether the counterclaim, amounting to $293.25 was correctly allowed by the trial court. The trial court found as a fact that it was agreed when the deed was given that Royer, the grantee therein, would be subrogated to the rights of Martin in respect to everything under the lease or contract for the cropping of the land in question. It is,

however, claimed by the appellant that this finding is not sustained by competent evidence. In our opinion this fact becomes immaterial so far as evidence extrinsic of the deed is concerned. It is undisputed that the deed conveyed all of Martin's title to and ownership in the land to the defendant. It is also conceded that the deed contained no reservation whatever, and that plaintiff had expressed no option that the money be paid in place of plowing the land when the deed was delivered. There is no claim that this money had been paid before the deed was delivered, and no question raised as to the proceeds of the crop not being sufficient. From these facts, we think it followed, as a conclusion of law, that the right to this money was assigned to the defendant and passed to him by virtue of the deed. This is not denied, so far as Martin's share of the crop is concerned. The contention of the defendant is that so far as to the money to be paid if the plowing was not done, a different rule prevails. He claims that this money was personal property, entirely disconnected from the land or contract for cropping or working on shares, and that the same was not assigned by the deed.

Whether the contract is technically a lease or a contract of employment, or one of adventure, we need not determine on this appeal. The result will be the same whatever that contract may technically be as a matter of law as to its general features. It is certain that the money due on the failure to do the plowing represented the compensation for the use of the plowed land for crop purposes. Rent is compensation for the use of land. It is immaterial whether it is to be paid in money or services. Whithed v. St. Anthony Ele. Co., 9 N. D. 224, 83 N. W. 238, 50 L. R. A. 254, 81 Am. St. Rep. 562; Wegner v. Lubenow, 12 N. D. 95, 95 N. W. 442. The plaintiff engaged with Southerland to have the land cropped during the year 1903, and for the use of the land was to receive a share of the crop. Some of the land was already plowed when the contract was made, and for the use of the plowed land Southerland bound himself to plow the same number of acres for the next year, or, at plaintiff's option, pay $1.25 per acre in money. The plowing, or a fixed sum in lieu thereof, was compensation for the use of the land, and went with the land unless specially reserved or excepted. Whatever Southerland was—that is, whether a tenant, cropper, or employe—in a strict technical sense, it seems clear that he was to do the plowing as compensa-

tion for the use of the plowed land, and it also seems clear that the right to it was assigned to the defendant by the deed to the same effect as though the technical relations of landlord and tenant had existed between the plaintiff and Southerland. This was rent, whether the technical relation of landlord and tenant existed under the contract by virtue of its other terms or not, and it passed to the defendant with the title to the land. In legal effect, this money was rent under the definition given. It belonged to the defendant and passed to him by virtue of the deed just as the crop did.

So far as this promise to plow is concerned, it was like a covenant to pay rent in a lease, and went with the land. In such a lease this court has held that a covenant to leave land in like condition is a covenant in favor of the owner of the land, and passes with the title (Nor. Pac. Ry. Co. v. McClure, 9 N. D. 73, 81 N. W. 52, 47 L. R. A. 149), although that case pertained to a lease in its legal signification. What is there said, however, concerning rent, applies with great force to the question under consideration here.

That the right to the rent which is to accrue passes to the grantee of the land as an incident of the deed is sustained by the following authorities, and many others: 24 Cyc. p. 1172, and cases cited; Allan v. Hall, 66 Neb. 84, 92 N. W. 171; West Shore Mills Co. v. Edwards, 24 Or. 475, 33 Pac. 987; Pelton v. Place et al., 71 Vt. 430, 46 Atl. 63. Our conclusion upon this point is that the plaintiff wrongfully accepted this money, and that he should restore it to the defendant.

It is however, contended that the defendant has no right of recovery for this money from the plaintiff for the reason that Southerland is the party responsible therefor to the defendant, and that there is no privity of contract between the defendant and the plaintiff under the contract or otherwise. The defendant is not claiming this money as a party to the contract. He claims that the plaintiff wrongfully received money belonging to him, and that the plaintiff should pay it to him. It is a counterclaim for money had and received, which in equity and good conscience the plaintiff should pay or allow as a credit upon the amount due upon the mortgage pleaded in the complaint. Under section 4802, Rev. Codes 1905, the defendant acquired the same rights to this money by virtue of the deed, as the plaintiff had before the land was

conveyed, but without this section the defendant's right to recover it could not be successfully questioned.

That no privity of contract existed between the parties to this suit is immaterial under such circumstances, and it is immaterial that no promise was made by the plaintiff to pay the same. By accepting the money wrongfully which belonged to the defendant, and which did not belong to the plaintiff, the law will imply a promise to repay, and the person accepting the money wrongfully will not be heard to assert that no privity of contract exists. Having accepted the money, and failing to show any legal or equitable right thereto, the defendant can recover, though an express promise to repay it does not exist. The law presumes such a promise, however. The fact that an action might have been brought against Southerland, the cropper, is immaterial, conceding, for this purpose, that such an action would lie.

The following authorities sustain the principle that the absence of contractual relations or the absence of a promise to pay is immaterial in this class of actions: Ela v. Express Co., 29 Wis. 611, 9 Am. Rep. 619; Byxbie v. Wood, 24 N. Y. 607; Brand v. Williams, 29 Minn. 238, 13 N. W. 42; Wittmann v. Watry, 45 Wis. 495.

The cases cited by plaintiff are not in point, not being cases for the recovery of money had and received, which ought, in good conscience, to be paid to the one entitled thereto.

The trial court sustained the counterclaim and deducted the amount thereof from the sum due on the mortgage, and gave costs to the plaintiff.

This judgment is affirmed. All concur.

(125 N. W. 1027.)

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NORTHERN STATE BANK OF GRAND FORKS, A CORPORATION, v. JAMES BELLAMY, SR.

Opinion filed March 21, 1910.

Rehearing denied April 14, 1910.

**Bills and Notes — Contract and Liability of Guarantor.**

1. The contract of one who indorses a promissory note in the words, "For value received, I hereby guarantee the payment of the within note and hereby waive presentment, demand, protest and notice of protest," and who receives no consideration or benefit from the loan

made to the principal debtor upon the execution of said note, is that of guarantor of payment, and his liability must be measured by the settled rules applicable to that relation.

**Bills and Notes — Guaranty — Effect of Extension — Construction of Negotiable Instrument Act.**

2. Under the law in force prior to the enactment of chapter 113, Laws 1899, relating to negotiable instruments, an extension of time of payment made by the holder of a promissory note to the principal debtor for a valuable consideration and without the knowledge or consent of a guarantor of said note, operated to release the guarantor from liability. This principle is still in force, unless it is changed by the adoption, as part of the law of 1899, of section 6422, Rev. Codes 1905, providing the terms upon which a person secondarily liable upon a negotiable instrument is discharged.

**Guaranty — Guaranty of Payment of Bill or Note — Person Secondarily Liable.**

3. The liability of a guarantor of payment is predicated wholly upon the term of his contract of guaranty, which is separate and distinct from the terms of the instrument on which it is indorsed. He is not a joint contractor with the principal debtor, and does not agree to make the debt his own, but only to answer for the consequences of his principal's default. His contract, while it may result in requiring him to pay the note, is secondary, within the meaning of section 6494, Rev. Codes 1905.

**Bills and Notes — Guarantor — Words and Phrases — "Primarily Liable" — "Secondarily Liable."**

4. The terms "primarily liable," and "secondarily liable," as used in section 6494, Rev. Codes 1905, have reference to the remedy provided by law for enforcing the obligation of one signing a negotiable instrument, rather than to the character and limits of the obligation itself. The remedy against a guarantor, depending as it does upon his separate contract of guaranty, and not upon the terms of the instrument, is not primary and direct, but collateral and secondary.

**Bills and Notes — Guaranty — Extension of Time of Payment — Release of Guarantor — Statutory Construction.**

5. A guarantor of payment of a negotiable instrument, not being by the terms of the instrument absolutely required to pay the same, is secondarily liable thereon; and an extension of time to the principal debtor without his consent operates, under section 6422, Rev. Codes 1905, as under the law formerly in force, to release him from liability.

Appeal from District Court, Grand Forks county; *Templeton*, J.

Action by the Northern State Bank of Grand Forks against James Bellamy, Sr. Judgment for plaintiff, and defendant appeals.

Reversed, and action dismissed.

*Hawver & Warmer* and *Guy C. H. Corliss,* for appellant.

*Scott Rex,* for respondent.

ELLSWORTH, J. The record on appeal in this case consists of the judgment roll alone, and from the finding of fact made by the trial court it appears that on February 17, 1906, the Drayton Milling Company, a corporation, made and delivered to the plaintiff its promissory note for $6,000, which note was indorsed as follows: "Pay Northern State Bank, Grand Forks, N. D., or order. For value received, I hereby guarantee the payment of the within note and hereby waive presentment, demand, protest and notice of protest." This writing upon the back of the note was signed by the defendant and appellant, Bellamy, and several others. The sum of $2,000 and interest on this note to April 1, 1907, was paid by the maker. On October 24, 1906, and again on December 17, 1906, plaintiff, without the knowledge or consent of appellant, Bellamy, for a valuable consideration, entered into an agreement with the defendant Drayton Milling Company, by the terms of which it was agreed that the payment of the note should be extended for a period, in each case, of ninety days. At the expiration of the extended time, Drayton Milling Company, the maker of the note, being in default of the balance due upon it, suit was commenced against it and the parties signing the guaranty on the back of the note. Appellant answered in this suit, setting out facts substantially as hereinbefore narrated and claimed as a defense to the action that by the extension of time of payment made to Drayton Milling Company, the principal debtor, he was released from liability upon his guaranty. The trial court held that appellant was in law a surety, and as such primarily liable upon the note sued upon, and was therefore not released from liability by the extension of time allowed Drayton Milling Company. The only question presented for determination upon this appeal is the correctness of this holding.

The trial court found that appellant received no part of the consideration for the loan made by plaintiff to Drayton Milling Company, nor was the loan for his benefit; that he was not the principal debtor in said loan, or in any manner liable upon the note except by signing the agreement upon the back, the wording of which is above set out. His liability was, therefore, in no manner distinguishable from that of an absolute guarantor of payment,

and must be measured by settled rules applicable to that relation.

Under the law in reference to negotiable instruments in force prior to the year 1899, it is conceded by counsel for respondent that the act of plaintiff in extending the time of payment to the principal debtor without the knowledge or consent of appellant exonerated him from liability. Section 6092, Revised Codes 1905; Foster County State Bank v. Hester, 119 N. W. 1044. In 1899 a new law upon the subject of negotiable instruments was enacted by the legislature, which, as respondent contends, contains certain provisions that alter and superseded the rules in force prior to that time governing the relator of guarantor. Section 6422, Rev. Codes 1905, which is a part of this new enactment, is as follows: "A person secondarily liable upon the instrument is discharged: * * * By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." As this section provides in express terms the means by which a party may be released from the obligation of a negotiable instrument, its provision must be regarded as precluding such relief to all parties not within the class described. The term "secondarily liable" is defined by section 6494, also a part of the new law, in these words: "The person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are secondarily liable." It seems clear that, if by the adoption of the new law a guarantor of payment can be said to be included in the class of parties primarily liable on the instrument, appellant would not be released from his obligation by the extension of time given to Drayton Milling Company as such act now operates to release only those secondarily liable. The question of appellant's liability, therefore, depends wholly upon the construction to be given the section defining the term "person primarily liable." The theory of the trial court seems to have been that the liability of appellant was in law co-extensive with that of a surety upon the note; that a surety being, by the terms of the instrument, absolutely required to pay the same, is primarily liable thereon and is not released by an extension of time granted to the maker without his consent; and that, the

liability being the same, a guarantor and surety might be proceeded against under the same rule.

That a surety under a law of negotiable instruments uniform with that of our state is primarily liable has been held by several recent cases. Vanderford v. Farmers,' etc., Nat. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129; Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875; Cellers v. Meachem, 39 Or. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133. Whether or not such rule of procedure shall apply in this state is not necessary to a decision of this appeal Neither is it necessary that we decide whether or not the ultimate liability of a guarantor under our present law differs in a substantial degree from that of a surety. The question whether or not a guarantor is a person primarily liable within the meaning of the definition of section 6494, Rev. Codes 1905, is, as we view it, dependent upon other considerations.

The nature and character of the contract of guaranty is an important factor in the determination of this point. "Guaranty is an undertaking by one person that another shall perform his contract or fulfill his obligation, and that in case he does not do so the guarantor will do it for him. A guarantor of a bill or note is one who engages that the note shall be paid." The "contract of guaranty" is broadly and clearly distinguished from that of suretyship. "A contract of suretyship is a contract by which the surety becomes bound as the principal or original debtor is bound. It is a primary obligation, and the creditor is not required to proceed first against the principal before he can recover from the surety. The surety is bound with his principal as an original promisor, that is, he is a debtor from the beginning and must see that the debt is paid and is held ordinarily to know every default of his principal, and cannot protect himself by the mere indulgence of the creditor, nor by want of notice of the default of the principal, however such indulgence or want of notice may, in fact, injure him. Being bound with the principal, his obligation to pay is equally absolute. On the other hand, the contract of a guarantor is his own separate contract; it is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, and is not merely an engagement jointly with the principal to do the thing. A guarantor, not being a joint contractor with his principal, is not bound to do what the principal has con-

tracted to do, like a surety, but only to answer for the consequences of the default of the principal. The guarantor has to answer for the consequences of his principal's default. A surety is an insurer of the debt. A guarantor is an insurer of the solvency of the debtor. A surety may be sued as promisor, but a guarantor cannot." Ogden, Negotiable Instruments, section 220.

With these considerations in mind, it is apparent that while, in its ultimate results, the liability of a guarantor may be as absolute as that of a surety, the nature of his contract and the procedure necessary to hold him are very different. Authorities all agree that a contract of guaranty is entirely separate from that contained in the negotiable instrument to which it is appended, and that the remedy of the holder of the note against a guarantor must be pursued as a distinct cause of action. Ogden, Negotiable Instruments, section 220. By express provision of our Code persons liable severally for the same debt or demand, although upon different obligation or instruments, may, at the option of the plaintiff, be included as parties to the same action. Section 6819, Rev. Codes 1905. In the absence of this provision, a guarantor must be proceeded against in a separate action. The fact that his contract is indorsed upon the negotiable instrument by which he is bound does not in the least alter the character of his obligation. "The engagement or contract of guaranty may be and often is written on the back of the note or bill, but it may as well, so far as the guaranty is concerned, be written on a separate piece of paper." 2 Parson's Notes & Bills, 119. "The contract of a guarantor is his own separate contract. It is in the nature of a warranty by him that the thing guaranteed to be done by the pricipal shall be done, and not merely an engagement jointly with the principal to do the thing. The surety's promise is to pay a debt which becomes his own debt when the principal fails to pay it. But the guarantor's promise is always to pay the debt of another." Coleman v. Fuller, 105 N. C. 328, 11 S. E. 175, 8 L. R. A. 380; Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875. A liability such as this, although it may result in requiring a guarantor to pay the note, is not predicated upon "the terms of the instrument," but upon a contract entirely separate and distinct.

The terms "primary and secondary," when they apply to the parties to an obligation, "refer to the remedy provided by law for

enforcing the obligation, rather than to the character and limits of the obligation itself." Kilton v. Prov. Tool Co., 22 R. I. 605, 48 Atl. 1039. Therefore, however closely analogous may be the ultimate liability upon the instrument of surety and guarantor, the clear distinction in the character of their respective contracts, and the procedure by which their obligations must be enforced, operates to place these parties in different classes of the persons liable as defined by the new law of negotiable instruments. The purpose in making a classification not provided by the former law would seem to be to strengthen the credit of negotiable paper by protecting the holder against a claim that persons directly and absolutely liable by the terms of the instrument had in fact signed, not as joint makers, but in some other capacity. As the law now stands, these questions of primary and secondary liability are to be resolved only upon the face of the instrument. All persons by its terms absolutely required to pay the same may be held as primarily liable; all others, secondarily. When a party on signing clearly indicates upon the instrument the capacity in which he is willing to be bound, the holder in accepting it cannot misapprehend its true quality, for he then knows that the party may be held in that capacity and no other. Appellant signed as guarantor, and, as in that capacity he was secondarily liable upon the instrument, he was released, as under the former law, by an extension of time to the principal debtor without his assent. As affecting him the principle governing the relation of holder and guarantor under the former law is unchanged.

The judgment of the district court against the defendant, Bellamy, is reversed, and it is directed to dismiss the action as to him. All concur.

SPALDING, J. I concur in the result, but cannot assent to all that is said in the opinion.

(125 N. W. 888.)

NORTH DAKOTA LUMBER COMPANY v. G. BULGER, NORWEGIAN-DANISH METHODIST EPISCOPAL CHURCH OF MCVILLE, N. D., (CONNECTED WITH THE NORWEGIAN-DANISH ANNUAL CONFERENCE OF THE METHODIST EPISCOPAL CHURCH), A CORPORATION, AND THE REV. THOMAS MYERS, D. D. MEMORIAL METHODIST EPISCOPAL CHURCH, A CORPORATION.

Opinion filed March 19, 1910.
Rehearing denied April 12, 1910.

**Mechanic's Lien — Subcontractor — Sufficiency of Notice to Owner.**

Where a subcontractor seeks to avail himself of the benefit of the mechanic's lien law, he must bring himself fairly within its provisions by complying with its terms, and is not entitled to a lien unless he notifies the owner of the land by registered letter previous to the completion of the contract that he has furnished materials, machinery, or fixtures. Mere personal knowledge of the owner that a particular person is furnishing material to the contractor does not supply a statutory notice upon which the person furnishing the materials can predicate a mechanic's lien on the property of the owner.

Appeal from District Court, Nelson County; *Templeton*, J.

Action by the North Dakota Lumber Company against G. Bulger and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

*Flynn & Traynor* and *Murphy & Duggan*, for Appellant.

*W. J. Courtney*, for Respondent.

CARMODY, J. This is an action brought by the plaintiff to foreclose a mechanic's lien which was filed against the defendants for certain lumber and building materials sold to the contractor for use in the church building, being constructed for the defendant churches. On the trial the plaintiff in open court stitpulated the fact to be that the defendants, the Norwegian-Danish Methodist Episcopal Church of McVille, N. D., and the Thomas Myers, D. D., Memorial Methodist Episcopal Church, were and are the owners of the real estate involved in this action and described in the complaint, and that the defendant G. Bulger was and is the contractor who, under contract with the said churches, costructed the church building upon the real estate involved in this action for said churches, and that the plaintiff, with the full and actual knowledge and consent thereto of the defendants, said Norwegian-Danish Methodist Episcopal Church of McVille, N. D., and the Thomas

Myers, D. D., Memorial Methodist Episcopal Church, sold and delivered lumber and building materials to the said G. Bulger for use in the construction of said church building, and that this is an action to foreclose a mechanic's lien claimed in favor of the plaintiff against the said church building and the real estate occupied thereby belonging to the said churches; for the balance due plaintiff on the purchase price of said materials, and that the plaintiff did not notify the said defendants, the Norwegian-Danish Methodist Episcopal Church of McVille, N. D., and the Thomas Myers, D. D., Memorial Methodist Episcopal Church, by registered mail, previous to the completion of the church building aforesaid then being constructed by said Bulger for said churches, that it (the plaintiff) had furnished to said Bulger materials for use in said building, and that the same was not fully paid for. Whereupon, on motion of the defendants, the court made an order dismissing said action upon the ground that no notice by registered mail was given prior to the completion of the contract. Thereafter a judgment was duly entered in favor of the defendants and against the plaintiff, from which judgment plaintiff appeals and demands a rehearing on issues of law shown herein.

The sole question to be determined on this appeal is whether the requirement in section 6237, Rev. Codes 1905, as to registered notice, is absolutely indispensable to the obtaining of a lien by the furnisher of materials, machinery, or fixtures. This section, after giving the right to a lien to the person who furnishes materials for the construction of a building, contains the following words: "Provided, that no person who furnishes any materials, machinery or fixtures as aforesaid, for a contractor or a subcontractor shall be entitled to file such lien unless he notify the owner of the land by registered letter previous to the completion of said contract that he has furnished such materials, machinery or fixtures." The purpose of the notice required by this section is to enable the owner of the property to take such steps for his own protection as he may deem necessary, so as not to be compelled to pay twice for the same improvement. The notice is a condition precedent to his right to acquire a lien. The doctrine is well settled that, where one seeks to avail himself of the benefits of a purely statutory right, he must bring himself fairly within its provisions, by complying with its terms. Mere personal knowledge of the owner that a particular person is furnishing materials to the contractor

does not supply a statutory notice upon which the person furnishing the materials can predicate a mechanic's lien on the property of the owner. In order, therefore, to create a lien, it is a fundamental requirement that the owner be notified as the statute requires.

The initiatory step in the acquisition of a statutory lien by a materialman who furnishes material to a contractor is to notify the owner of the land in the manner provided by statute, in this state by registered letter, previous to the completion of the contract, that he has furnished such materials, machinery, or fixtures, A mechanic's lien is a creature of the statute, and every step prescribed by the statute must be shown to have been substantially followed, or it does not exist. Mark Paine Lbr. Co. v. Douglas County Imp. Co. et al., 94 Wis. 322, 68 N. W. 1013; Rosholt et al. v. Corlett et al., 106 Wis. 474, 82 N. W. 305; Caylor v. Thorn 125 Ind. 201, 25 N. E. 217; Robbins v. Blevins, 109 Mass. 219; Berry v. McAdams, 93 Tex. 431, 55 S. W. 1112; Neeley v. Searight, 113 Ind. 316, 15 N. E. 598; Schulenberg v. Bascom, 38 Mo. 188, 189, Clark v. Edwards, 119 N. C. 115, 25 S. E. 794; Shafer v. Archbold, 116 Ind. 29, 18 N. E. 56.

The appellant contends that the formality of sending a registered letter to the defendants advising them that the plaintiff was furnishing materials for the church was rendered unnecessary by reason of the fact that the defendants already had actual knowledge of the facts which such letter could give, and had prior to the completion of the contract, and in fact as the materials were being furnished, actual knowledge of plaintiff's furnishing the lumber for the church building and had approved of its doing so, and consented thereto, and the mailing of this information to the defendants was absolutely unnecessary, and a useless act under the circumstances. This contention must be overruled. Personal knowledge of the defendants that plaintiff was furnishing the material to the contractor is not sufficient to entitle plaintiff to a lien. See cases hereinbefore cited. The provision of the statute which requires those who desire to acquire a lien on the property to notify the owner is a salutary one, not only for the benefit of the owner, but of the laborer and materialman as well. To hold with appellant would annul the purposes of the statute and fritter away its beneficial provisions. No notice having been given to the de-

fendants by registered mail, they had the right to presume that the plaintiff relied upon the responsibility of the contractor.

The case of Robertson Lumber Co. v. Bank of Edinburg, 14 N. D. 511, 105 N. W. 719, is not in point. In that case notice by registered letter had been given to the owner, so that the question of notice was not in controversy.

Appellant contends that, as to materialmen who furnish materials with the knowledge of the property owner, the following provision of the statute would apply, to wit: "The owner shall be presumed to have consented to the doing of any such labor or the making of any such improvement, if at the time he had knowledge thereof, and did not give notice of his objection thereto to the person entitled to the lien." This provision does not help appellant, as it only applies to a contractor, and not to a subcontractor and has no application to the case at bar.

The judgment appealed from is clearly right and is affirmed. All concur.

On petition for rehearing. CARMODY, J.

Plaintiff in this case filed a petition for a rehearing, in which it contends that this court has failed to consider or decide the vital point at issue in this case, in this, that the court has wholly failed to in any way define the terms "full and actual knowledge, approval, and consent," as applied to the facts in this case, and has wholly failed to take cognizance of the contention of plaintiff and appellant upon the oral argument of this case, wherein plaintiff and appellant contended that, the defendant churches having obtained the material from plaintiff and appellant through their contractor under the contract between said plaintiff and said contractor with the full and actual knowledge, approval, and consent of said defendant churches, the said churches thereby became parties to the contract between plaintiff and the defendant Bulger, thereby establishing a direct contractual relationship between plaintiff and the defendant churches, and that the plaintiff thereupon became no longer or in fact never a subcontractor, but instead contracting directly with the defendant churches, and furnished material, not "for a contractor or subcontractor," but for the owners.

That the statute does not require the materialman, when contracting directly with the owners, to give the said owner or owners any notice by registered mail, and that, under the facts as stipulated

in this case, there being a direct contractual relationship between plaintiff and the defendant churches, owners of the property, the statute did not require the plaintiff to give the owners any notice by registered mail.

Plaintiff strenuously contends that full and actual knowledge, approval, and consent imports every presumption of direct contractual relationship, between plaintiff and the owners. It presumes, for instance, that the owners went personally and picked out every parcel and portion of that material from the lumber yard; that they personally passed upon each and every article as it was obtained from the plaintiff; that they knew, as each item was purchased, just what it cost, knew whether or not the plaintiff had been paid, knew it was going into their building, and not only knew these things, but took an active participation in the making of the contract for the materials and in the direction of the delivery and disposal of the materials as parties to the contract, together with Bulger, the builder, on the one hand, and the plaintiff, as materialman, on the other.

We agree with the plaintiff that the statute does not require the materialman, when contracting directly with the owner, to give the said owner or owners any notice by registered mail; but we do not agree with it that the facts as stipulated in this case and which are, as far as material, as follows: "That the defendant Bulger was and is the contractor who, under contract, with the said churches, constructed the church building upon the real estate involved in this action for said churches, and that the plaintiff, with the full and actual knowledge and consent thereto of the defendants, * * * sold and delivered lumber and building materials to the said G. Bulger for use in the construction of said church building"—constitute a direct contractual relationship between the plaintiff and the owners. The fact that the owners knew and consented to the plaintiff furnishing the defendant Bulger material to be used in the construction of the church does not release the plaintiff from notifying the defendant churches by registered letter, previous to the completion of said contract, that it furnished such materials, machinery, or fixtures. The statute makes no exception. It requires the materialman in every instance to give the owner the required notice. As stated in the original opinion, the notice is a condition precedent to the right of the materialman to acquire a lien. The purpose of the notice is to enable the owner

of the property to take such steps for his own protection as he may deem necessary, so as not to be compelled to pay twice for the same improvement. There is nothing in the stipulation to show that the defendant churches knew that the material was not fully paid for. The statute requiring notice is not only for the benefit of the owner, but for the laborer and materialman as well. It is no hardship to require the materialman to give the notice required by the Code.

In Rosholt et al. v. Corlett et al., 106 Wis. 474, 82 N. W. 305, which was an action for the foreclosure of three alleged mechanics' liens in favor of subcontractors and materialmen against Corlett, the owner of the building, Lizzie Corlett, his wife, and the principal contractors for the building, the complaints charged that the materials were sold and the work performed upon the joint request of the owner and the contractors, and did not allege the giving of the notice required by the statute. Upon the trial it appeared without dispute that the materials were sold to, and the work was performed for, the principal contractors alone, and that neither Corlett nor his wife ordered the materials or made any contract with either of the plaintiffs. The court said: "The lien is a creature of the statute, and every step prescribed by the statute must be shown to have been substantially followed, or it does not exist."

In the case at bar, there is nothing in the evidence or the stipulation to show that the plaintiff made any contract with the defendant churches. The part of the stipulation that the plaintiff, with the full and actual knowledge and consent thereto of the defendants, said Norwegian-Danish Methodist Episcopal Church of McVille, N. D., and the Thos. Myers, D. D., Memorial Methodist Episcopal Church, sold and delivered lumber and building material to the said G. Bulger for use in the construction of said church building, falls far short of showing that the plaintiff sold the material to the defendant churches. In fact, it shows that the materials were sold to the defendant Bulger. The actual knowledge and consent of the defendants that plaintiff sell said material to defendant Bulger does not constitute any contract between plaintiff and defendant churches.

The petition for rehearing is denied. All concur.

(125 N. W. 833.)

## MARY ELIZABETH BOYLE v. JOHN BOYLE.

Opinion filed March 18, 1910.

Petition for rehearing denied May 6, 1910.

**Divorce — Appeal — Acceptance of Portion of Judgment — Alimony.**

1. Where the district court makes an allowance for counsel fees in a final decree denying a divorce to the wife, who is plaintiff, and granting a divorce to the husband, and the wife appeals from the judgment, and demands a review of the entire case in the Supreme court, under section 7229, Rev. Codes 1905, and while such appeal is pending the wife's attorneys unconditionally accept the sums allowed by the district court for costs and counsel fees, such acceptance is a waiver of the appeal, entitling the respondent to a dismissal thereof.

**Appeal and Error — Review — Opinion of Trial Judge.**

2. An opinion of the trial judge is not to be considered as explanatory of a final judgment.

ELLSWORTH, J., dissenting.

Appeal from District Court.

Action by Mary Elizabeth Boyle against John Boyle. Judgment for defendant, and both parties appeal.

Dismissed.

*Palda, Aaker, Greene & Kelso,* for the Motion.

*Sinkler & Heder,* opposed.

MORGAN, C. J. Two motions were submitted in this case at the same time, one by the appellant and plaintiff for suit money with which to prosecute this appeal, and another by the defendant to dismiss the appeal, based on the ground that the appellant has accepted benefits under the judgment appealed from, by an unconditional acceptance of the money adjudged to be paid to her for attorney's fees in the district court. We will consider the motion to dismiss the appeal first.

This is an action for a divorce, in which the wife is the plaintiff, and as a ground for divorce she alleges extreme cruelty and the habitual intoxication of the defendant. The answer denies all the allegations of cruelty and intoxication, and alleges an affirmative cause of action for a divorce, by counterclaim or cross-appeal, in which the plaintiff's misconduct is specifically alleged, and a decree of divorce demanded in favor of the defendant. The trial court made findings of fact and conclusions of law in the defendant's favor, and a decree was entered granting a divorce to him.

From that decree the plaintiff has appealed, and demands a review of all the evidence in the case, under the provisions of section 7229, Rev. Codes 1905. The appeal is from the whole judgment. The notice of appeal alleges that the appeal is from "that certain judgment and from each and every part thereof," etc., and the notice further states: "And plaintiff and appellant appeals from the whole and each and every part of said judgment and demands a new trial of said action in the Supreme Court of the state of North Dakota." In her complaint the plaintiff alleges what property the defendant owns, and in the prayer for relief she demands "that defendant be required to pay a reasonable sum into court to defray the expenses of this action, and for counsel fees."

In the judgment is the following provision: "And it is further ordered and adjudged that the defendant pay to the plaintiff upon the entry of this judgment, the sum of two hundred and fifty dollars ($250.00) as suit money in this action." In the affidavit in support of the motion to dismiss the appeal, the attorney for the respondent states: "That judgment was rendered therein the 10th day of September, A. D. 1909, and that thereafter on the 10th day of November, 1909, on demand and by request of the attorneys for the appellant, respondent did pay to the appellant, through her attorneys D. C. Greenleaf and E. R. Sinkler, all sums adjudged against him by the district court of the Eighth judicial district, and that said appellant did furnish to respondent a full satisfaction of that judgment rendered on the date hereinbefore mentioned, all of which was done after the purported appeal was taken from the judgment of the district court of Ward county, North Dakota, as more fully appears by the certified copy of the judgment and satisfaction and copy of the notice of appeal and undertaking hereto attached and made a part thereof."

From the provisions of the judgment and the allegations of the complaint and the findings of the court respecting the financial responsibility of the defendant, it is apparent that the sum to be paid to the plaintiff's attorney for suit money was litigated before the trial court. The judgment of the trial court fixed the sum of $200 as a reasonable attorney's fee, and $50 for costs and disbursements, and thereby the amount to be paid became a part of the final judgment, and as such was conclusive upon all parties until reversed or modified by an appeal. That provision was an adjudication upon one of the litigated questions in the trial court, and a review

of that provision of the judgment was included in the specific demand for a new trial, contained in the notice of appeal. This court would have the power to affirm such provision or reverse or modify it, dependent upon the evidence in this case. The appeal is from the entire judgment, and not from any portion thereof. Either plaintiff or defendant might receive a different judgment in the Supreme Court, inasmuch as all parts of the judgment would be before the court for review in the nature of a trial de novo. This court, on such an appeal, would have power to adjudge that the plaintiff was not entitled to any sum as attorney's fees, and if the evidence warranted it, might grant to the plaintiff a larger amount than given to her by the district court. It is well settled that provisions in a final decree fixing the attorney's fees in divorce cases in favor of the wife are a part of the judgment, and are not independent therof, and are reviewable on an appeal from the judgment. In Nelson on Divorce and Separation, p. 834, it is said: "When an appeal is taken the whole case is open for review upon the evidence, and while the courts hesitate to disturb discretionary orders, it seems that the order for attorney's fees is often changed with great freedom, and the amount reduced to what the appellate court deems a reasonable fee."

For these reasons we think it beyond question that the appeal from the judgment in its entirety brought before this court for review the provision fixing attorney's fees in the district court for services rendered in that court. This being true, it necessarily follows that the prosecution of the appeal through which a different attorney's fee might legally be fixed by the appellate court is inconsistent with an unconditional acceptance of the amount as fixed by the district court. The validity and correctness of the judgment cannot be assailed and its provisions unreservedly accepted. An appellant is not permitted to take such antagonistic positions. The principle is elementary that a voluntary acceptance of the benefits under a judgment is a waiver of the appeal. There are some exceptions to this general principle. If a provision of the judgment appears to have been fixed by consent, or is undisputed, or, for any reason, cannot be changed or reversed by the appeal, an acceptance of the benefit given by such provision is not a waiver of the appeal. This question was considered in Tyler v. Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660, and the principles there decided seem to us to be sound and well supported. In Tuttle v. Tuttle

(recently decided by this court) 124 N. W. 429, the Tyler case was adhered to under facts not legally distinguishable from those at bar. See, also, Williams v. Williams, 6 N. D. 269, 69 N. W. 47, and Williams v. Williams, 29 Wis. 517.

In Storke v. Storke, 132 Cal. 349, 64 Pac. 578, a similar case was before the Supreme Court of that state. In the final judgment granting a divorce the court awarded to the defendant $250 for alimony and $200 for attorney's fees and costs. Before any motion for a new trial was made by the defendant, the sums which were allowed for alimony and attorney's fees were paid by the plaintiff to the defendant and accepted by her. Thereafter she made a motion for a new trial, and plaintiff moved to dismiss said motion for a new trial, and said motion to dismiss was denied. The plaintiff appealed from the order denying the motion to dismiss the motion for a new trial. In considering that motion the court said: "Another reason exists why the motion for a new trial should be dismissed. Defendant accepted a part of the judgment that was beneficial to her. It was a final judgment, and by its terms gave her $450. This sum was based upon the findings, and was the result of the litigation. Defendant took the $450, and now seeks to attack the judgment through which she received it. This she cannot do. Having taken the benefit, she must bear the burden. The amount of this judgment was not large, but the principle is the same. It may have been as great a hardship to the plaintiff to have paid the $450 as it would be for a wealthy man to pay $450,000. If the defendant should procure a new trial, she would still have the $450, and plaintiff would not have his divorce. If she has used it, or is otherwise unable to pay it back, the plaintiff cannot be placed in the same condition in which he was before the trial. The principle is well settled that a party accepting and receiving the portion of a judgment beneficial to him cannot appeal from it"—citing cases.

In this case the provision for counsel fees is incorporated in the final decree refusing plaintiff's prayer for divorce and granting defendant's prayer for divorce. The trial court filed a memorandum of the grounds on which he bases his decision. In this memorandum he states that $50 is allowed for costs and $200 as attorney's fees, and that such sums "shall be considered as alimony pending suit, inasmuch as the court would have allowed said amount during the trial had motion therefor been made by the plaintiff; the court

therefore makes such allowance in lieu of and as alimony herein." The memorandum or opinion does not in any way change the fact that the allowance was made in the final decree and became a part thereof. The opinion of the judge is no part of the decree, and cannot be considered to explain or change the unequivocal terms of the decree. Whereas the judge states that the allowance of attorney's fees is considered as made pending the suit, the fact remains that it was made in the final decree. The opinion is not the judgment, nor any part of it, and it cannot control the judgment. What we have here said is not to be taken as deciding that a memorandum opinion may properly be made a part of the judgment roll or statement of the case.

It follows that the motion must be granted and the appeal dismissed. All concur, except ELLSWORTH, J., dissenting.

ELLSWORTH, J. (dissenting). I am unable to agree either in the reasoning or the result of the foregoing opinion. I believe that the reasoning of my associates proceeds upon an erroneous view, if not an entire misapprehension, of the purpose for which temporary alimony is allowed by our statute; and that the result announced presents an instance in which a rule of practice well settled, and generally salutary in its application to a proper case, is in this case so misapplied as to be productive of great hardship, and possibly grave injustice. Under our law there is a wide and radical difference both in the purpose and the procedure necessary to an allowance of temporary and permanent alimony. The district court, which seems to be the only court of this state having jurisdiction of an action in divorce, is empowered to allow temporary alimony by section 4071, Rev. Codes 1905, in words as follows: "While an action of divorce is pending, the court may in its discretion require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." The last clause of this statute has reference unquestionably to suit money, or attorney's fees, which is always regarded as a specific part of the temporary alimony the court is authorized to allow, and is granted under the same conditions. 2 Nelson on Divorce and Separation, section 875.

Authority to allow permanent alimony is given by another section of the statute. "When a divorce is granted for an offense of the husband the court may make such suitable allowance to the wife for her support during her life or for a shorter period as the

court may deem just; and when such divorce is granted for the offense of either the husband or wife, the court may compel such husband to provide for the maintenance of the children of the marriage, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." Section 4073, Rev. Codes 1905. It is therefore apparent that, from its very nature, premanent alimony cannot be granted until, not only the matrimonial status and full property rights, or, in other words, the entire merits of the controvery between the parties, have been investigated and a divorce decreed. As this permanent allowance can be awarded only after all the issues of the case are determined, it is necessarily a part of the final decree. It arises out of the relation of the parties as determined by the judgment of the court in the case, and becomes operative only after the ordinary obligations of matrimony are dissolved. It is readily perceived, however, that an award of temporary alimony becomes necessary and operative at a different time, and involves considerations of an entirely different character. The principle on which it is granted is inherent in the matrimonial relation, and the award is in furtherance of the obligations of that relation and not as a substitute therefor. It is called for as soon as the wife is subjected to the expenses attendant upon an action of divorce. It may be allowed "while the action for divorce is pending," and is intended, among other things, for the purpose of enabling the wife "to prosecute or defend the action." The right to this allowance accrues to the wife at the beginning of the action and ceases upon the entry of a decree; for as noted above, after the determination of the rights of the parties by means of the final judgment, the property rights incidental to the new relation of the parties are governed by an entirely different statute.

As our statute authorizes an allowance of temporary alimony before judgment, and at any time during the pendency of the suit, it follows by necessary implication that this allowance must be made by order. It is assumed that matrimonial cohabitation has ceased before the beginning of an action for divorce, and that during its pendency the wife will be without means of maintenance or support, for her children unless such means can be provided by orders of the court summarily enforced. In order that she may present her cause of action, or defense as the case may be, she must have the necessary means to secure the attendance of witnesses, and

to pay the attorney who conducts her case. If these means may be withheld until the entry of judgment or until the determination of an appeal, which may extend over a period of months or even years, she will suffer great hardship, and in many cases the entire end and purpose of a statute providing for an allowance of temporary alimony will be defeated.

Influenced by considerations such as the foregoing, the cases are in practical agreement that an award of temporary alimony must be made by order of the court, and is not properly included in the final judgment. Williams v. Williams, 53 Hun. 636, 6 N. Y. Supp. 645; Straus v. Straus, 67 Hun, 491, 22 N. Y. Supp. 567; Mercer v. Mercer, 73 Hun. 192, 25 N. Y. Supp. 867; Storke v. Storke, 99 Cal. 621, 34 Pac. 339; and Earle v. Earle, 75 Ill. App. 351. Not only is this allowance entirely extrinsic to the purposes of the action and dependent upon considerations different from those out of which the judgment proceeds, but the ordinary process of execution as applied to judgments is entirely unsuited to the enforcement of such allowance, and, unless other and more summary means are adopted, a wife's action or defense, however meritorious, may lapse at any time through failure of sustenance. It follows from these considerations that an order for temporary alimony is never properly a part of a final decree. Where the court sees fit to include such provision in its decree it is void, or, at best, irregular. Sharon v. Sharon, 75 Cal. 1, at page 38, 16 Pac. 315. In any event, when entered in the decree it should not be regarded as other parts properly included; but should still be treated as a temporary order, the enforcement of which, notwithstanding supersedeas of the decree, remains with the district court. Delor v. Donovan, 157 Mich. 587, 122 N. W. 196. The order making such allowance is appealable, and if the husband is aggrieved thereby there is the most abundant opportunity for review. 2 Nelson on Marriage and Separation, section 875; Traylor v. Richardson, 2 Ind. App. 452, 28 N. E. 205.

I am unable to find any case, or in fact, any recognized authority, which holds "that provisions in a final decree fixing the attorney's fees in divorce cases in favor of the wife are a part of the judgment and are not independent thereof," and cannot, therefore, accept the holding of the majority opinion that such principle "is well settled." The principle announced by such authority as bears upon this point is rather the reverse of this, and to the effect that "the power of the court to order and enforce an allowance for

alimony pendente lite, although an adjunct of the action of divorce, is an independent proceeding standing upon its own merits, and in no way dependent upon the merits of the issues in the divorce suit or in any way affected by the final decree upon those merits. It grows, ex necessitate rei, out of the relations between the parties to the controversy, and has nothing to do with the merits of that controversy." State v. Seddon, 93 Mo. 520, 6 S. W. 342; Dawson v. Dawson, 37 Mo. App. 213.

It is true that such orders are reviewable upon the appeal from the judgment. They are thus reviewable, however, only as interlocutory orders, and not as part of the judgment. If the husband is aggrieved by such order it is his privilege to appeal therefrom at the time the order is entered, or in case the time for appeal from the order has not run, and he has not complied therewith at the time of the entry of judgment, he may appeal from the judgment, and in that connection ask for a review of the order. If he does not appeal, however, or, if he voluntarily pays the sum of money specified in the order, he waives all right to review. He cannot in such case ask that the order be reviewed upon the wife's appeal, even though her specification for review requires a trial de novo of the action. Such trial de novo does not extend to an examination of interlocutory orders.

In the case at bar it seems to have been recognized by both parties and by the court from the beginning of the action that the wife was entitled to an allowance for attorney's fees and other expenses of suit. Through some inadvertence such order was not asked for during the course of the trial, or, as the court indicates in its memoranda, it would have been allowed at once. At the conclusion of the trial the court improperly and irregularly included this allowance in its order for judgment. After judgment was entered the amount ordered to be paid was paid voluntarily by the attorneys for respondent to appellant's attorneys. This payment was, as the record shows, never received by appellant. She was in entire ignorance of the action of her attorneys even though, as held in the majority opinion, such action operated to deprive her of the right of appeal. The attorneys could not have made a stipulation binding upon appellant that she would not exercise her right of appeal. They would not have been authorized without express authority from her to waive an appeal. I cannot understand, therefore, how under any settled practice she should be deprived of this valuable

right through an inadvertent act of the attorneys, the benefits of which, if any, she did not receive or share to the slightest extent.

Being disqualified, I did not participate in the motion to dismiss the action of Tuttle v. Tuttle, cited by my associates as a precedent for their action in this case. The facts in that case are legally distinguishable from this only in that the misapplication of a technical rule of practice there produced hardship and deprivation of right even greater than I believe possible in this case. The holding in that case was announced so recently that it cannot be regarded as a settled rule of practice; and I feel that I must earnestly protest against the perpetuation of a principle so harsh, drastic, and, as I believe, thoroughly unsound, and its extension to another case.

The principle that a party by voluntary acceptance of a benefit under a judgment waives the right of appeal has no application to this case. The benefit, so called, was not awarded by the judgment, but by what was in effect an interlocutory order. The husband, by voluntary payment of the allowance made, admitted in effect that it was reasonable, and that he was not aggrieved by it. The case of Williams v. Williams, 6 N. D. 269, 69 N. W. 47, cited as authority, was one in which it appeared that an award of permanent alimony properly entered in the judgment had been accepted by the wife previous to her appeal. In case of Storke v. Storke, 132 Cal 349, 64 Pac. 578, also cited, the wife accepted a payment awarded by the decree as "alimony," which, as such provision was made upon final adjustment of all the rights of the parties, may be regarded as permanent alimony. It is only necessary to consider the broad distinction between an award of temporary and permanent alimony to be satisfied that the principle announced in those cases has no application whatever to this.

The fallacy of the principle that orders awarding temporary alimony when included in a judgment can be reviewed only by appeal from the judgment is apparent when we consider the remedy of the husband who was successful in this action, in case no appeal had been attempted by the wife, and he had felt aggrieved by the amount of attorney's fees allowed. He could secure a review upon this point only by an appeal from the judgment with the general provisions of which he is entirely satisfied, but which would by such act on his part be placed in peril throughout in order that the court might examine the comparatively insignificant matter of an allowance of temporary alimony. If he, therefore, should be unwilling

to accept the hazard of a trial de novo of the entire judgment, he must waive the right of review on an allowance which he considers excessive. A much sounder theory, it seems to me, is that this allowance must be included in an order from which the husband may appeal specifically, whether the judgment is favorable or unfavorable to him, and which, if it be so desired, may be reviewed on appeal without requiring a trial de novo of a lengthy and complicated action for divorce, with the result of which both parties may be satisfied.

I am therefore of the opinion that upon the facts shown respondent's motion to dismiss should be denied.

(126 N. W. 229.)

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ALEXANDER MCKENZIE v. CARLOS N. BOYNTON.

Opinion filed March 18, 1910.

**Taxation — "Wood Law" — Notice of Expiration of Redemption — Leaving Copy at Defendant's Hotel.**

1. Under the so-called "Wood Law" (chapter 67, Laws 1897) the county of Emmons obtained a judgment for taxes in October, 1897. In December following the lands included in such judgment were sold by the sheriff, the county becoming the purchaser, to whom certificates of sale were duly issued. Ninety days preceding the expiration and maturity of such certificates the county treasurer assumed to give notice to M., the owner of the lands, of the statutory notice of expiration of time for redemption. The notice was signed "Emmons County, N. D., by H. W. Allen, County Treasurer," and service thereof was attempted to be made by registered mail, and also by leaving a copy thereof with one F., an employe at the hotel where M. resided. M. had no family, nor was he residing in the family of another within the meaning of subdivision 7, section 6838, Rev. Codes 1905, relating to the service of process. *Held*, for reasons more fully stated in the opinion, that such attempted service of the notice was of no validity or effect.

**Taxation — "Wood Law" — Notice of Expiration of Redemption Period — Failure to Serve — Effect.**

2. There being no legal service of the notice of expiration of time for redemption from the sale, the county acquired no title through its certificate, but merely retained a lien on the land by virtue of such certificates.

**Taxation — Tax Title — Notice of Redemption — Conveyance by Purchaser.**

3. Subsequently the county auditor, by authority of the county commissioners, attempted to convey said land and other land by deed to H. B. L. Co., and the latter thereafter attempted to convey the same to defendant. *Held,* that, the county having no title, none was conveyed through such deed.

**Taxation — "Wood Law" — Tax Title — Subrogation to Lien of County — Equitable Relief — Reimbursement of Tax Penalty and Interest.**

4. In addition to the sum paid by the H. B. L. Co. to the county as consideration for such deed, the record discloses that said land company paid to the county certain taxes for subsequent years on such lands, and defendant has paid taxes thereon for certain other years. *Held,* under the facts, that in equity defendant is subrogated to the lien of the county for all taxes, interest and penalty paid by him or his grantor to such county, and that plaintiff will be granted the equitable relief prayed for only on condition that he first reimburse defendant for all sums thus paid, on the principle that he who asks equity must first do equity.

Appeal from District Court, Emmons county; *Winchester* J.

Action by Alexander McKenzie against Carlos N. Boynton. Judgment for plaintiff and defendant appeals.

Modified and affirmed.

*Cochrane & Bradley,* for appellant.

*Lynn & Coventry,* for respondent.

FISK, J. This is an appeal from the district court of Emmons county, and defendant and appellant specifies that he desires a review of the entire case in this court. The action is a statutory one to determine adverse claims to certain real property; the complaint being in the statutory form. The answer is a general denial, and also contains new matter by way of counterclaim, in which defendant sets up title to the property through certain tax proceedings under the so-called "Wood Law" (Laws 1897, c. 67), by which it is alleged the county acquired title to said lands and subsequently conveyed the same to defendant's grantor, the latter conveying such lands to defendant by warranty deed, and asks to have his title quieted as against plaintiff.

The facts are all stipulated, and are in substance as follows: That plaintiff was, on November 1, 1899, and for more than three years prior thereto, the owner of the property in question, and that he is still such owner, unless his title thereto has been divested by the tax proceedings hereinafter set out; that on October

4, 1897, Emmons county obtained a judgment in the district court for certain taxes levied against said property in prior years Thereafter such proceedings were had thereon that on December 6, 1897, the real property in controversy was sold at public auction by the sheriff pursuant to the judgment, the county of Emmons becoming the purchaser by reason of the absence of other bidders, and certificates of sale in due form were issued to such county by the sheriff and recorded in the office of the register of deeds on December 20, 1901.

The only proof of notice of expiration of the time for redemption from such sales and service thereof is contained in Exhibits 3 to 9, inclusive. Exhibit 3 is an affidavit by one Allen, county treasurer, in which, among other things, he makes oath that: "On September 6, 1899, being at least 90 days preceding the expiration and maturity of said tax sale certificate, he gave notice for Emmons county of the expiration and maturity of said tax sale certificates to Alexander McKenzie, the owner of said land and a resident of the state of North Dakota, by depositing in the United States post office at Linton, N. D., a true copy of the original notice of expiration of redemption, dated September 2, 1899, which said notice is hereto attached and made a part of this affidavit, and mailing the same by registered letter, registry fee and postage thereon prepaid, said copy being inclosed in an envelope addressed to Alexander McKenzie, St. Paul, Minn., his last-known post office address, on said date, * * * and affiant received, upon mailing said copy at said post office, * * * the registry receipt attached; and affiant, after said last-named date, received the registry return receipt hereto attached, also by leaving at the place of residence of said Alexander McKenzie in Bismarck, N. D., a true copy of the notice of expiration of redemption hereto attached." The notice referred to the affidavit addressed to Alexander McKenzie recites the tax proceedings and the facts of the sale under the judgment, the time when the right to redeem will expire, a description of the land, and in other respects appears to be in conformity with the statute, with the exception that it is signed "Emmons County, N. D., by W. H. Allen, County Treasurer." There is also annexed to such affidavit a certificate purporting to be made by the sheriff of Burleigh county, in which he certifies that he served such notice on September 6, 1899, on Alexander McKenzie, by leaving at the Sheridan House in Bismarck, the place

of residence of said McKenzie, with W. J. Freede, an employe and clerk at said Sheridan House, a true and attested copy thereof. There are also attached to such affidavit the registry receipt and registry return receipt referred to therein; the letter being signed as follows: "Alex. McKenzie. P. J. Jukins"—such receipt disclosing on its face that the said Jukins receipted for the registered letter as assumed agent of McKenzie. Following the above is a written statement by said Allen, county treasurer, to the effect that proof of notice of expiration of period of redemption was not made and filed December 6, 1899, for the reason that he was enjoined from so doing by an order of the district court. Exhibits 8 and 9 relate merely to the publication in the Emmons County Record of such notice of expiration of redemption and proof thereof, and are concededly not material.

In such stipulation of facts it is agreed that Alexander McKenzie, during all the times mentioned, was a resident of Bismarck, N. D., his place of residence being at the Sheridan House in said city; also that said lands were wholly unoccupied during all the times mentioned. It is further stipulated that on November 18, 1901, the county of Emmons sold and conveyed its interest in such real property to the Hackney-Boynton Land Company for a valuable consideration, by a deed of conveyance executed by the county auditor, pursuant to a resolution of the board of county commissioners, and that the Hackney-Boynton Land Company, for a valuable consideration, sold and conveyed by warranty deed, its interest in said land on August 1, 1904, to defendant. The stipulation next recites that such real property was assessed for taxation, and taxes levied thereon for the years 1895-6-7-9-1900-1-2-3, and that such taxes were paid by the Hackney-Boynton Land Company on dates therein mentioned, amounting to $223.40, and that defendant paid to Emmons county certain taxes assessed and levied for the years 1904 and 1905. Until due proof of service of notice of expiration of time for redemption was filed the county acquired, through its certificates, no title to the premises, for the statute (section 14, chapter 67, Laws 1897) expressly provides: "The fee simple of any piece or parcel of land named in any certificates shall not vest in the holder thereof until the notice provided for herein is given and due proof thereof filed with the clerk of the district court." See, also, Darling & Angell v. Purcell et al., 13 N. D. 288, 100 N. W. 726. In order to establish his alleged

title to the premises through the tax proceedings under the so-called "Wood Law," it was incumbent on defendant to prove the service of such notice and the filing thereof with the clerk, as required by such statute. Cruser & Baker v. Williams, 13 N. D. 284, 100 N. W. 721.

When the owner of the property is a resident of this state the statute requires personal service to be made on him of the notice of the expiration of time for redemption. It is respondent's contention, and the trial court so held, that the stipulated facts fail to show a compliance with the statute in this respect. In this we think they are correct. It is not contended by appellant that personal service of such notice was in fact made; the contention merely being that the stipulated facts show the equivalent of personal service. In this they are in error. The delivery by the sheriff of the copy of such notice to W. J. Freede, an employe at the Sheridan House, falls far short of personal service upon McKenzie. For all that is contained in the alleged proof of such service McKenzie may have been actually in his room in said hotel at the time the sheriff left with said employe the copy of such notice. The personal service required by the statute must, we think, be made in the manner of making personal service of a summons as provided by section 6838, Rev. Codes 1905. That action, so far as applicable, reads as follows: "The summons shall be served by delivering a copy thereof as follows: * * * (7) In all other cases, to the defendant personally and if the defendant cannot conveniently be found, by leaving a copy thereof at his dwelling house in the presence of one or more of his family over the age of 14 years; or if the defendant resides in the family of another, with one of the members of the family in which he resides over the age of 14 years. Service made in any of the modes provided in this section shall be taken and held to be personal service. * * *" Plaintiff had no family, nor was he residing in the family of another within the meaning of the statute. His residence was at a public hotel; hence the service which, under the statute, would be valid and binding upon him could be made only by delivering to him personally the notice required. For like reasons the attempted substituted service by registered mail, even if the proof thereof was complete, is utterly unavailing. As said by this court in Bank v. Holes, 12 N. D. 38, 94 N. W. 764: "The term 'personal service' has a fixed and definite meaning in law. It is service by deliv-

ery of the writ to the defendant personally. Other modes of service may be given the force of such service by legislative enactment. But the use of the words 'personal service,' unqualified, in a statute means actual service by delivering to the person, and not to a proxy"—citing Hobby v. Bunch, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301. See, also, 19 Enc. Pl. & Pr. 613, 630, et seq.; 32 Cyc. 448, 457, and cases cited. See, also, R. I. Hospital Trust Co. v. Keeney, 1 N. D. 411, 48 N. W. 341. Having reached the conclusion that notice of the expiration of the time for redemption from the tax sales and certificates was not served as the statute requires, it follows under the plain wording of the statute that no title to the property ever vested in Emmons county under such certificates, and that at the time of the attempted conveyance of these lands to the Hackney-Boynton Land Company the county merely had, under such certificates, a lien upon the land for the unpaid taxes, interest and penalty. Darling & Angell v. Purcell, 13 N. D. 288, 100 N. W. 726; Cruser & Baker v. Williams, 13 N. D. 284, 100 N. W. 721.

By the prayer of the answer defendant asks that, if for any reason the court shall decide that his claim of title under the tax proceedings and deeds is declared invalid, he be adjudged to have a lien on said land for all taxes paid, and that plaintiff, as a condition to his obtaining the relief prayed for, be required to pay all such taxes, together with interest, penalty, etc., including the taxes paid by the Hackney-Boynton Land Company, as well as himself. While counsel for appellant make no reference in their brief to such point, we deem it proper to briefly notice the same. It is entirely clear that, if the deed to the Hackney-Boynton Land Company operated to assign to it the lien of the county against this land for the unpaid taxes, interest and penalty, defendant, by the deed to him, acquired an assignment of such lien, and that a court of equity would not grant plaintiff the relief prayed for, except upon condition that he first reimburse defendant for the amount of such taxes, interest and penalty. Did the deed, executed and delivered to the Hackney-Boynton Land Company by the county auditor of Emmons county, thus operate to transfer the county's lien? The legislature, in enacting the Wood Law, saw fit to prescribe the manner in which its rights, under such certificates, might be assigned, and also prescribed a form for use in making such assignments, and it will be observed by reading said

statute that no other method is herein prescribed. Section 19 authorizes the county treasurer (not the auditor) to assign the right of the state or county in any piece or parcel of land bid in by it, upon the payment of the amount for which it was bid in, with interest and the amount of any subsequent taxes, penalty and interest upon the same. As said in Darling & Angell v. Purcell, supra: "This act gives no authority for transferring the interest which the state or county may acquire other than by assigning its certificate." In the case at bar no assignments of the certificates were made by the county treasurer to the Hackney-Boynton Land Company, and therefore defendant, through the deeds, did not succeed to the county's rights as a lienholder, unless it may be said that the first deed operated to effect an equitable assignment to the land company of the county's lien for taxes. The land company paid to the county, as consideration for such deed, the amount of the tax liens, and it also paid subsequent taxes for certain years. Defendant also paid the taxes thereon for certain years after his purchase from the land company. We think, notwithstanding the statute aforesaid, that in equity defendant should be deemed subrogated to the rights of the county as to its said tax liens, and that as to all subsequent taxes paid by him or his grantor he should be adjudged to have an equitable lien therefor upon the premises in question. Plaintiff is asking equitable relief, and as a condition to obtaining such relief he must be required to do equity.

One conclusion is that the judgment should be modified in the following particulars: An account should be taken of the amount of all taxes, including interest and penaltites paid to the county, either by the defendant or his grantor, and that judgment be entered in plaintiff's favor for the relief prayed for, upon the condition, however, that plaintiff first pays to defendant, or to the clerk for his benefit, the amount of such taxes, interest and penalties, together with interest thereon from the date the same were paid to the county, at the rate of 7 per cent per annum. As thus modified the judgment is affirmed. Appellant shall recover his costs on this appeal. All concur.

SPALDING, J. (concurring). I concur in the foregoing opinion, except that I express no opinion as to service of a notice, by leaving a copy with the clerk of a hotel at which a party to be served resides, being personal service. Assuming that service of the notice

in question might have been made in the same manner that personal service of a summons is authorized, and that leaving a copy with the clerk of the hotel at which the party resides, when he cannot conveniently be found, is personal service, no such service is shown in this case. The return fails to show that McKenzie could not conveniently be found, and the defect is fatal.

(125 N. W. 1059.)

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AUGUSTA BRAATZ v. CITY OF FARGO.

Opinion filed March 18, 1910.

**Municipal Corporations — Defective Sidewalks — Negligence.**

1. Plaintiff, while walking on the sidewalk along the south side of Front street where it intersects with Eleventh street, in the city of Fargo, became frightened by the whistle of a bicycle rider, who approached suddenly from the rear, and she, without looking, stepped off such walk and into a drainage ditch or gutter, which ran under such sidewalk at that point, receiving injuries. In an action against the city to recover damages for such injury, she alleges that such city was guilty of culpable negligence contributing to cause her injury, first, because it suffered weeds to grow in and about such ditch to such a height as to obscure the same from view; and, second, in not placing a cover over such ditch or a railing or guard along the edge of the walk at said point.

*Held*, that from plaintiff's own testimony it appears that the presence of the weeds in no manner contributed, either proximately or remotely, to plaintiff's injuries, she testifying, in effect, that she did not look where she was stepping, and hence was not misled or deceived as to the dangerous character of the place where she stepped by reason of the presence of such weeds.

**Municipal Corporations — Defective Sidewalks — Negligence.**

2. The sidewalk at the place in question was five feet in width, and concededly in good repair. The drainage ditch or gutter was constructed in the ordinary method for the purpose of carrying off surface water, and the height of the sidewalk above the bottom of such ditch was approximately from 18 to 24 inches.

*Held*, that the failure of defendant city to guard against possible accidents by covering such ditch, or by placing or maintaining a railing at the edge of the walk over such ditch, did not constitute actionable negligence on its part, as no careful or prudent person could reasonably anticipate that any such accident would happen to pedestrians using such walk.

**Municipal Corporations — Sidewalks — Streets — Reasonable Care.**

3. A municipal corporation is only required to guard against such dangers in its streets, which includes sidewalks, as can or ought to be anticipated or foreseen in the exercise of reasonable prudence and care.

Appeal from District Court, Cass county; *Pollock,* J.

Action by Augusta Braatz against the City of Fargo. Judgment for defendant, and plaintiff appeals.

Affirmed.

*Glassford & Lacy* and *E. E. Sharp,* for appellant.

Cities must keep highways in reasonably safe condition, and are responsible for neglect, although the negligent act of third party contributed to an injury received by city's lack of care. Village of Carterville v. Cook, 16 Am. St. Rep. 248; City of Joliet v. Shufeld, 38 Am. St. Rep. 453; Knouff v. Logansport, 84 Am. St. Rep. 292; Webster v. Hudson River R. R. Co., 38 N. Y. 260; Ring v. City of Cohoes, 77 N. Y. 83; North Penn. Ry. Co. v. Mahoney, 57 Penn. St. Rep. 187; Burrell v. Uncaper, 177 Pa. St. Rep. 353, 2 Am. St. Rep. 664; Smith v. New York, etc., R. R. Co., 46 N. J. Law, 7; Tailor v. City of Yonkers, 105 N. Y. 202, Shearman and Rerfield on Negligence, sections 36, 346; City of Joliet v. Verley, 85 Am. Dec. 342; Michigan City v. Boeckling, 23 N. E. 518; Gallagher v. City of St. Paul 28 Fed. 305.

City is liable for injuries arising from falling from a sidewalk of usafe height and unguarded, although a third person pushed him. Village of Carterville v. Cook, 22 N. E. 14, 4 L. R. A. 721.

Whether city was negligent in allowing weeds to grow in and about the ditch, was for the jury. Larson v. City of Grand Forks, 3 Dak. 307, 19 N. W. 414; Fugate v. City of Somerset, 29 S. W. 970; Miller v. International R. R. Co. et al., 102 N. Y. Supp. 254; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359, 29 Cyc. 627; Slaughter v. City of Huntington, 61 S. E. 155, 16 L. R. A. (N. S.) 459; Ludlow v. City of Fargo, 3 N. D. 485, 57 N. W. 506.

*W. C. Resser,* for respondent.

Sidewalks must be in a reasonably safe condition, and whether they are so, is to be determined by the circumstances of each case. 2 Dillon Municipal Corporations (4th Ed.) section 1019; Stratton v. City of New York, 83 N. E. 40; Butler v. Village of Oxford, 79 N. E. 712.

City not liable for discretionary acts. Town of Spencer v. Mayfield, 85 N. E. 23; Gaskins v. City of Atlanta, 73 Ga. 746; City of Vincennes v. Spees, 35 Ind. App. 389, 74 N. E. 277, and cases cited; Stratton v. City of New York, supra; Butler v. Village of Oxford, supra.

City not liable for remote cause. Smith v. County Court of Kanawha County, 8 L. R. A. 82; Herr v. Lebanan, 16 L. R. A. 106; Chamberlain v. Oshkosh, 19 L. R. A. 513; Schaeffer v. Jackson Township, 18 L. R. A. 100; Kidder v. Dunstable, 7 Gray. 104; 28 Cyc. 1394.

City is bound only for danger that can be anticipated by reason, care and prudence. 28 Cyc. 1366 (IV); Doulan v. Clinton, 33 Iowa, 397; Raymond v. Lowell, 6 Cush. (Mass.) 524; Bigelow v. Kalamazoo, 56 N. W. 339; Beltz v. Yonkers, 42 N. E. 401 and citations; Morris v. Philadelphia, 45 Atl. 1068; Burroughs v. Milwaukee, 86 N. W. 159; Depere v. Hibbard, 80 N. W. 933; Gosport v. Evans, 13 N. E. 256; Kleiner v. Madison, 80 N. W. 453.

Where there is no conflict as to the manner of construction of the ditch and sidewalk, matter of contributory negligence was for the court. Crocker v. City of Springfield, 110 Mass. 135; Riggs v. Standard Oil Co., 130 Fed. 199; Wilson v. Illinois Railroad, 71 N. E. 398; Claus v. Northern Steamboat Co., 89 Fed. 646; Mo. Pac. Ry. Co. v. Monlay, 57 Fed. 921; 29 Cyc. 631.

FISK, J. Plaintiff recovered a verdict for $850 for personal injuries alleged to have been caused through the negligence of defendant city. A motion for judgment, notwithstanding the verdict, was made and granted, and judgment rendered in defendant's favor, from which the appeal is prosecuted.

The assignments of error relate wholly to the correctness of the ruling in granting such motion. The facts material to the legal questions presented are as follows: At the time of the accident plaintiff was walking westward on the sidewalk on the south side of Front street. Just as she reached the point where such walk crosses a drainage ditch running along the east side of Eleventh street and connecting with a ditch running along the south side of Front street just north of the sidewalk aforesaid, a man riding a bicycle, also traveling westward on said walk, came up suddenly behind plaintiff and whistled, whereupon she became scared and stepped off the sidewalk on the south side, stepping into the drainage ditch aforesaid, severely injuring her left foot. There is

some conflict in the testimony as to the depth of such drainage ditch at the point where plaintiff was injured, but we think it reasonably certain from the proof that such ditch was the ordinary drainage ditch constructed for the purpose of carrying off surface water, and that it was only about eighteen inches from the top of the sidewalk to the bottom of such ditch at said place, although plaintiff and her witnesses contend that it was two feet or more in depth. The accident happened in broad daylight. At the time the bicyclist whistled plaintiff was walking about one foot from the south edge of the sidewalk. This sidewalk, at the point in question ,was about five feet in width, and no contention is made that it was not in perfect repair. Weeds had been suffered to grow to a height sufficient to obscure from view such ditch.

The alleged negligence relied upon to sustain the recovery consists in defendant's allowing said drainage ditch to remain in the condition in which it was at the time of the injury without any guard or notice and in permitting weeds to obstruct the view of said ditch by pedestrians using such walk. By her own testimony plaintiff effectively eliminated from the case the latter ground relied on for sustaining the recovery. Suffering the weeds to obscure the ditch cannot possibly be considered as constituting the least cause, either proximate or remote, of plaintiff's injuries. She testified, "I didn't have time to look where I was stepping when he whistled." As the trial judge very properly said: "The plaintiff's own testimony negatives the idea that the weeds had any effect upon her act whatever. * * * The whistling of the approaching bicyclist, its touching her dress, her fright, her sudden movement to the left, and stepping off the walk were instantaneous. Under the testimony it clearly appears that no thought entered the mind of plaintiff that she was about to step into a safe place, and was thereby deceived by the weeds. In other words, with no weeds, her movement into the ditch would have been the same."

It remains for us to determine whether, under the facts when construed in the most favorable light for plaintiff, it can be said as a matter of law that defendant city was not guilty of actionable negligence in maintaining the sidewalk in the manner in which it was maintained at the point where the injury occurred. As the trial court very aptly stated, in effect, the city cannot be held liable unless it can be said that it owed a legal duty to pedestrians using such walk to place guards along the sides of the walk

at said point. If reasonable and prudent men might differ as to whether due care was exercised by the city in the premises to prevent accidents to such pedestrians, then error was committed in the ruling complained of.

What we deem a correct statement of the rule by which to measure the duty and liability of municipalities under alanogous facts is announced by the Court of Appeals of New York in the recent case of Beltz v. City of Yonkers, 148 N. Y. 67, 42 N. E. 401. There the plaintiff, while walking upon a sidewalk of stone flagging eight feet in width, stepped into a depression in the center of the walk about two and a half inches deep, which had been caused by the removal of a portion of the stone flagging which had become broken, and received the injuries complained of. In holding the evidence insufficient to warrant a submission of the case to the jury it was said: "It is scarcely necessary to repeat here, what has often been said before, that a city is not responsible for every accident that may happen in its streets resulting in personal injuries. With the greatest vigilance and the utmost foresight there will still be accidents for which no one, in any legal sense, is to blame. In many such cases, however, when an accident does happen the human mind can see and suggest many ways by which it could have been avoided. In this case the jury had the right to assume that the authorities of the city, whose duty it was to keep the streets in repair, either knew or should have known of the condition of this walk at the point in question if it was such a defect as reasonable care would require them to notice. Of course, a city cannot be required to keep streets in such condition as to insure the safety of travelers under all circumstances. The measure of its duty in this respect is reasonable care, and it is liable only for neglect to perform this duty. There are very few, if any, streets or highways that are or can be kept so absolutely safe and perfect as to preclude the possibility of accidents, and whether in any case the municipality has done its duty must be determined by the situation and what men knew about it before, and not after, an accident. When the defect is of such a character that reasonable and prudent men may reasonably differ as to whether an accident could or should have been resonably anticipated from its existence or not, then the case is generally one for the jury; but when, as in this case, the defect is so slight that no careful or prudent man would reasonably antici-

pate any danger from its existence, but still an accident happens which could have been guarded against by the exercise of extraordinary care and foresight, the question of the defendant's responsibility is one of law. Assuming that the defendant's officers were men of reasonable prudence and judgment, could they, in the reasonable exercise of these qualities, have anticipated this accident, or a similar one, from the existence of this depression in the walk? They could undoubtedly have repaired it at very little expense, but the omission to do so does not show, or tend to show, that they were negligent, unless the defect was of such a character that a reasonably prudent man should anticipate some danger to travelers on the walk if not repaired. If the existence of such a defect is to be deemed evidence of negligence on the part of a city, then there is scarcely any street in any city that is reasonably safe within the rule, and when accidents occur the municipality must be treated practically as an insurer against accidents in its streets The law does not prescribe a measure of duty so impossible of fulfillment, or a rule of liability so unjust and severe. It imposes upon municipal corporations the duty of guarding against such dangers as can or ought to be anticipated or foreseen in the exercise of reasonable prudence and care. But when an accident happens by reason of some slight defect from which danger was not reasonably to be anticipated, and which, according to common experience, was not likely to happen, it is not chargeable with negligence. Hubbell v. Yonkers, 104 N. Y. 434 (10 N. E. 858, 58 Am. Rep. 522); Hunt v. Mayor, etc., 109 N. Y. 134 (16 N. E. 320); Goodfellow v. Mayor, etc., 100 N. Y. 15 (2 N. E. 462); Clapper v. Town of Waterford, 131 N. Y. 382 (30 N. E. 240); Craighead v. Brooklyn City R. R. Co., 123 N. Y. 391 (25 N. E. 387); Lane v. Town of Hancock, 142 N. Y. 510 (37 N. E. 473)."

It will be noted that in the foregoing case the defect complained of was in the walk itself which was negligently suffered to remain in such defective condition for several years. We understand the well-settled rule upon the subject to be as above stated by the New York court. Following is a statement of the rule by Judge Dillon: "A municipal corporation is not an insurer against accidents upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the

ordinary modes, by night as well as by day, and whether they are so or not is a practical question, to be determined in each case by its particular circumstances." 2 Dillon Munic. Corp. (4th Ed.) section 1019. See, to the same effect, Butler v. Village of Oxford, 186 N. Y. 444, 79 N. E. 712; Stratton v. City of New York, 190 N. Y. 294, 83 N. E. 40; 36 Cent. Dig. Munic. Cor., sections 1624, 1625; Town of Spencer v. Mayfield, 43 Ind. App. 134, 85 N. E. 23.

In the case at bar appellant's contention, in effect, is that defendant city in adopting the plan of construction of this sidewalk was guilty of culpable negligence in not providing a railing or barrier to prevent pedestrians from stepping off the walk and into such ditch. We think the correct rule for measuring the duty and liability of municipalities with reference to the plan for the construction of public improvements, and the maintenance of such improvements when completed, to be as stated by the New York court in Beltz v. City of Yonkers, supra, to the effect that it owes a duty to the public using such improvements of guarding against such accidents as can or ought to be anticipated by the exercise of reasonable care and prudence. If, according to common experience, danger from slight defects could not have reasonably been anticipated, and was not likely to happen in the light of common experience, the municipality may not be held liable for negligence. As said in Town of Spencer v. Mayfield, supra: "A municipal corporation is only required to guard against such dangers in its streets as can or ought to be anticipated or foreseen in the exercise of reasonable prudence and care." Judge Dillon, in his work on Municipal Corporations, vol. 2 (4th Ed.) section 1005, states the law as follows: "Thus towns are not necessarily bound to fence or erect barriers to prevents travelers from getting outside of the road or way. A municipal corporation may determine for itself to what extent it will guard against mere possible accidents, and if it be not guilty of negligence, the judicial tribunals are not to say it shall suffer in damages for not giving to the public more complete protection, since that would practically take the administration of municipal affairs out of the hands to which it had been intrusted by law." We are firmly impressed both with the correctness and justice of the rule as above announced. To hold municipalities to a higher degree of care would be, in effect, requiring them to become insurers of the safety of their streets and walks, which is not exacted by any court. In addition to the fore-

going authorities, see Canavan v. Oil City, 183 Pa. 611, 38 Atl. 1096, the syllabus in which is as follows: "A municipality is not liable for personal injuries caused by a fall into an uncovered gutter at a street crossing, where it appears that the gutter is a common, approved method of construction of crossings in cities and boroughs."

Appellant's counsel place much reliance upon the case of City of Olathe v. Mizee, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308. That case is not in point, and is expressly differentiated from a case like the one at bar. There an excavation had been made in the traveled portion of a street about 20 inches deep and 20 inches wide, for the purpose of laying a drain pipe to carry off water. It extended from a cross-walk southward. Such ditch extended up to the cross-walk, and was left unguarded, and plaintiff, in attempting to cross the street, stepped into such ditch and was injured. The court very properly held the city liable. In the opinion, however, the following language appears: "It was its duty to keep, not only the cross-walks, but the entire width of the street, in a reasonably safe condition for both pedestrians and teams. It was one of the principal thoroughfares of the city; and, in the absence of any guards, lights, or notices of danger, Mrs. Mizee had a right to presume that all parts of it could be traveled with safety. A divergence or departure from the cross-walk is ordinarily not an evidence of want of care. Pedestrians have a right to cross a street at any point, and it is the common practice to do so. A difference in this respect exists in sidewalks and cross-walks, as the former are for pedestrians only, while the latter are placed on a level with the street, and are traveled over by both passengers and vehicles."

As before stated the facts in the case at bar disclose that the ditch into which plaintiff stepped is the ordinary drainage ditch or gutter constructed in the usual method, and that the sidewalk at the point where it crosses such ditch was in perfect condition. Therefore, in the light of the well-settled rule announced in the foregoing authorities, we think it clear that no careful or prudent person would reasonably anticipate any danger to pedestrians using the walk at said place, even conceding that the depth of the ditch was as stated by plaintiff and her witnesses. All the facts conclusively refute the idea that such an accident could reasonably have been foreseen or anticipated. To hold that the city owed a

duty to cover such ditch, or to place a guard rail at the side of the walk where it crosses such ditch, would be manifestly unreasonable. There is nothing in the prior decisions of this court cited by appellant's counsel holding contrary to the views here expressed, and counsel have failed to call to our notice any authority sustaining a recovery under facts analogous to those in the case at bar

The conclusion we have reached renders it unnecessary to notice the other questions presented.

Judgment affirmed. All concur.

(125 N. W. 1042.)

NOTE—See note to Heckman v. Evenson, 7 N. D. 182, also note to Pewonka v. Stewart, 13 N. D. 122. One lawfully riding a bicycle on a sidewalk, can recover from a city for injuries received from a walk not in a reasonably safe condition. Gagnier v. Fargo, 11 N. D. 73, 88 N. W. 1030. "Public travel" includes travel by bicycle. Id. City has fulfilled its duty to bicyclists if the sidewalks are reasonably safe for pedestrians. Id. City auditor is the proper person upon whom to serve notice of claim for damages. Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359. Aggravation of consequences of a personal injury upon sidewalk, by use of opiates by advice of physician, not a defensive matter, as the necessity for such use arises from city's, not the injured person's negligence. Id. Notice of claim for injuries describing the place of injury as about thirty feet from a point, when it is twenty, is sufficient. Johnson v. Fargo, 15 N. D. 525, 108 N. W. 243. Whether a wire at the edge of sidewalk, attached to stakes driven close thereto, and extending along the walk to the top of a fruit booth, etc., is an obstruction to the sidewalk, is a question for the jury. Id. Whether plaintiff is guilty of contributory negligence, or defendant of negligence, are questions for the jury. Id.

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## F. L. SINGER AND M. B. GOLBERG, CO-PARTNERS UNDER THE FIRM NAME AND STYLE OF F. L. SINGER & CO., v. JAMES M. AUSTIN, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF KATE AUSTIN ANGELL, DECEASED.

Opinion filed March 18, 1910.

**Executors and Administrators — Action on Rejected Claims — Limitation.**

1. Under section 8105, Rev. Codes 1905, requiring a claimant within three months after his claim has been rejected to bring suit thereon, otherwise the same will be barred forever, *held*, that plaintiff's claim is barred.

**Executors and Administrators — Notice to Creditors — Rejected Claims — Limitation.**

2. Such statute is operative as to claims presented and constructively rejected by nonaction for ten days as provided in section 8103,

Rev. Codes 1905, although notice to creditors as provided in section 8097, Rev. Codes 1905, has not been given.

**Executors and Administrators — Claims Against Decedent — Presentation Before Notice to Creditors — Limitation.**

3. Section 8097, supra, requiring the publication of notice to creditors, being independent of section 8105, requiring suit to be brought within three months after the claim is rejected, the publication of notice under the former is an unnecessary condition to the enforcement of the latter.

Appeal from District Court, Dickey County; *Allen*, J.

Action by F. L. Singer and others against James M. Austin, executor of Kate Austin Angell. From an order sustaining a demurrer to the complaint, plaintiffs appeal.

Affirmed.

*McCumber & Forbes*, for Appellant.

Publication of notice to creditors before order is made therefor, is a nullity. Wise et al. v. Williams et al., 25 Pac. 1064; Ribble v. Furmin, 98 N. W. 420; Mosher v. Goodale, 106 N. W. 195; Smith v. Hall et al., 19 Cal. 85; 18 Cyc. 447.

Short statute of limitations begins to run only after notice to creditors is given. 8 A. E. C. L. 1081; Bradley v. Kent, 7 Houst. (Del.) 372; Fillyau v. Laverty, 3 Fla. 72; Pratt v. Houghtaling, 45 Mich. 457, Hawkins v. Ridenhour, 13 Mo. 135; Gardner v. Callaghan, 61 Wis. 91; Whitmore v. Foose executrix, 1 Denio, 159; Snell v. Dale, 17 N. Y. S. 575; In re Haxton, 6 N. E. 111; Clark v. Sexton's Exrs., 23 Wendell 478; Mosher v. Goodale, 106 N. W. 195; McConaughy v. Wilsey, 88 N. W. 1101.

*S. G. Roberts*, for Respondent.

Rights to sue administrator to establish claim against his intestate, depends upon his rejection, or the lapse of ten days after presentation. Boyd v. Von Neida, 9 N. D. 337, 83 N. W. 329; Farwell v. Richardson, 10 N. D. 34; In re Smith's Estate, 13 N. D. 513; Janin v. Browne, 59 Cal. 37; Ricketson v. Richardson, 19 Cal. 330.

Creditor waives publication of notice to creditors by presenting his claim in advance of the notice. In re Smith's Estate, 13 N. D. 513; Ricketson v. Richardson, 19 Cal. 330, McFarland v. Fairland, 52 Pac. 239.

FISK, J. Action to establish a claim against the estate of one Kate Austin Angell, deceased. A demurrer to the complaint was

interposed in the trial court; the ground of demurrer being that the complaint fails to allege facts sufficient to constitute a cause of action. The appeal is from an order sustaining such demurrer, and the sole error assigned relates to the correctness of such ruling.

Briefly stated, the complaint alleges the following facts: That in February, 1905, the said Kate Austin Angell died testate, and on March 21, 1906, her last will and testament was duly allowed to probate in Dickey county; the defendant, James M. Austin, being appointed executor of said estate and on such date duly qualified as such. On April 12, 1906, plaintiffs, who during the life of decedent sold and delivered to her certain goods, wares, and merchandise, no part of the purchase price of which has ever been paid, presented their claim duly verified to defendant, and that defendant neither allowed nor rejected such claim. Again, on August 14, 1907, plaintiffs presented their said claim to defendant, but that defendant has failed to either allow or reject the same. That the county court has never made any order in said estate directing or requiring the publication of notice to creditors to present their claims. This action was commenced October 4, 1907.

The sole question raised and relied upon by appellant's counsel is whether the action is barred under the provisions of section 8105, Rev. Codes 1905; it being appellant's contention that the time prescribed in said section for bringing suit never commenced to run for the reason that no order was ever made by the county court requiring publication of notice to creditors in which to present claims. Section 8105, supra, reads: "When a claim is rejected, either by the executor or administrator or the county judge, the holder must bring suit in the proper court * * * against the executor or administrator, within three months after the date of its rejection, if it be then due, * * * otherwise the claim is barred forever." This section is plain and susceptible of but one construction, which is that the claim is forever barred unless suit is brought thereon within three months after the claim is rejected. The whole controversy resolves itself into the one question whether in the light of section 8103, Rev. Codes, it can properly be said that a claim presented prior to the giving of notice to creditors will be deemed rejected at the end of 10 days after presentment to the executor for allowance if he refuses or neglects to indorse thereon his allowance or rejection. The latter section provides: "If the

executor * * * refuses or neglects to indorse such allowances 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." This court has repeatedly held that a claim is rejected within the meaning of section 8105, supra, by the refusal or neglect of the executor, administrator, or county judge for 10 days to indorse thereon his allowance or rejection. Boyd v. Von Neida, 9 N. D. 337, 83 N. W. 329; Farwell v. Richardson, 10 N. D. 34, 84 N. W. 558; In re Smith's Estate, 13 N. D. 513, 101 N.W. 890. It was expressly held in the latter case that a constructive rejection by nonaction for 10 days has the same force and effect as a rejection by written indorsement.

Is appellant's contention sound to the effect that the time prescribed in section 8105 for bringing suit on rejected claims never commenced to run because publication of notice to creditors has not been given? After mature deliberation, we feel constrained to answer such question in the negative. While a few authorities may be found apparently supporting appellant's contention, the weight of modern authority, and we believe the better reasoned cases, hold to the contrary. We will briefly notice a few of such authorities. In the recent case of Morrisey v. Hill, 142 N. C. 355, 55 S. E. 193, this precise question arose, and the court said: "It is insisted that the provisions of this section should not be enforced because it nowhere appears that the general notice provided for in section 39 of the Revisal of 1905 has been given, and that the publication of this notice is necessary to the operation and enforcement of section 93. We do not so understand or construe the law; nor do we see any such connection as that suggested between the two sections. Section 39, * * * directing that a general notice shall be published, was enacted more for the protection of the executor, and is necessary to enable him to go on and administer the estate without regard to claims which are not presented within the year; but it has no necessary connection with section 93, which applies to claims which have been presented and rejected by the executor. The language of the statute is positive and explicit, and must be enforced in accordance with the plain meaning of its terms. A like construction has been placed on a statute substantially similar in other jurisdictions. Benedict v. Hoggin, 2 Cal. 386." The New Jersey court in the recent case of Simons v. Forster, 73 N. J. Law, 338, 63 Atl. 858, held to the same effect

under similar statutory provisions. We quote from the opinion as follows: "The purpose of those provisions of the statute is to aid the executor in the speedy settlement of the estate of his decedent, and in determining whether it is to be settled as a solvent estate (Emson, Adm'r, v. Allen, 62 N. J. Law, 493, 41 Atl. 703), and, in furtherance of that purpose, to provide a means for him to ascertain promptly the amount of the outstanding debts, the parties in whose hands they are, the fact that they are at least prima facie valid obligations against the estate, and, when in his judgment the liability of the estate to answer a given claim is doubtful, to compel the creditor to have that question promptly determined by a court and jury. A creditor who presents his claims, properly verified, to the executor, before the rule to limit is taken out, has furnished to the executor the information which the statute was intended to elicit and is entitled to its protection if the validity of his claim is not disputed. If it is disputed, then, in order to avoid the penalty of the statute, he must bring suit upon it within three months after notice of that fact given to him by the executor." That the creditor may properly and legally present his claim for allowance or rejection prior to the publication of notice to creditors is well settled. 1 Ross, Pro. Law and Pr. page 529; McCann v. Pennie, 100 Cal. 547, 35 Pac. 158; Janin v. Browne, 59 Cal. 37; Ricketson v. Richardson, 19 Cal. 330; McFarland v. Fairlamb, 18 Wash. 601, 52 Pac. 239; Field v. Field, 77 N. Y. 294. In the latter case it was said: "Claims may be presented at any time after the executors qualify and enter upon the discharge of their duties, and while they are entitled to a reasonable time to examine and decide upon the justice of claims presented, when they do decide, even though no notice has been published, the effect of their decision is the same as though the claim was presented after publication. The notice is for the protection of executors, and the estates which they represent, and there is no absolute legal obligation to give it at all." The first presentation of the claim being valid, such claim was on the tenth day thereafter as effectually rejected as if a written disallowance had been endorsed thereon. As a necessary result, the special statutory limitation of time for bringing suit commenced running on the date of such rejection, and by force of the statute the claim became forever barred long prior to the date of the second presentation thereof and of the time this action was commenced. The fact that the claim is just and the

equities with appellant affords no reason why we should ignore the plain mandate of the Legislature. Such statutes are uniformly upheld and enforced by the courts regardless of the fact that such enforcement may work a hardship in individual cases. As said by Wallin, J., in Farwell v. Richardson, supra: "The wholesome purpose of the statute manifestly is to expedite the process of winding up the estates of deceased persons." Such being the purpose of the statute, a wise public policy would seem to require a rigid, rather than a lax, enforcement thereof.

Order affirmed. All concur.

(125 N. W. 560.)

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SOLOMON J. LILAND v. A. K. TWETO.

Opinion filed March 18, 1910.

**Statement of Case — Motion to Strike Out — Missing Exhibits.**

1. This case is in the Supreme Court for trial de novo on all the evidence taken in the trial court. Respondent submits a motion to strike out appellant's statement of the case and abstract, on the ground that Exhibits 40 and 67, shown by the abstract to have been referred to by witnesses, are not present in this court. The certificate of the judge of the district court shows these exhibits were present and included in the record certified to the Supreme Court, but not printed in the abstract because of the inconvenience of reproducing them. After full consideration of the entire record, this court is able to say that the presence of neither of said exhibits is material or necessary to, or would in any manner affect or influence, its decision of the case. *Held,* under these conditions, the motion to strike out the statement of the case and abstract will not be granted.

**Exchange of Property — Confidential Relations.**

2. While no exact definition of the terms "confidential relations" and "relations of confidence" applicable in all cases can be given, such relations exist when the parties to a transaction do not meet upon an equality, one having a full knowledge of the subject of traffic, and the other but slight knowledge, and no ability to acquire full knowledge, and the innocent person relies on and places confidence in the representations made by the other party to the transaction.

**Confidential Relations — Fraud — Rescission of Contract.**

3. When relations of confidence exist between the parties to an exchange of property, one of whom has full knowledge of the character and condition of the property, and the other but slight knowledge, and no means of obtaining full knowledge, representations as

to value which under most circumstances would only amount to expressions of opinion, if made knowing them to be false by the party making them, and with an intent to deceive the other party to the transaction, constitute such fraudulent misrepresentation as may warrant a rescission of the contract or transaction.

**Fraud — Rescission of Contract.**

4. In an action to rescind a conveyance of real estate brought by the grantor against the grantee, where the consideration received was stock in a corporation the character and condition and value of whose assets were known only to the grantee, and cannot be ascertained by the grantor, the suggestion as a fact that the stock was of a certain value, such suggestion being made to induce the trade, and without which the transaction would not have been consummated, and made by one who in the nature of things must have known it to be untrue, constitute fraud which may entitle the grantor to a rescission of the transfer.

**Contracts — Rescission — Fraud — Suppression of Truth.**

5. Under the circumstances and conditions described in the foregoing numbers of this syllabus, the failure of the owner of the stock to disclose to the party to whom he transferred it, as a consideration for a deed to real estate, the insolvent condition of the corporation by which such stock was issued, he having knowledge of its condition, is a supression of the truth which may entitle the grantor to a rescission of his deed.

**Contracts — Rescission — Ratification—Fraud.**

6. To work a ratification of a contract or transfer induced by fraud which will defeat the innocent party's right to a rescission, the innocent party must have done some act, after he acquired full knowledge of the fraud, inconsistent with a rescission or rendering it impossible to place the other party in statu quo.

**Contracts — Impossibility of Restitution.**

7. The rule that impossibility of restitution is a defense to an action for a rescission does not apply when complete restitution to the statu quo has been rendered impossible by the act of the defendant.

**Cancellation of Instruments — Evidence — Burden of Proof.**

8. The burden of proving knowledge of facts giving rise to the right to rescind, and of the time of acquiring such knowledge, rests on the defendant.

**Contracts — Ratification — Fraud.**

9. The plaintiff had some conversation with a third party regarding the purchase by the third party of stock held by the plaintiff after plaintiff acquired knowledge of his right to rescind. The third party

made an offer to buy, which was not accepted. *Held,* that this did not work a ratification of the transfer complained of as fraudulent.

Appeal from District Court, Richland County; *Allen,* J.

Action by Solomon Liland against A. K. Tweto. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

*Engerud, Holt & Frame and W. S. Lauder,* for Appellant.

Producing a false impression may be done by words, acts, or concealment or suppression. Stewart v. Wyoming Ranche Co., 128 U. S., 383, Paddock v. Strobridge, 29 Vt., 470; Howard v. Gould, 28 Vt. 523; McAdams v. Cates, 24 Mo., 223; Marsh v. Webber, 13 Minn., 109, (Gil. 99.); Jeffreys v. Bigelow, 13 Wend., 519; Rawdons v. Blatchford, 1 Sandf. Ch. 344; Brown v. Gray, 72 Am. Dec. 563; Rheem v. Wheel Co., 33 Pa. St., 358; Newell v. Randall 19 N. W. 972; Rosenbaum v. U. S. Credit Co., 44 Atl. 966; Brue v. Ruler, 17 Eng. Com. L., 700; Hill v. Gray, 2 Eng. Com. L., 167; Mellish v. Motteaux, Peake's Cases, 115, Burns v. Dockray, 30 N. E. 551; Busch v. Wilcox, 46 N. W. 940; Hanson v. Edgerly, 9 Foster, 343, 359; Englehardt v. Clanton, (Ala.), 3 So., 680; Dowling v. Lawrence, 16 N. W. 552; Downing v. Dearborn, 1 Atl., 407; Mallory v. Leach, 35 Vt. 156; 2 Kent's Com. 482; I Story's Eq. Jur., Sec. 208-216; Pomeroy Eq. Jus. Sec. 901, page 1611 and note 2; Bank v. Baxter, 31 Vt., 101.

*Purcell & Divet, and Chas. E. Wolfe,* for Respondent.

Mere expression of opinion, though false, is not fraudulent Krause v. Cook, 108 N. W. 83; Fargo Gas & Coke Co. v. Fargo Gas & Elec. Co., 4 N. D. 219, 59 N. W. 1066; Pasley v. Freeman, 3 T. R. 51; 2 Smith's Leading Cases, 1300, (Collin's 9th Ed.) Mooney v. Miller, 102 Mass. 217; Manning v. Albee, 11 Allen 520; Gordon v. Parmellee et al., 2 Allen, 212; Credell v. Swindell, 63 N. C. 305; Wise v. Fuller, 29 N. J. Eq. 257; Wilkinson v. Clausen, 29 Minn. 91; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Markel v. Moudy, 11 Neb. 213; Dowagiac Mfg. Co. v. Mahon & Robinson, 13 N. D. 517; Neidefer v. Chastain, 36 Am. Rep. 198; James Music Co. v. Bridge, 114 N. W. 1108; French v. Ryan et al., 62 N. W. 1016; Hubbell v. Meigs, 50 N. Y. 480; Gordon v. Butler, 105 U. S. 553, 26 L. Ed. 1166; Homer v. Perkins, 124 Mass. 431; Kimball v. Bangs, 11 N. E. 113, and note.

A party defrauded may tender back what he received and recover what he gave, or retain what he received and sue for dam-

ages. 20 Cyc. 87; Westerfeld v. New York Life Ins Co., 58 Pac. 92; Wilson v. Nichols et al., 43 Atl. 1052; Wabash Valley Protective Union v. James, 35 N. E. 119; Teachout v. Van Hoesen, 76 Ia., 113, 14 Am. St. Rep. 206, 40 N. W. 96; Hargadine-McKittrick Dry Goods Co. v. Swofford Bros. Dry Goods Co., 63 Pac. 281; Weaver v. Shriver, 30 Atl. 188; Gilchrist v. Manning, 19 N. W. 959; Minazek v. Libera et al., 86 N. W. 100; Whitney v. Allaire, 1 N. Y. 305; Wilson v. New United States Cattle Ranch Co., 73 Fed. 994; Am. Bldg. & Loan Ass'n v. Rainbolt, 67 N. W. 493; Friend Bros. Clothing Co. v. Hulbert, 73 N. W. 784; Moore v. Howe et al., 87 N. W. 750; Smeesters v. Schroeders, 101 N. W. 363.

Unless statement of case has all the exhibits enumerated therein, or officially identified as a part thereof, Supreme Court cannot try the case anew. Eakin v. Campbell, 10 N. D. 416, 87 N. W. 991; Bank v. Davis, 8 N. D. 83, 76 N. W. 998; U. S. Savings & Loan Co. v. McLeod, 10 N. D. 111, 86 N. W. 110; Edmonson v. White, 8 N. D. 72, 76 N. W. 986; Otto Gas Engine Works v. Knerr, 7 N. D. 195, 73 N. W. 87; State ex rel. Wiles v. Heinrich, 11 N. D. 31, 88 N. W. 734; Marck v. Soo Railway 15 N. D. 86; State v. School District No. 50 of Barnes Co., (N. D.) 120 N. W. 555; National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285; Geils v. Fluegel, 10 N. D. 211, 86 N. W. 712; Iowa Business Men's Bldg. & Loan Ass'n v. Fitch, 120 N. W. 694; Kipp v. Angell, 10 N. D. 199, 86 N. W. 706; Littel v. Phinney et al., 10 N. D. 351, 87 N. W. 593; Teinen et al v. Lally, 10 N. D., 153, 86 N. W. 356; Schmidt v. Beiseker, 19 N. D. 35; 120 N. W. 1096; Berteson v. Ehr, (N. D.) 116 N. W. 335; O'Keefe v. Beecher, 117 N. W. 353 (N. D.)

SPALDING, J. This is a suit in equity, commenced and tried in the district court of Richland county to obtain a judgment rescinding an exchange of plaintiff's farm and personal property for defendant's shares of stock in the United Farmers' & Merchants' Exchange Company of Abercrombie, a corporation. Defendant had judgment, from which plaintiff appeals, demanding a new trial of the entire case.

Epitomized, the pleadings state the following facts: That on the 15th day of November, 1906, plaintiff was the owner of the real estate described, being two half sections of land in Richland county, and of certain personal property consisting of horses, farming

utensils, and cattle; that the value of the land was about $30,000 and of the personal property about $2,000, and that the land was incumbered to the amount of about $14,000; that the defendant was at that time the owner of 1,726 shares of the capital stock of the corporation named, and that such shares were of par value of $10 each; that the plaintiff was an old man, not conversant with the English language, had been a farmer all his life, with no business experience otherwise than as a farmer; that the plaintiff had been intimately acquainted with defendant for many years, and had implicit confidence in defendant's honesty, business ability, and friendship, and for that reason reposed great confidence in his advice and representations relating to business matters; that the defendant, when the transaction involved occurred, well knew the facts as to plaintiff's confidence in him, his advice, and statements; that on the 15th day of November, 1906, with intent to deceive plaintiff and induce him to sell and convey to defendant the real estate and personal property mentioned, defendant wrongfully and fraudulently stated and represented to plaintiff that said corporation was in a very prosperous and flourishing financial condition, and doing a large and profitable business; that its shares of stock were worth at least $12 per share; that it had been earning large profits, so that a dividend of at least 7 per cent. on the paid-up capital stock would be declared and paid at the next annual meeting of the corporation to be held in January thereafter, and that defendant requested and advised plaintiff to exchange his property for stock in said corporation; that plaintiff was wholly ignorant of the financial condition of such corporation, and by reason of his implicit confidence in the honesty, business ability, and friendship of defendant in general he implicitly believed and relied upon such statements and representations and advice, and was thereby induced to sell and convey to defendant such real estate and personal property for the shares of stock mentioned and owned by defendant, and in pursuance of such agreement, and to carry it into effect executed and delivered a deed of conveyance, conveying to defendant the land described, subject to incumbrances against the same, and also delivered possession of the personal property in controversy and possession of the lands, and that defendant assigned and transferred the shares of stock referred to, to plaintiff; that at the time defendant made the false and fraudulent statements set forth he well knew said statements were false

and untrue, and that plaintiff would and did rely thereon, and that said statements were false and untrue in that such corporation, at that time, was in an insolvent condition, unable to pay its debts, did not have sufficient property to pay its obligations, and was in fact in a bankrupt condition, and would not be able to, and the officers and directors did not expect said corporation would or could pay any dividend to its stockholders, and that the shares so transferred were of no value whatsoever; that plaintiff did not discover the falsity of said representation and the deceit practiced upon him by defendant until immediately before the commencement of this action; that he is ready, willing, and able, and offers, to restore and reassign defendant all such shares of stock and brings the same into court and offers to assign them to defendant. The complaint then alleges the sale by defendant of the personal property involved for the sum of $1,900, and the payment by defendant of certain indebtedness, and that plaintiff is ready, able, and willing to return to defendant the sums of money paid out by him on account of the transaction, and to comply with all other conditions which the court may impose, in order to restore defendant to the condition in which he was before the exchange was made, and he prays for judgment requiring a reconveyance of the lands and an accounting as to the personal property and an adjustment of the amount received therefrom by the defendant and the amount paid out by the defendant.

The answer is a general denial, except as to matters admitted, and admits the ownership, but denies that the real estate was of the value of $30,000; admits the existence of the corporation and defendant's ownership of the 1,726 shares of the par value of $10 per share and the exchange of the property and the incumbrances upon the real estate; alleges that defendant assumed and agreed to pay the same, and has paid about $1,040 thereon. The answer further alleges that at the time of such transaction the stock transferred was of the actual value of $10 per share, and that the corporation was solvent and possessed of resources largely in excess of its liabilities, but that after the transaction between these parties such corporation became involved in financial difficulties, that though solvent, it was unable to meet its obligations as they became due, and as a result made a deed of assignment of all its property for the benefit of its creditors, and was by such act involved in litigation in the bankruptcy courts of the United States.

its property placed in the hands of a receiver, and the value of all of the stock in such corporation greatly depreciated or destroyed; that the making of the deed of assignment was participated in by the plaintiff as a director and stockholder, and advised and countenanced by him in opposition to the express wish of defendant, and that by reason of the act of the corporation so participated in by plaintiff the value of the stock transferred has been greatly depreciated or destroyed without fault on the part of defendant, and that a transfer of such stock to him would not restore him to the position he occupied in reference thereto at the time of the exchange; that at the time such deed of assignment was made plaintiff was fully advised of the financial condition of the corporation, and of its exact condition in relation to its assets and liabilities, and of the truthfulness or falsity of any representations made by defendant as to the value of such stock, and that with such knowledge plaintiff acted as a director and stockholder, and as the owner of the shares transferred and thereby ratified and affirmed the transaction between these parties; that after the transfer of the stock such corporation incurred large liabilities in addition to those existing on the 15th of November, 1906, and disposed of large amounts of property owned by it at that time, and that by reason of these facts the proportion of liabilities and assets was greatly changed before the commencement of this action, increasing the proportion of liabilities to assets, and thereby diminishing greatly the value of the stock.

The testimony taken is very voluminous. More than 1,000 pages of printed evidence have been carefully read, and many books of account belonging to the corporation, introduced as exhibits for the purpose of showing its condition at the time the transaction in question took place, have been examined. We are first met by a motion to strike out appellant's statement of the case and abstract. As originally submitted, it was based on numerous grounds which have been reduced by respondent's supplemental brief to two. It is contended that the motion should be granted by reason of the absence from the record now in this court of Exhibits 40 and 67, shown by the abstract to have been introduced in evidence at the trial in the lower court, and to have been referred to by witnesses in testifying in material particulars. The certificate of the judge who heard the case in district court shows that these exhibits were present and included in the record certified to this court. Neither

of them is printed in the abstract because of the inconvenience of reproducing them. Under the statute we are required to try this suit anew on the evidence submitted in the district court. It is therefore manifest that if any material part of such evidence is wanting, we shall be unable to review it and arrive at a conclusion founded upon the whole case. Numerous authorities are cited where motions have been granted because exhibits were not certified to this court by the trial court, or where they were missing when the record reached the appellate court. The first class of authorities is not in point. Those of the second class may or may not be in point, depending on the nature of the exhibits, and a consideration of them being essential to a determination of the controversy. In the present instance one of the exhibits is a plat of a town site known as Sandoun. A careful examination of the record discloses that its presence could have no effect whatever upon a consideration of the case upon the merits. It appears to have been used solely for the purpose of locating one tract of land, indirectly in question, with relation to the town site. The testimony here shows all that is necessary to take into consideration in relation to it, and we can say affirmatively that the presence of the plat would furnish no material aid to this court. The other exhibit is an inventory taken of a part of the corporation's stock of merchandise some time after the transaction in question occurred. It was introduced to show that the clothing included in the stock was of less value than claimed by the respondent. Its admission was strenuously opposed on numerous grounds by respondent's counsel. Under our system the trial court could not pass upon its admissibility, but had to receive it. Appellant's counsel now concede that the objections were well taken, and that the testimony of the witnesses who took the inventory of the clothing contained in the exhibit is inadmissible. We shall not pass upon the question whether this objection and admission would cure its loss from the record. The record discloses an inventory and valuation of the clothing, submitted by the respondent, and the value is so small a part of the total amount involved that any difference shown by the missing exhibit would not materially affect our conclusions; hence we are able to give the respondent the full benefit of his valuation upon the clothing in question, without in any manner changing the result of our deliberations. For these reasons the motion is denied. This is done without establishing any rule that the loss of

exhibits in an action to be tried de novo in this court may not furnish a ground for granting similar motions when it is apparent that their presence is essential to a determination of the controversy on its merits. The trial court having certified up the exhibits, their absence does not deprive this court of jurisdiction.

On the first witness for plaintiff being sworn defendant objected to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that the facts alleged did not show fraud on the part of the defendant, and that no facts were alleged to establish confidential or trust relations between the parties, and because the facts alleged as tending to show fraud are not alleged to have been untrue. The trial court failed to rule on this motion. We discover no merit in it. Our discussion of the facts involved will disclose our reasons without extending them at this time.

The learned trial court found, so far as material to a determination of this appeal, that the land exchanged by appellant was of the value of about $30,000, and incumbered by mortgages aggregating about $14,000; that the personal property was of the value of about $2,000; and that at the time of the trade or exchange there was no relation of trust or confidence of any kind existing between the plaintiff and the defendant; and that there had never been dealings or relations between them of such character as to justify the plaintiff in reposing any trust or confidence in the defendant; and that there was nothing in the relations or dealings of said parties that would or did induce any belief or trust on the part of the plaintiff in the defendant; and that in making such trade each traded with the other upon an ordinary business footing; and that there was nothing in the relations or former dealings between the parties to lead the defendant to believe that plaintiff was dealing with him in reliance upon any trust or confidence entertained by plaintiff in defendant; and that the defendant was ignorant of any such trust or confidence, and that at the time of making the exchange defendant did nothing to prevent or dissuade plaintiff from fully investigating and learning the character and value of the property transferred to him by defendant, but, on the contrary, encouraged him to investigate its value and character; and that plaintiff relied upon his own knowledge and judgment of the value and character of the property received by him; and that the allegations of the complaint of false and fraudulent concealment and

misrepresentations were not sustained by the evidence; and that no fraud or deceit was practiced upon plaintiff by defendant to induce him to make the trade. No finding was made on the financial condition of the company.

We now proceed to consider the case upon its merits. We cannot review in extenso the great mass of evidence before us without unduly extending this opinion, and this would serve no useful purpose. The plaintiff was born in Norway. At the time of the trial he had been in this country 21 years, and was 66 years old. He received a little schooling in Norway, but none in arithmetic and none in the English language, and cannot read or write English, and his understanding of the English language in conversation is very meager. He had never been in business or done anything except to farm. He knew nothing about bookkeeping, or how to conduct an investigation of complex book accounts. He had known the defendant for some years, and had done some business with him, but their social relations had not been intimate. He had reared eight children, of whom one son 21, and another 16, years of age were still at home, but neither of these sons desired to remain there and engage in farming. The wife of the plaintiff was 62 years of age. He had a large amount of taxes to pay each year, as well as interest, and felt that they were getting old and unable to handle the farm business any longer. Those were the reasons for his desiring to trade his land for other property which could be handled more easily, and which would give him an income on which he and his wife could be supported. After the corporation known as the United Farmers' & Merchants' Exchange Company was organized he took 77 shares of its capital stock of the par value of $770, and was paid dividends thereon for the years 1904 and 1905 pursuant to the action of the directors at the annual meetings held in 1905 and 1906. He had attended these annual meetings and heard the condensed annual statements of the company's assets and liabilities read by Tweto, but testifies that they were understood only in small part by him, and we are satisfied from the evidence that, while they may have been read both in English and Norwegian, he was unable to comprehend their import fully. The defendant Tweto has resided in Abercrombie since 1880, and during that time has been engaged in different lines of business, such as farming, dealing in farm machinery, grain, running an elevator, and banking, and at the time this suit was brought was the *presi-*

dent of five or six banks, one of them in Abercrombie, and most of the others in small villages not far distant from Abercrombie. He was engaged in business on the site of the elevator and store of the company prior to the organization thereof. In 1900 his buildings and business were destroyed by fire, after which he rebuilt and re-engaged in the machinery business. In 1903 he organized the corporation referred to, and transferred to it his business site, lots, and buildings, together with his stock of machinery, etc., and took $15,000 worth of stock therefor. This exchange was not made directly, but Tweto gave his check on the bank for the stock, and the company gave its check for the property received, and it would appear that the checks were offset in the bank, the purchase price of the business and property being the same amount as that for the stock in the corporation. After the organization of the company, and before the exchange of the property with Liland, several tracts of land owned or purchased by Tweto were by him transferred to the corporation; that is, the equities in such lands were transferred, as we believe none of them were clear of incumbrances. He received cash or stock, or both, and on several of these exchanges made a considerable profit. He was at all times the president and manager of the corporation until the 8th day of March, 1907 and in fact was the corporation. Different amounts of stock were owned by several people, but Tweto was the head and front of the organization. He dictated its policies and all its principal transactions. The very numerous exchanges between him and the corporation were conducted between Tweto as an individual on one side and Tweto as president and manager of the company on the other. We are led to believe by the record that whenever he saw an opportunity to get property and turn it over to the company at a profit, or when he had property which he desired to dispose of, he transferred it to the corporation. It thus became a sort of dumping ground for his equities in real estate.

Liland, as we have shown, had a desire to retire from farming, and to invest in something which would give him a safe income during the remaining years of his life. He heard that one of the banks in Abercrombie was contemplating an increase of its capital stock, and spoke to one of the officers of the bank with reference to the possibility of exchanging his farm for some of the stock of that bank, but was informed that it could not be done. Tweto was in the bank at the time and overheard this conversation. This led

to a conversation between the two as to an exchange of Liland's land for stock in Tweto's corporation, and after two or three weeks' negotiations the transfer set out in the pleadings was consummated. It appears that there was about $12,000 stock in the corporation still unsold and known as treasury stock, and the question arose with reference to which stock would be best for Liland to take. Tweto explained to Liland that if he took treasury stock, he would not draw any dividends for the year 1906, while if he took his stock, he would be entitled to dividends, and Liland told him that the dividends were what he was after. Other representations which will be referred to later were made regarding the stock and the corporation.

While, as we have said, the trial court made no finding as to the solvency of the corporation, we deem that fact of prime importance, and the evidence shows beyond controversy that the corporation, at the time the exchange of properties was consummated, was not only insolvent in the statutory sense that it was unable to pay its obligations in the due course of business, but that its property was of such a nature and in such condition that on the sale of the whole thereof within any reasonable period of time, and the application of the proceeds to the extinguishment of its indebtedness, little would have been left for the stockholders. According to respondent's showing, taken from the statement he submitted at the annual meeting January 17, 1907, the assets aggregated $87,988.42, while the liabilities, exclusive of the capital stock, reached $49,718.42, and including the capital stock $87,988.42. These liabilities embraced bills payable of nearly $25,000, accounts payable to wholesale houses over $18,000, surplus, $3,964.39, and 1906 profits, $1,879.82, but did not include a large amount of liabilities in the shape of mortgages on the real estate and as indorser on bills receivable discounted at the bank. We are unable to determine the exact amount of these items. It is sufficient to say that they aggregate a large sum. On the other hand the gross value of the real estate was not included in the assets; the method pursued being to count the value of the equities in the real estate as an asset, and to disregard the mortgages and indorsements as liabilities. The record shows that the company had to take up its discounted paper in large amounts. In the assets was included the company's main building, in which it did business at Abercrombie, at over $14,000 valuation. Several witnesses testi-

fied as to its value, and, while conceding that it would cost more than that to construct it, they almost uniformly agreed that it was of small value as compared with its cost, by reason of its being larger than the requirements of the business demanded in a village as small as Abercrombie. Also included in the resources were numerous accounts for repairs, additions, and changes in buildings which added nothing to their salable value, but served to pad the statement of assets. Lands were included at excessive values, and large expense items were added to the values of a number of items. We mention these facts only as showing the method pursued by the company in making its financial showing to stockholders or others, and on which it is claimed by respondent appellant had every opportunity to inform himself. It is clear that the statements of assets were padded; that many of them were not readily salable, and practically none at figures even approximating those of the statements. Many other items of a similar nature might be mentioned.

Section 5293, Rev. Codes 1905, so far as pertinent to this inquiry, reads as follows: "Actual fraud within the meaning of this chapter consists in any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto or to induce him to enter into the contract: (1) The suggestion as a fact of that which is not true by one who does not believe it to be true. (2) The suppression of that which is true by one having knowledge or belief of the fact." "(5) Any other act fitted to deceive." It is urged by the appellant that the representations made by respondent in the course of the negotiations of the parties, not only constituted positive false and fraudulent representations as to values and the condition of the company and its ability to realize profits and pay dividends, entitling him to rescind, but that, giving the respondent the benefit of the least weight that can properly be attached to such representations, they operated as suggesting as a fact that which was not true, and that respondent did not believe them to be true. It is also maintained that it was incumbent upon the respondent to state the facts within his knowledge regarding the financial condition of the corporation to appellant, and that his failure to do so was a suppression of that which was true by one having knowledge or belief of the fact. It is clear that the parties did not meet upon an equality. Tweto was the corporation. True, others were in its employ as

salesmen and bookkeepers, and in other corresponding vocations, but everything was under Tweto's direction. He made the trades by which all the property of the corporation was acquired. He knew the condition of the accounts, and was familiar with the methods of bookkeeping. He knew the character of its assets and liabilities. He also knew, not only that Liland was incompetent to ascertain from its books the character of its resources and liabilities, their value and amount, but that they were so complex, so diverse in character, and of such a nature that no man, unless one of more than ordinary intelligence, could in any reasonable length of time determine by his own exertions the actual condition of the corporation. We cannot go into details on this subject, but the record is clear. Liland explained to Tweto his reasons for desiring to dispose of his farm, and why he thought stock in a corporation would prove a satisfactory investment. Liland testified that Tweto told him that the stock was worth $12 per share. Tweto's testimony is to the effect that he told him it was worth $10 per share, and as much added as the surplus earnings showed on the statements. Considerable discussion has been had as to this conflict in their testimony. We deem it wholly immaterial. On Tweto's version he misrepresented the value of the stock. Other evidence was submitted showing further representations by Tweto as to the corporation being in good condition financially. We are convinced that, taking the record as to their negotiations and Tweto's statements as a whole, the effect of Tweto's statements was to lead Liland to believe that the corporation was in good working condition, and in such shape that it could pay dividends which would enable him and his wife to maintain themselves, and that he knew the contrary to be the fact. We are satisfied that Tweto made such statements knowing that Liland so understood them, and intending that he should draw such inference.

The learned trial judge, as we have stated, made no finding regarding the condition of the corporation but found that relations of confidence did not exist between the parties. It is apparent that the findings were so made because that court misinterpreted the meaning of relations of confidence in such transactions, and found that the statements of Tweto were mere expressions of opinion, in the absence of such relations between the parties, not amounting to misrepresentations or fraud. No exact definition can be given as to what is necessary in all cases of this kind to create such relations,

but the trial court evidently had in mind that a marked degree of friendship or close and intimate business relations must have existed for a time between the parties to establish such conditions. This is not the meaning that should be applied in the case at bar. They rather mean that the parties do not meet upon an equality by reason of the extensive knowledge and information of one of them, and the lack of such knowledge and information, and of the ability to acquire it, of the other party to the trade, and that either from the nature of the transaction or surroundings the complainant was compelled to and did place confidence in and rely on the representations made by the respondent. In the instant case, from what we have said, it is clear that Liland did repose confidence in and rely on Tweto's representations, and Tweto's knowledge of his purpose in disposing of his land and investing in the stock. He could not do otherwise if the trade was made, and the statements amounted to representations of facts which were the inducement to Liland to make the exchange. Had he known of the true condition of the corporation, he would not have engaged in the transaction. Zimmerman v. Bitner, 79 Md. 115, 28 Atl. 820; Parry v. Parry, 80 Wis. 123, 48 N. W. 654; Carlton v. Hulett, 49 Minn. 308, 51 N. W. 1053; Goodrich v. Smith, 87 Mich. 1, 49 N. W. 469.

In 2 Addison on Torts, section 1186, it is said: "If the representation is as to matter not equally open to both parties, it may be said to be a statement of fact; but, if it is a matter that rests entirely in the judgment of the person making it, and the means of information upon which a fair judgment can be predicated are equally open to both parties, and there is no artifice or fraud used to prevent the person to be affected thereby from making an examination and forming a judgment for himself, the representation is a mere expression of opinion, and does not support an action for fraud."

In French v. Ryan et al., 104 Mich. 625, 62 N. W. 1016, the Supreme Court of Michigan says: "Representations of the probable earnings of the enterprise were not necessarily fraudulent. They may be mere expressions of opinion, made in good faith, and in such case cannot be made the basis of a recovery; but if made in bad faith, by one who is possessed of superior knowledge respecting such matters, with design to deceive and mislead, the party making them must respond."

This court said in Dowagiac Mfg. Co. v. Mahon & Robinson, 13 N. D. 517, 101 N. W. 905: "There are cases sustaining cancellation of contracts entered into in reliance on opinions, but the parties were not dealing as equals, or one of them was induced to forbear making inquiry as to the facts. The party injured was not the equal of the other mentally or in experience, or placed confidence in such opinion as coming from one who was his superior and one in whom he had special confidence."

Chilson v. Houston, 9 N. D. 498, 84 N. W. 354, related to representations made regarding the value of a promissory note and the solvency of the maker. The court says: "The question which is decisive of this point is this: Did plaintiff rely and act upon these statements to his damage? Whether he relied upon them is not a question of law but a question of fact purely. The question is not whether the false statements should have induced plaintiff to part with his property, but is this, did they induce him to do so? * * * The misrepresentations must be the operative cause of the transfer. * * * The evidence shows that the plaintiff parted with his land for this note. He supposed he was getting the value of his equity in the farm, a good and collectible note. He knew of its value only from defendant's statements. In estimating its value he had nothing else to rely upon and under these conditions it is absurd to say that the jury were not justified in concluding that he did rely upon what defendant told him." This language is as applicable in the present case as it was where used.

In Fargo Gas & Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593, a defense was made on the ground of false and fraudulent representations, which consisted mainly of representations regarding the earning capacity of the plant sold, and the defendant relied chiefly upon its earning capacity in making the purchase, and was induced to believe its net annual earnings would equal 10 per cent of the purchase price, because its net earnings during the previous year had equaled that. The court charged the jury in effect that defendant did not have the right implicitly to rely upon the representations of the plaintiff touching the character of the plant, and that it must make investigation as to their truth or falsity. This court remarked: "It is obvious that something more than a mere inspection of an object present before a purchaser was necessary to enable the purchaser in this case to discover the truth or falsity of the plaintiff's state-

ment. Such an instruction to a jury might be appropriate in an action in which fraud in the sale of a horse was sought to be proved, the seller having represented the horse to be perfectly sound, and it appearing that the horse stood before the purchaser at the time the representation was made, and that the only defect consisted in the absence of a leg, easily discoverable by the ordinary use of eyesight, but in the case at bar the means of discovering the truth or untruth of these false statements were not at hand in the sense that they must have been implied before the seller might be held responsible for his fraudulent representations; and, when this language was used the jury must have drawn the inference from the fact that this plant was in the same city, and might be investigated with respect to its condition and its earnings and the prices charged customers for gas and electric light, and with reference to the other features embraced in the statements made by plaintiff on the sale; that therefore the means were at hand within the rule laid down by the court requiring the purchaser to discover at his peril the truth or falsity of the statements made. Such a rule would be unjust and intolerable. When parties deal at arm's length the doctrine of caveat emptor applies, but the moment that the vendor makes a false statement of fact, and the falsity is not palpable to the purchaser, he has an undoubted right to implicitly rely upon it. That would indeed be a strange rule of law which, when the seller has successfully entrapped his victim by false statements, and was called to account in a court of justice for his deceit, would permit him to escape by urging the folly of his dupe for not suspecting that he (the seller) was a knave In the absence of such a suspicion it is entirely reasonable for one to put faith in the deliberate representations of another. The jury must have understood that the means were at hand to discover the claim because the defendant might have measured the wire, counted the poles, examined the gas meters, ascertained how many customers were paying for gas and electric light, and might have hired an expert to examine into the earning and expenses of the plaintiff in running the plant, with a view to discover whether a business man had told the truth. It should have been left to the jury to determine whether the means were at hand to discover the falsity of the statements made, in view of the character of such statements and the nature of the property sold. The defendant, as a matter of law, had a right to rely implicitly upon the

statements made by plaintiff touching the character of this plant. So long as defendant did not actually know the representations to be false, it was under no obligations to investigate to determine their truth or falsity." The court then cited numerous authorities sustaining the rule announced, and further remarked: "The unmistakable drift is toward the just doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim, and holds that the material question is whether the purchaser has in fact been deceived."

The principles announced in that case are directly applicable in the case at bar, and render further citation of authorities unnecessary on this point. We may, however, say that there are numerous authorities holding to the general principle that expressions of opinion as to value do not constitute actionable representations when false; but, as we read the evidence in this case, and notice the relative position and knowledge of the parties and all the surrounding circumstances, it is clear to us that it does not come under the general rule, but rather under exceptions to that rule. The complaint only stated express misrepresentations. We think the allegations are sustained by the evidence, as before indicated, but this conclusion is greatly strengthened by the fact that the record discloses, not only express representations which were fraudulent, but suppression of the truth. The evidence of these is properly considered in determining the effect of the express representations. We think the case may be stated thus: The vendor was familiar with the nature and condition of the assets of the corporation and of their value. He knew whether or not it was solvent and in condition to do profitable business. He knew the motive prompting the vendee to make the exchange. He knew Liland's ignorance of business in general, and that it was impossible for him to ascertain by independent effort the condition of the corporation and the value of the stock. He sold to him for a sound price his stock in the corporation knowing it to be insolvent, and not in condition to do a profitable business and without disclosing to Liland the true condition. We thus have a sale for a sound price of an article containing a latent defect known to the vendor, which could not be ascertained by the vendee, for a particular purpose known to the vendor, and for which purpose the article was unfit. This alone would render the transaction fraudulent. It amounts to a concealment of latent defects under circum-

stances which imposed a duty upon the vendor to disclose such defects. When to this is added the further fact that representations were made indicating the soundness of the article, the fraud is all the more apparent.

In Paddock v. Strowbridge, 29 Vt. 470, the court states this principle thus: "There is no positive duty in the vendor to disclose defects in the article, but if he conceals them, even by silence, when he knews the other party has fallen into a delusion in regard to them, and is making a purchase which he otherwise would not make, or at a price materially beyond what he otherwise would pay, in consequence of such delusion, this is equivalent to a false representation or to the use of artifice to disguise the defects of the article." The plaintiff purchased an article for a certain purpose known to the defendant. It was unsuitable for that purpose, and the defendant knew this fact. Defendant made no representations whatever as to its fitness or qualities, and did not disclose to the purchaser that the article was unfit for the purpose for which it was desired, but did nothing to conceal the defects or to mislead the purchaser, except by concealment. The court held that because the defendant knew the purpose for which the plaintiff bought the article, and that it was unsuitable for that purpose, he was guilty of fraudulent concealment of a material fact particularly within his own knowledge, which he was called upon to disclose, and, that by refraining from making the disclosure he was guilty of a suppression of the truth equivalent to a falsehood, because he knew the plaintiff made the purchase under a fatal delusion regarding the characteristic which induced its purchase.

In McAdams v. Cates, 24 Mo. 223, it was held that an action for deceit in the sale of a horse with a latent defect known to the vendor, and not to the vendee, would lie though no artifice was used or representations were made to mislead the vendee. The court says: "If he fails to disclose an intrinsic circumstance that is vital to the contract, knowing that the other party is acting on the presumption that no such fact exists, it would seem to be quite as much a fraud as if he had expressly denied it, or asserted the reverse, or used any artifice to conceal it, or to call off the buyer's attention from it."

In Howard v. Gould, 28 Vt. 523, 67 Am. Dec. 728, a statement of another variation of this principle is made. The plaintiff purchased of defendant a horse affected with glanders. The defend-

ant knew the horse had the disease, and told the plaintiff the horse was sick and not fit to use, and, in reply to a question as to what was the matter, said the animal had horse distemper of the worst kind he supposed, but that plaintiff might examine him. The court, in awarding judgment to the plaintiff, said: "When the defendant undertook to answer the inquiries put to him he was bound to make a full disclosure. It is quite evident that this is a case where, to say the least, there was a fraudulent suppression of material facts, which, if they had been disclosed, would probably have prevented the trade; that the plaintiff knew the horse was diseased, and had the means of examining him, yet he had not the same means of knowing the character of the disease as the defendant had, and in this respect they cannot be said to stand upon an equality."

In Stewart v. Wyoming Cattle Ranch Co., 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439, it is said: "The gist of the action is fraud producing a false impression upon the mind of the other party, and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." See, also, Marsh v. Webber, 13 Minn. 109 (Gil. 99); Rawdon v. Blatchford, 1 Sandf. Ch. (N. Y.) 344; Brown v. Gray, 51 N. C. 103, 72 Am. Dec. 563; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668; People v. Peckens, 153 N. Y. 593, 47 N. E. 883; Cruess v. Fessler et al., 39 Cal. 336; Cottrill v. Krum, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549, and those parts of the note near top of page 556 and middle of page 557; National Bank v. Taylor, 5 S. D. 99, 58 N. W. 297; Waldo v. Ry. Co., 14 Wis. 576; McClellan v. Scott, 24 Wis. 81; Union Nat. Bank v. Hunt, 76 Mo. 439; Merrill v. Fla. Land & I. Co., 60 Fed. 17, 8 C. C. A. 444; Fishback v. Miller, 15 Nev. 428; Brown v. Norman, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663; Harvey v. Smith, 17 Ind. 272; Haygearth v. Wearing, L. R. 12 Eq. 320; 14 Am. Law Rev. 184, 185. We call particular attention to Rawdon v. Blatchford, Cruess v. Fessler, and Cottrill v. Krum, supra.

But it is said that Liland did not rely upon the representations made by Tweto. The record discloses that Tweto told Liland to make inquiry of other parties, and that before consummating the trade Liland went to one Korsvick, who had served as secretary

of the corporation, and made inquiry, and to one Hagen. Hagen told Liland to investigate the concern. Korsvick had some conversation with him, but was unable to give him any definite information. It does not appear that he made inquiry of any other parties. The inquiries which he did make of the persons named and the nature of the information, or the lack of it which he received, but emphasizes the fact already stated that he relied implicitly upon Tweto. He did not investigate. Had he done so, at least without the assistance of experts, he could have obtained no accurate information, and the information which he received from the parties named furnished no inducement to him to consummate the trade.

It is urged by respondent that a rescission should not be decreed because appellant ratified the contract, and by his own action placed the corporation in such a position as to destroy its credit and materially affect the value of the stock. Tweto remained president after he exchanged the property until the 8th day of March, 1907, when he resigned, and one Lochrem was made president. Lochrem, prior to that date, had no interest in the corporation, but had worked for it on salary. At Tweto's request he permitted Tweto to transfer to him five shares of stock, and on the ninth of the same month 200 more shares were placed in his name. We are unable to discover from the books whence these 200 shares came, but the record discloses that he neither paid, nor made any agreement to pay, for it, and that it was issued to him by direction of Tweto to qualify him for directorship and the presidency. Liland had been elected a director a few days before Tweto resigned as president, but had taken no active part in the management of the corporate affairs until a meeting of the directors held on March 8th, when Lochrem was elected president, and at which no other business was transacted. It appears that among the liabilities of the corporation were bills payable in large amount, due the different banks in which Tweto was interested, and that four days after the exchange was consummated between Tweto and Liland, Tweto, as president, and the secretary of the corporation executed chattel mortgages on all the personal property belonging to it to these different banks to secure such indebtedness, and that this was done without authority from the board of directors. But for Tweto's knowledge of the rottenness of affairs, can it be said he would have given these mortgages? We think not. These chattel mort-

gages were not filed with the register of deeds until the 11th day of March, 1907, three days after Tweto's resignation as president. Chattel mortgages were also given about the same time to other parties, but not filed until after Tweto resigned. These mortgages, together with those previously existing on the real estate, created liens upon all the property of every description, including all the stock of merchandise owned by the corporation. Their filing resulted in a number of foreign creditors at once taking steps to secure their indebtedness. A committee of such creditors visited Abercrombie. A meeting of the directors was held on the 14th day of March, 1907, for the purpose of considering the best method of procedure. The committee was present, and demanded the execution and delivery of a trust deed to secure the creditors. The board of directors asked a few days in which to consider it. This was refused by the committee, whereupon a resolution was passed by the board that the property, both real and personal of the company be conveyed to G. H. Korsvik, I. H. Lochrem, and E. B. Edgar as trustees, for the benefit of its creditors, and thereupon such a deed was executed and delivered. A part of the creditors appeared to have refused to concur in this transaction. This resulted in proceedings being instituted in the federal court to have the corporation adjudged bankrupt, and a receiver was appointed of its property by the bankruptcy court. Thereupon both Tweto and the corporation secured counsel, and submitted an application for the dissolution of the receivership and the discharge of the receiver. A hearing was had on this application by the judge of the United States court, at which an attempt was made by Tweto to show the solvency of the corporation, and that the affidavits submitted by creditors were untrue. The court denied the application and continued the receivership, whereupon Tweto effected a compromise with the creditors and took assignments of all the claims of the hostile creditors, agreeing to pay in installments 55 cents on the dollar for their claims. This agreement was subsequently modified by their accepting 50 cents on the dollar in cash, and the claims were transferred to Tweto personally.

The contention is that the participation of Liland as a director in the meeting which resulted in the execution of the trust deed was a ratification of the exchange of property for the shares of stock. There may be no doubt that had he done this with full knowledge of the condition of the company, it would have ef-

fected such ratification, but from what we have said, based upon the record, as to the condition of the company's affairs and Liland's ignorance of business methods and inability to examine the books, as well as the fact that the books failed to disclose the condition, it is apparent that he could not have been fully advised at that time of the company's condition. An unexpected emergency arose; the creditors were insistent. The immediate occasion of this emergency was Tweto's action in placing upon record the chattel mortgages. The board was compelled to accede to the request of the creditors or face bankruptcy proceedings; and, in view of the fact that Liland did not have full knowledge of conditions when he thus acted, and of the emergency and the duty which would devolve upon the board to protect the property of the corporation of which they were directors, irrespective of the ownership of the stock, we are satisfied that Liland's act was not intended to be, and does not in law constitute, a ratification of the exchange. He held stock which qualified him for the directorship independently of his purchase from Tweto. He rescinded on acquiring full information of affairs and his right to rescind. The rule that impossibility of restitution is a defense, as claimed by respondent, does not apply when complete restitution to status quo has been rendered impossible by the act of the defendant. 24 Am. & Eng. Enc. Law, 623. The burden of proving knowledge of the facts giving rise to the right to rescind and of the time of acquiring such knowledge rests on the defendant. 24 Am. & Eng. Enc. Law, 626. We are likewise satisfied that certain conversations between him and the cashier of one of Tweto's banks at a subsequent date, regarding the purchase by the cashier of Liland's stock, did not constitute a ratification. The most that can be said of it was that Liland and Johnson, the cashier, had some conversation with reference to a sale and purchase of this stock, and that Liland made no proposition of sale. Johnson made an offer to buy, which was not accepted.

In addition to what we have heretofore said in regard to the condition of affairs, we may add that an inspection of the books of the corporation before us as exhibits fails to disclose when the bills payable existing at the time of the transaction in question matured; at least we have found no entries giving that information. The absence of such information in the books only emphasizes the impossibility of Liland determining, from any inspection which

he might make, or cause to be made, the true condition of the assets and liabilities.

It is also said that the corporation sold and acquired property after the 15th day of February, 1906, which materially changed its condition. We are not aware that Liland had anything to do with these transactions further than they related to the trust deed; but, even if he did participate in them, they consisted in the purchase and sale, and the payment of indebtedness in the ordinary course of their business, and did not materially change the condition of the corporation financially. If debts were paid with money, such payment decreased the liabilities and the assets at the same time. If goods were purchased on credit, the increase in liabilities was offset by an increase in assets, and no showing is made that extraordinary indebtedness was incurred which materially affected the ability of the corporation to meet its obligations; on the contrary, as far as we are able to ascertain, if any change occurred, it consisted in some reduction in its libilities. The fact that Tweto has disposed of personal property which he acquired from Liland does not mitigate against a judgment in favor of appellant or affect the equities. There is no material controversy as to the value of such property. The trial court can easily take an account of the same, and strike a balance between it and the amounts paid by Tweto on the indebtedness against the farm, and enter judgment in favor of the proper party for the difference.

The judgment in favor of defendant is reversed, and the district court is directed to enter judgment directing a transfer of the stock and the land to the respective parties, and to take an accounting as prayed for in plaintiff's complaint. All concur.

(125 N. W. 1032.)

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DAVID W. CASSEDAY AND MILBURN SANDEFUR, FOR THE USE AND BENEFIT OF AMELIA E. KINSLOW, v. GEORGE A. ROBERTSON.

Opinion filed March 14, 1910.

**Adverse Claims — Evidence — Judgment.**

1. In an action to determine adverse claims to a part of a lot in the city of Kenmare, and to recover damages for the withholding thereof, evidence examined, and *held,* sufficient to sustain the judgment for plaintiff.

**Costs Dependent Wholly upon Statute.**

2. Costs are purely the creature of the statute, and can be awarded only when expressly authorized by law. It is accordingly *held*, that an allowance of $100 by way of attorney's fees is erroneous, and the judgment is modified by eliminating such item therefrom.

Appeal from District Court, Ward county; *Goss*, J.

Action by David W. Casseday and Milburn Sandefur, for the use and benefit of Amelia E. Kinslow, against George A. Robertson. From a judgment in favor of plaintiffs, defendant appeals.

Modified and affirmed.

*Palda & Burke*, for appellant.

*Gray, Keith & Gray*, for respondent.

CARMODY, J. This is an action to determine adverse claims to the west 15 feet of lot 4, block 1, in the city of Kenmare, and to recover damages for the withholding thereof. From a judgment in favor of plaintiffs, defendant appeals to this court and desires a review of the entire case.

The facts are as follows: The Soo Railway Company obtained title to the town site of the city of Kenmare, by filing script covering the same, some time before the year 1898. That patent was issued on November 25, 1900. That not later than July 1, 1899, the interest of the railway company was transferred to plaintiff, David W. Casseday. That prior to that time the railway company, one W. T. Smith, and one E. C. Tolley entered into an agreement, whereby the town site of Kenmare should be their joint property in proportions, as follows: Railway company one-half interest; Tolley and Smith each one-fourth. Casseday succeeded to the railway company's interest; the title to remain in the railway company and Casseday as its successor until such time as the patent should be issued and Tolley and Smith should pay the railway company their proportionate share of the cost of the script and expenses. That on or about the 12th day of June, 1901, the said Casseday, pursuant to the agreement, transferred one-fourth of the land to W. T. Smith and one-fourth to Milburn Sandefur, who held the title for E. C. Tolley. That the tract in controversy was in the transfer to Sandefur. That on the 6th day of January, 1905, Sandefur conveyed the tract in controversy to plaintiff Kinslow. That Tolley was the agent of the railway company, and later the agent of Casseday. That on or about March 1, 1897, appellant, Robertson, went into possession of lots

4 and 5 in block 1 in the city of Kenmare. That the possession was peaceable and with the consent of E. C. Tolley, in accordance with the usual custom of the town-site owners allowing persons desiring the lots to go into the possession of the same with the understanding that, as soon as the patent was issued, deeds would be delivered. That appellant's possession of lot 5 and the west 15 feet of lot 4 continued peaceable, open, and notorious until the fall of 1901 or 1902, when a notice to vacate the premises in controversy was served upon him. That he, however, remained in continuous possession, having built a lean-to 12½x40 feet, in which he and his family have always lived while in Kenmare on the west 15 feet of said lot 4, which lean-to adjoins his store on lot 5; the same having been built according to the agreement with Tolley during the year 1897 or 1898. That appellant at no time paid rent for the premises in controversy, but always paid the taxes. Appellant claims that at the time he made the agreement for lots 4 and 5 he made the agreement for lot 6 adjoining. This plaintiffs deny, claiming that some time after appellant went into possession of lots 4 and 5 he surrendered possession of lot 4 and took possession of lot 6 in place thereof. That during the month of February or March, 1901, plaintiff Casseday came to Kenmare for the purpose of making a settlement with his co-owners and the purchasers of lots, at which time the price of appellant's lots was agreed upon at $150 each. That shortly thereafter, and in March of the same year, the defendant, who was in the general mercantile business, gave credit on his books to E. C. Tolley in the sum of $375, which appellant claims was the purchase price of lots 5 and 6 and the west 15 feet of lot 4 in said block 1. That during the summer and fall of 1901, merchandise was sold by appellant to E. C. Tolley and W. T. Smith and charged to their accounts as follows: Tolley, $332.88; Smith, $55.11. That during the summer of 1901 appellant, about the month of August, drilled a well and excavated a basement under his store building on lot 5 and the lean-to on the 15 feet in dispute and built a stone foundation thereunder; the value of which improvements on the 15 feet being: Well, $150; excavating and foundation, about $500. That during the summer of 1901 the husband of plaintiff, Kinslow, who owned lot 3 in said block 1 and had a hotel thereon, purchased the east 10 feet of lot 4.

Appellant specifies numerous errors of law, and also specifies ultimate facts which he claims to be established by the evidence in the case. Under our view of the case, a correct decision depends wholly on questions of fact. It is well settled that a party who, under an oral contract, has purchased real estate, goes into possession, made valuable improvements thereon, and paid the purchase price, is entitled to specific performance of the contract. Thomas v. Dickinson, 12 N. Y. 364; Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685; Stowell v. Tucker, 7 Idaho, 312, 62 Pac. 1033; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; 8 L. R. A. (N. S.) 877, note; 3 L. R. A. (N. S.) 790, note. The part performance on the part of the appellant, Robertson was sufficient to take the contract out of the statute of frauds. Engholm v. Ekrem, supra; Muir v. Chandler, 16 N. D. 551, 113 N. W. 1038; Roberts v. Templeton, 48 Or. 65, 80 Pac. 481, 3 L. R. A. (N. S.) 790.

E. C. Tolley, a witness for plaintiffs, testified that the defendant prior to 1901, selected lots 4 and 5 in block 1 as two lots that he wanted to buy when title would be secured and when the owners were ready to transfer the property, and that later, and before the title had been acquired, the appellant selected lots 5 and 6 instead of lot 4. He also testified: That about February 18, 1901, he and plaintiff Casseday went to appellant and arranged to deed him lots 5 and 6, and at the same time arranged to deed to Kinslow, husband of plaintiff Kinslow, lot 3 and 10 feet off the east side of lot 4, and at the same time offered to sell appellant the 15 feet in controversy. That he would not take it, and that afterwards a deed was delivered to appellant for lots 5 and 6 and to Kinslow for lot 3 and the east 10 feet of lot 4. He also testified that afterwards, and during the same season, appellant asked permission to occupy the 15 feet, and offered to pay him a rental or the taxes for the time that he was on it. That appellant continued to occupy it and built the stone wall hereinbefore mentioned. That in the fall of 1901 he served notice on appellant to vacate, and again in the winter of 1905, after the 15 feet had been sold and conveyed to the plaintiff Kinslow. That appellant refused to remove, and still occupies the lean-to on the 15 feet, and has occupied it since he built it in the early history of Kenmare. Witness also testified that some time after appellant got the deed to lots 5 and 6 he wanted to buy this 15 feet, stating that his wife wanted it. Witness went to

their residence and had a talk with her relative to it. It is also in evidence that the appellant, Kinslow, and Tolley measured off Kinslow's 10 feet and ran a line between the east 10 feet and the west 15 feet of lot 4, and that Kinslow erected a fence on that line.

Plaintiff Casseday's evidence was taken by deposition. He testified: That he was in Kenmare in February or March, 1901, to close up his interest in the town site. That he saw appellant, made arrangements with him for lots 5 and 6, and asked him if he wanted to buy the west 15 feet of lot 4. Appellant refused, stating that he had land enough. Thinks he sold lots 5 and 6 for $250 each, but is not positive. That appellant was in possession of the west 15 feet of lot 4. That he afterwards deeded lots 5 and 6 to appellant. Appellant, in his own behalf, testified that about March 1, 1897, he selected lots 4, 5 and 6 of block 1, under an oral contract with E. C. Tolley, who told appellant to go ahead and build whatever he wanted to build, and when the time came, and they got their title, they would close the deal. That appellant went into possession of these three lots and erected first a store building on lot 5 and a leanto on the west 15 feet of lot 4, in which he and his family lived from the time it was erected until the time of the trial. That along in the spring of 1901, Tolley and plaintiff Casseday came into appellant's store and said they wanted to settle for the three lots, 4, 5, and 6, at $150 each, and which was satisfactory to appellant, but that Tolley told appellant he had to give the east 10 feet of lot 4 to Kinslow, and appellant consented thereto. That afterwards he and Tolley took a tapeline and measured off the 10 feet, and Kinslow set the stake and afterwards built a fence on the line. That appellant then asked Tolley if it was all right for appellant to go to work and excavate as far as his building extended on the 15 feet, which was 12½ feet. That Tolley said: "Yes, sir; go ahead. It is yours." And that appellant excavated under the building and put in a basement and dug a good cellar and afterwards bored a well. That in the fall of 1901 Francis J. Murphy, who was in the employ of Tolley, brought him a deed from Casseday to lots 5 and 6. That appellant told Murphy that the half lot should also be in the deed, and went with Murphy to Tolley's office and told Tolley that the deed was not right. Tolley said he knew it was not right, and said he would go to Minneapolis and get it fixed. That appellant left the deed with Tolley. That Tolley went to Minneapolis. When he came back appellant met him, but

Tolley told him the deed was not fixed, but that he would go down again and have it fixed. That he never saw the deed again and never heard anything more about the lot until late in the fall of 1901 or 1902, when papers were served on him to vacate. That in the spring of 1901 Tolley told appellant, who was then keeping a general mercantile store, that Smith might take part or all of his share of the proceeds of the two lots and the one-half lot in trade. That appellant saw Smith, and Smith agreed to do it. That appellant, about the time Tolley and Casseday called on him, gave Tolley credit for $375, the price of the two lots and the one-half lot. Appellant claimed he was to have the 15 feet of lot 4 for $75. That Tolley took out in mercandise and cattle the sum of $332.88, and Smith took out in merchandise the sum of $55.11, part of which was an order for $44 given by Tolley and Smith to one Burke on defendant. Appellant afterwards went through bankruptcy and A. W. Gray, the trustee, finding no deed on record to appellant for any lots in Kenmare, procured from Casseday a deed to lots 5 and 6, which Gray caused to be placed on record. Appellant had previously erected a stone building on lot 6, but had disposed of lot 6 before the trial.

One Grinnell, a witness on the part of appellant, testified that he was bookkeeper for appellant in 1901, and about March 1st, by direction of appellant, gave Tolley credit by two lots and a half, $375. Smith, the co-owner with Tolley and Casseday of the town site of Kenmare, testified that in the first place appellant got lots 4 and 5 and afterwards, under some arrangements that he (Smith) knew nothing about, appellant got lot 6. Smith also testified in answer to the following question: "Do you know whether there was any talk as to what arrangement there was to be made as to lot 4 and the proportion he was to have, if any? A. Only in a general way; but I know he was supposed to get the deed for the west half of lot 4 and lots 5 and 6."

Smith also testified that appellant asked him (Smith) if he would take some goods out of the store as his part of the pay for the lots, and Smith told him he would. Smith and Tolley were in partnership in the land business, but Tolley had charge of the sales of the lots in Kenmare. The court asked the witness Smith the following question: "You stated you had an understanding that this half of the lot was to be the property of the defendant, here. Do you know where you got that? A. Through the gen-

eral talk I had with Mr. Tolley. He had charge of the sale of the various property up there all the time. Of course, I had talked it over with him as to who had the different lots, and my idea was all the time that Robertson was to have half of the lot." The following question was asked the witness Smith: "Do you remember the transaction of giving an order to one Burke to be charged to this lot account, an order for some money that you and Tolley owed Burke? A. I would not be positive that I gave any order, although there was something said about it at the time, but my recollection is not clear enough to say."

Francis J. Murphy, for plaintiffs in rebutal, testified: That he went to Kenmare on the 17th day of August, 1901, and immediately became associated with Tolley as his private secretary and as a partner in some instances. That he delivered a great many deeds for Tolley, and might have delivered the deed to appellant, but had no conversation with him in regard to the 15 feet in lot 4. That aupellant did not walk down with him (Murphy) to Tolley's office and enter into conversation relative to the deed. That appellant and Tolley might have had the conversation in regard to the west 15 feet of lot 4, testified to by appellant, but that he (Murphy) did not hear it. The witness Tolley testified for plaintiffs, in rebuttal: That he did not have the conversation testified to by appellant relative to the excavation of the cellar and building the foundation or wall on the property in controversy. That the first he (Tolley) knew of it he discovered appellant's hired man excavating and dragging dirt from the west 15 feet of lot 4 onto some other lots. He (Tolley) stopped him. Appellant was not at home, but when he came back the witness went over to see appellant, who explained to him that he was trying to get the dirt out from under the main building. That appellant wanted to erect the stone wall, and witness told him if the lot was sold he would be out the stone. Appellant said if anybody bought the lot, perhaps they would want the stone wall, and if they did, he would sell it. Witness also denied that he told appellant that Smith could take out his share of the proceeds of the lots in trade. He says that he (Tolley) was responsible to Casseday for Casseday's share of the proceeds of the lots. Tolley also denied that he gave Burke, or any other person, an order on appellant. Appellant, recalled, testified that Casseday did very little talking in regard to the lots and did not try to sell him the west 15 feet of lot 4, but that Tolley, in Casseday's

presence, said he might have to give Kinslow the east 10 feet of lot 4 to keep peace in the family, and appellant said anything to keep peace in the family would be all right with him, and that shortly after Tolley came back and told appellant he (Tolley) had to let Kinslow have the east 10 feet of lot 4. Tolley denied that appellant left the deed with him (Tolley), and testified that he himself delivered the deed to appellant and never saw it afterwards.

Exhibit 3, which was a settlement between Casseday, Smith, and Tolley, was introduced by plaintiffs in evidence over the objection of appellant, and shows the sale of lots 5 and 6 to appellant for $300, and lot 3 and the east 10 feet of lot 4 to Kinslow for $250. Also shows that in the division Casseday got the property in controversy.

The court made findings of fact: That on January 15, 1901, plaintiff Casseday was the owner of the land in controversy. That on or about the 13th day of June, 1901, he conveyed it to plaintiff Sandefur. That on or about the 6th day of January, 1905, plaintiff Sandefur, by Tolley, his attorney in fact, conveyed it to plaintiff Kinslow. That defendant, George A. Robertson, has been ever since the date of said conveyance by Casseday to Sandefur, and for a long time prior thereto, in the wrongful possession of said described property. That all the averments of the plaintiff's complaint are true, except as to the allegation of damages, and all the denials and allegations of the defendant's answer are untrue.

As conclusions of law: That the plaintiff Kinslow is the owner in fee simple and entitled to the possession of said property, and that the title be quieted in her as against the defendant and all persons claiming under or through him. That plaintiff is entitled to a judgment for her costs and $100 attorney's fees, and that the defendant is entitled to remove from the tract in question any and all buildings which he has placed thereon, within 30 days after the entry of judgment.

Appellant specifies as error that the findings of fact do not cover all the material facts involved in the issues as presented by the pleadings, and contends that the failure so to find constitutes ground for a new trial or reversing the judgment in this particular instance; that a judgment, entered without findings, disposing of all material issues of fact, is erroneous. We think the findings are sufficient to justify the judgment. Section 7229, Rev. Codes 1905. While there are some circumstances surrounding the transaction

that tend to sustain appellant's contention, we think the evidence sufficient to sustain the judgment. There is no doubt but what the appellant could have surrendered lot 4 and taken lot 6 in lieu thereof. A contract may be discharged by agreement of the parties, by substitution of a new contract.

The contention of appellant that there is no warrant in law for the inclusion in the judgment of $100 attorney's fees, in favor of the plaintiffs and against the defendant, must be sustained. Engholm v. Ekrem, supra.

The judgment will be modified by striking therefrom $100, and, as modified, is affirmed. Appellant to recover costs in this court. All concur.

(125 N. W. 1045.)

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FRED LANG v. HARRY H. BAILES AND WILLIAM M. PERKINS, COPARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF BAILES & PERKINS.

Opinion filed March 12, 1910.

Rehearing denied April 13, 1910.

**Appeal and Error — New Trial — Judgment Notwithstanding the Verdict — Conflicting Evidence.**

1. An order denying a motion for a new trial or for judgment notwithstanding the verdict, which is based upon the insufficieny of the evidence to justify the verdict, will not be disturbed where it appears that there is a substantial conflict in the evidence.

**Master and Servant — Safe Place to Work — Delegation of Duty — Negligence of Vice Principal.**

2. The rule as to the duty of a master in respect to providing a safe place to work is not applicable to a case where a servant is injured by reason of defects in, or insufficiency of a temporary structure such as a scaffolding or framework for supporting heavy materials, which are appliances or instrumentalities by means of which the work is done. When, by the express or implied contract between the master and servants, the former undertakes to furnish the necessary tools or appliances, it is his duty to use ordinary care to see to it that such instrumentalities are safe and suitable; and this duty, when it exists, is one of the absolute and personal duties. Any servant to whom the master delegates it is pro hac vice, a vice principal, for whose negligence the master is responsible.

**Master and Servant — Instructions — Harmless Error.**

3. The trial court charged the jury that "it was the duty of the defendants to use ordinary care to furnish for the plaintiff and his fellow workmen a staging that was reasonably safe for the purpose for which it was intended and used; and if you find that the defendants negligently failed to perform this duty, and furnished a staging that was unsafe, and that the plaintiff, while in the exercise of ordinary care and without negligence upon his part and without knowledge of the unsafe condition of the staging, went upon the same to perform his work in the ordinary way, and by reason of the defect therein, if any, fell to the ground and was injured, then plaintiff is entitled to recover."

This instruction is undoubtedly erroneous, as it assumes as a fact that the employers were under a legal duty to furnish the scaffold as a completed structure, but in view of the fact that the jury found that the defendant instructed the carpenters to build the staging, and that they undertook to become responsible for the safe building of such staging, its giving is held not prejudicial error.

Ellsworth, J., dissenting.

Appeal from District Court, Grand Forks County; *Templeton,* J.

Action by Fred Lang against Harry H. Bailes and William M. Perkins, co-partners, doing business under the firm name and style of Bailes & Perkins. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, and from a judgment in favor of plaintiff defendants appeal.

Affirmed.

*Guy C. H. Corliss,* for Appellants.

If the master furnishes material for the construction of an appliance which he has not undertaken to construct, and the workman constructs it, the master is not liable for the manner of construction. Butler v. Townsend, 126 N. Y. 107, 26 N. E. 1017; Kimmer v. Weber, 151 N. Y. 418, 45 N. E. 860; Fraser v. Red River Lumber Co., 47 N. W. 785; Olsen v. Nixon, 40 Atl. 694; Pfeiffer v. Dialogue, 46 Atl. 772; Phoenix Bridge Co. v. Castleberry, 131 Fed. 175; Hutton v. Holdbrook, etc. Co., 139 Fed. 734; Peschel v. Ry. Co., 62 Wis. 338, 21 N. W. 269; Burns v. Sennett, 33 Pac. 916; Noyes v. Wood, 36 Pac. 766; Beesley v. Wheeler, 61 N. W. 658; Adasken v. Gilbert, 43 N. E. 199; Brady v. Norcross, 52 N. E. 528; Benn v. Null, 21 N. W. 700; Ross v. Walker, 21 Atl. 157; Kellea v. Faxon, 125 Mass. 485; O'Connor v. Rich, 164 Mass. 560, 42 N. E. 111; Lambert v. Pulp Co., 47 Atl. 1085; Garrow v. Miller, 47 Atl. 1087; Hoar v. Merritt, 29 N. W. 15; 26 Cyc. 1329.

The fellow servant rule prevails in this case. Sec. 5544, Rev. Codes 1905; Ell v. N. P. Ry. Co., 1 N. D. 336, 48 N. W. 222. The vice-principal rule is repudiated. Richards v. Hayes, 3 Am. Neg. Rep. 267; Peschel v. Ry Co., 62 Wis. 338; Noyes v. Wood, 36 Pac. 766; Leishman v. Union Iron Works, 83 Pac. 30; 20 Cyc. 1330 and note; Metzler v. McKenzie, 76 Pac. 114; 2 Labatt M. & S. 1790; Garrow v. Miller, 47 Atl. 1087; As repudiating the "different department" rule. Fraser v. Red River Lbr. Co., 47 N. W. 785; ..... Pfeiffer v. Dialogue, supra; Beesley v. Wheeler & Co., 27 L. R. A. 266; Hogan v. Field, 44 Hun. 72; Butler v. Townsend, 126 N. Y. 107, 26 N. E. 1017; Kellea v. Faxon, supra; Hoar v. Merritt, 29 N. W. 15.

Erecting of a temporary scaffold is a servant's work, although one class of servants erect it for the use of another. Butler v. Townsend, supra; Fraser v. Red River Lbr. Co., 47 N. W. 785; Pfeiffer v. Dialogue, supra; Beesley v. Wheeler, supra; Kellea v. Faxon, supra; Lambert v. Pulp Co. supra.

*Bangs, Cooley & Hamilton,* for Respondent.

Facts found by a jury are as conclusive upon the appellate court as if proven by uncontradicted legal proof. Taylor v. Jones, 3 N. D. 235; 55 N. W. 593; Black v. Walker, 7 N. D. 414, 75 N. W. 787; Muri v. White, 8 N. D. 58, 76 N. W. 503; Howland v. Ink, 8 N. D. 63, 76 N. W. 992; Becker v. Duncan, 8 N. D. 600, 80 N. W. 762; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Magnusson v. Linwell, 9 N. D. 157, 82 N. W. 743; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988; Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724.

Where staging has been furnished by the master, he is liable for his neglect to make it safe. Chambers v. Am. Tin Plate Co., 129 Fed. 561; Cadden v. Am. Steel Barge Co. 88 Wis. 409, 60 N. W. 800; Ch. & A. R. Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826; Ch. & A. R. Co. v. Maroney, 48 N. E. 953; Edw. Hines L. Co. v. Ligas, 50 N. E. 225; Kelly v. R. R. Co., 48 Pac. 843; Coughtry v Globe Woolen Co., 56 N. Y. 124; McNamara v. MacDonough, 102 Cal. 575; 36 Pac. 941; Donnelly v. Booth Bros., 37 Atl. 874 White v. Wm. Perry Co., 76 N. E. 512; Brown v. Gilchrist, 45 N. W. 82; Kan. Cy. Car & F. Co. v. Sawyer, 53 Pac. 90; Sims v. Am. Steel Barge Co., 56 Minn. 68, 57 N. W. 322; Arkerson v. Dennison, 117 Mass. 407.

Where a servant is performing a duty personal to the master and non-delegable, the master is responsible for his negligence. Lindaell v. Woods, 48 Fed. 62; Killea v. Faxon, 125 Mass. 485; Kan. Cy. Car & F. Co. v. Sawyer, supra; Roche v. Denver etc. R. Co., 73 Pac. 880; Lewis v. Seifort, 116 Pa. St. 628, 11 Atl. 514; Jacques v. Gt. Falls Mfg Co., 66 N. H. 482, 22 Atl. 552; Benzing v. Steinway, 5 N. E. 449; Mast v. Kern, 54 Pac. 950; Kelly v. Erie Tel. & Tel. Co., 25 N. W. 706; A. T. & S. F. R. Co., v. Moore, 29, Kan. 452; Haskell v. Cape Ann Anchor Wks., 4 L. R. A. (N. S.) 220, notes; Balt. & O. R. Co., v. Baugh, 149 U. S. 368, 37 L. Ed. 772; Coffeyville V. B. & T. Co. v. Shanks, 76 Pac. 856; Beesley v. Wheeler, 61 N. W. 658.

The "Vice-Principal" rule was not abrogated by section 5544 Rev. Codes 1905. Nor. Pac. R. R. Co. v. Herbert, 116 U. S. 642, 29 L. Ed. 755; Ell v. Nor. Pac. R. Co., 1 N. D. 336, 48 N. W. 222; Meehan v. Gt. Nor. Ry. Co., 13 N. D. 432.

Admission of incompetent testimony is harmless error, if there is other sufficient competent evidence to sustain a verdict. Fowler v. Iowa Land Co., 99 N. W. 1095; Cairncross v. Omlie, 13 N. D. 387, 101 N. W. 897; Waldner v. Bowdon State Bank, 13 N. D. 604, 102 N. W. 169; Union Cent. L. Ins. Co. v. Prigge, 96 N. W. 917.

CARMODY, J. This action was brought to recover damages for personal injuries for the alleged negligence of the defendants. A verdict was rendered in favor of the plaintiff for $2,500. A motion for a new trial and for judgment notwithstanding the verdict was made; the defendants having moved for a directed verdict at the close of all the evidence. This motion was denied, and the appeal is taken from the final judgment, and from the order denying such motion. At the time of the injury complained of, the relation of master and servant existed between the plaintiff and the defendants. Plaintiff's injury was sustained by reason of the breaking of one of the portlocks upon a scaffold on which plaintiff, who was a mason, was doing brick work. The evidence shows that the portlock was defective because of a large knot in the same, rendering the sound timber of the portlock insufficient to bear very heavy weight. The building upon which the plaintiff was working when injured was a small receiving vault, which was being constructed by defendants under contract. The walls of the building were of brick, and at the time the scaffold broke the plaintiff was working thereon, on the east gable end of the building; the scaf-

fold being about 21 feet from the ground. The masons had constructed some of the scaffolds previously used on the building, and had had something to do with this scaffold. As the brickwork was carried up towards the roof, the scaffold in question had to be raised to different levels from time to time. Two of the carpenters did the work in raising the scaffold to the last level. While this level was being constructed by the carpenters, the plaintiff and one Bacon, a brick mason, were at work on the west end of the building. When they were ready to use the scaffold, they found it a complete structure and ready for their use. They, however, did some work in bracing and changing the scaffold.

Counsel for plaintiff concede that there was plenty of good material, furnished by defendants, out of which the scaffold might have been constructed without using the defective timber. At the request of the court, the jury, in addition to their general verdict, made certain special findings of fact as follows.

"Question No. 4. Did the defendant Perkins tell the plaintiff or Bacon, or either of them, the day the plaintiff was injured that he (Perkins) would see to having the staging built on which the plain- was injured? Answer. Yes.

"Question No. 5. Did the defendant Perkins instruct the carpenters, or any of them, on said day to build such staging? Answer. Yes.

"Question No. 6. If you answer either question 4 or 5 in the affirmative, then did the defendant Perkins by what he said undertake to become responsible for the safe building of such staging? Answer. Yes.

"Question No. 7. At the time the staging in question was built was there any general custom in this vicinity among contractors and their employes that the contractor should not only furnish a sufficient amount of good material for stagings, but should also be responsible for the building of the staging in a safe manner? Answer. Yes."

The main question to be determined on this appeal is whether as a matter of law, upon the evidence in the case and the facts found specially by the jury, the verdict in favor of plaintiff should be sustained. The rule, as we understand it, is that a scaffold is ordinarily a mere incident or detail to the construction of a building, and, unless the master has assumed the responsibility of furnishing such scaffold or staging, but intrusts the making of it to

the servants, he is not liable for an injury caused to the workmen by reason of a defective scaffold or staging. If, however, the master undertakes to furnish the scaffold or staging as a complete structure, he is responsible for his neglect to make it safe. In the case at bar, there is some evidence that the defendants undertook to furnish the staging or scaffold on which plaintiff was injured, and assumed the responsibility of its construction.

Henry Bacon, one of the masons working on the building, testified that the defendant Perkins told him to stay on the wall, and he, Perkins, would look after the scaffold, and Perkins and the carpenters built it, or Perkins was there to see that the carpenters built it. There is evidence that plaintiff told defendant Perkins that they would soon be ready for another scaffold, and he Perkins, had better have a scaffold built on the east end of the building. Perkins directed the carpenters to build the scaffold, and, when plaintiff and the other mason got ready to use it, they found it constructed and ready for use. It is true that the plaintiff and Bacon, the other mason, and their helper, moved a beam and braced the scaffold somewhat, but did not in any way change the portlock that gave way, or the boards resting thereon. The jury have found in favor of the plaintiff in a general verdict, and have found in answer to the special questions that the defendant Perkins told the plaintiff or Bacon the day that plaintiff was injured that he, Perkins, would see to having such staging built, that Perkins instructed the carpenters on said day to build the staging, and that defendant Perkins, by what he said, undertook to become responsible for the safe building of such staging. The defendants having moved for a new trial and for judgment notwithstanding the verdict on the grounds, among others, of the insufficiency of the evidence to justify the verdict and the trial court having denied such motion, if the verdict is supported by substantial evidence, then it must stand. Taylor v. Jones, 3 N. D. 235, 55 N. W. 593; Black v. Walker, 7 N. D. 414, 75 N. W. 787; Muri v. White, 8 N. D. 58, 76 N. W. 503; Howland v. Ink, 8 N. D. 63, 76 N. W. 992; Becker v. Duncan, 8 N. D. 600, 80 N. W. 762; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Magnusson v. Linwell, 9 N. D. 157, 82 N. W. 743; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988; Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693.

Under the doctrine laid down by this court in the cases herein cited, there is substantial evidence to support the verdict, and the learned trial court did not abuse his discretion in denying the motion for a new trial or for judgment notwithstanding the verdict on the ground of the insufficiency of the evidence. See cases hereinbefore cited. The rule as to the duty of a master in respect to providing a safe place to work is not applicable to a case where a servant is injured by reason of defects in, or insufficiency of a temporary structure, such as a scaffolding or framework for supporting heavy materials, which are appliances or instrumentalities by means of which the work is done. When by the express or implied contract between the master and servants, the former undertakes to furnish the necessary tools or appliances, it is his duty to use ordinary care to see to it that such instrumentalities are safe and suitable, and this duty, when it exists, is one of the absolute or personal duties. Any servant to whom the master delegates it is pro hac vice, a vice principal, for whose negligence the master is responsible. Phœnix Bridge Co. v. Castleberry, 131 Fed. 175, 65 C. C. A. 481; Hutton v. Holdrook (C.C.) 139 Fed. 734; Chambers v. Am. Tin Plate Co., 129 Fed. 561; 64 C. C. A. 129; Kelley v. Union Pac. R. R. Co., 58 Kan. 161, 48 Pac. 843; Coughtry v. Mill Co., 56 N. Y. 124, 15 Am. Rep. 387; Cadden v. Am. Steel Barge Co., 88 Wis. 409, 60 N. W. 800; McNamara v. MacDonough, 102 Cal. 575, 36 Pac. 941; Donnelly v. Booth Bros., 90 Me. 110, 37 Atl. 874; White v. Perry, 190 Mass. 99, 76 N. E. 512; Brown v. Gilchrist, 80 Mich. 56, 45 N. W. 82, 20 Am. St. Rep. 496; Kansas City Car Co. v. Sawyer, 7 Kan. App. 146, 53 Pac. 90; Arkerson v. Dennison, 117 Mass. 407; Ch. & A. R. Co. v. Scanlan, 170 Ill. 106, 48 N. E. 826; Ch. & A. R. Co. v. Maroney, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396; Edw. Hines L. Co. v Ligas, 172 Ill. 315, 50 N. E. 225, 64 Am. St. Rep. 38.

In White v. Perry, supra, the court says: "It was competent for the jury to find that the platform, though temporary in its nature, was an appliance provided by the defendant, through its superintendent, for the use of the men who were engaged in loading the cars with rails. And the question whether he exercised due care in making it as he did, or whether it should have been fastened together, was for the jury." In this case plaintiff was assisting in loading a car with rails, and while standing on a platform made of sleepers was in the act of pushing a rail over the side

of the car, when in consequence, as he contended, of the slipping of one of the sleepers, his foot went down, and the rail crushed his wrist against the side of the car, and broke it.

In Chambers v. Am. Tin Plate Co., supra, the defendant was erecting for its own use a large brick mill. It supplied the material and hired masons and carpenters by the day, and the work was carried on under the general direction of a superintendent. A scaffolding was constructed out of material furnished by the defendants for the use of the masons in the prosecution of their work. This scaffold fell while the plaintiff was standing thereon, engaged in laying brick. The court says: "There was evidence, therefore, from which the jury might reasonably infer that the defendants undertook to furnish all necessary scaffolding, and that they had, in fact, supplied a completed structure for the use of the plaintiff and his fellow masons. Whether we regard a mason's staging as a place to stand and do his work, or as an appliance for the doing of his work is not very important for the purpose of this case. In an obligation to furnish such staging was assumed by the defendants, they were bound to exercise reasonable care to furnish an appliance reasonably safe and suitable for the purpose. * * * When a gang of masons are engaged in plastering or painting a room, the construction of proper platforms or places upon which to stand while doing the work is a detail of business that is generally left to the men themselves. The master may, it is true, take this out of their hands, and assume to do it himself, and in that case he would be bound to furnish an appliance reasonably safe and suitable for the purpose. * * * If an employer undertakes himself to furnish his employes with reasonably suitable and safe appliances, he does not discharge his duty by the employment of an agent to carry out his obligation. For the negligence of that agent he continues responsible."

The cases cited by appellants are not applicable to the facts of this case, and go no farther than to hold where stagings or platforms necessary for the erection of a building were erected by the workmen from materials furnished by the owner of the building, by whom the workmen were employed, the owner is not liable for injury sustained by the workmen from the breaking down of the staging from faulty construction. The rule is that if the master had furnished suitable material and left with the servants generally the duty of preparing their own platforms, and this platform so pre-

pared was defective, that was the negligence of the employes, and the employer would not be liable; while, on the other hand, if the master undertook himself to furnish his employes with reasonably suitable and safe appliances, and he is neglectful in any of these matters, and an employe suffers damage on account thereof, the master is liable. If he engages another to do the work, he is liable for the neglect of that other. It is generally a question of fact for the jury. Where the master undertakes to furnish his employes with reasonably suitable and safe appliances and engages another to do it for him, he is liable for the neglect of that other, which in such a case is not the neglect of a fellow servant, no matter what his position is as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such or which he undertakes to perform. Cases hereinbefore cited.

Our views find support in the recently decided and well-considered case of Allison v. Stivers, 106 Pac. (Kan.) 996. In this case appellant was a contractor engaged in the erection of a roundhouse. The work was conducted under the supervision of a general foreman, and appellee was a carpenter. In the prosecution of the work brick masons and their helpers erected a scaffold for their own use, which was left standing after it had subserved its purpose. Appellee was directed by the foreman to put on some drop siding over a window close by the scaffold, and commenced to build a scaffold of his own to enable him to reach the place. He required a scaffold higher than the one the brick masons had left. He was using a ladder for his purpose when the foreman came along and ordered him to take the ladder down, get upon the old scaffold to nail the necessary timbers, and get the work done. The order was obeyed, and while appellee was driving the second nail the scaffold fell, and he suffered the injury for which he recovered damages. The court said: "This is the ordinary case of a master who provides his employe with an unsafe instrumentality with which to prosecute the work. The brick masons' scaffold took the place of the ladder. In the exercise of his own discretion, appellee chose the ladder as the proper implement with which to build his own scaffold. Acting upon his own initiative, he was bound to know whether the work could be safely accomplished by means of a ladder, and whether the one he himself selected was fit for use. But he was not allowed to proceed according to his own judgment,

select his own materials, supply his own instrumentalities, and make his own place as the conduct of the enterprise required. The master, through the foreman, interfered, took away the ladder, and gave appellee the brick masons' scaffold instead. Appellee had no discretion in the matter. He did not select or use the scaffold, relying upon the care and prudence of the brick masons in building it. The master selected it, and ordered it to be used just as he might have purchased another ladder, brought it upon the scene, and ordered appellee to substitute it for the one he was using when the foreman appeared. In such a case the duty would rest upon the master to supply a ladder which was reasonably safe, and he would be bound to know whether it was reasonably safe before ordering an employee, ignorant of its condition, to climb upon it. The discharge of his duty would not depend upon who constructed the ladder. Whether made by a manufacturer of ladders, by an ordinary carpenter, or by brick masons or their helpers, the master's duty would be the same. So here. The master took the scaffold as he found it, adopted it as his own, supplied it to appellee, and ordered appellee to use it instead of the ladder. It is immaterial that the scaffold was built by the brick masons, and immaterial that the master did not superintend its erection. He imposed it upon appellee, and was obliged to know whether it was reasonably fit for service. Appellee was no more a fellow servant of the bricklayers, and no more assumed the risk of their work, than he would be a fellow servant with the ladder manufacturer and so would assume the risk in the supposed case."

It is due to counsel for appellants to say that he does not question the accuracy of the foregoing rules of law; his contention being that the facts do not warrant the application of such rules. Appellants contend that the court erred in instructing the jury as follows: "It was the duty of the defendants to use ordinary care to furnish for the plaintiff and his fellow workmen a staging that was reasonably safe for the purpose for which it was intended and used; and if you find that the defendants negligently failed to perform this duty and furnished a staging that was unsafe, and that the plaintiff while in the exercise of ordinary care and without negligence upon his part, and without knowledge of the unsafe condition of the staging, went upon the same to perform his work in the ordinary way, and by reason of the defect therein, if any, fell to the ground and was injured, then plaintiff is entitled to recover." This instruction is undoubtedly erroneous, as it assumes as a fact

that the employers were under a legal duty to furnish the scaffold as a completed structure. Whether they were under such legal duty depended upon the question whether they had undertaken or assumed to discharge such duty, and this, in turn, depended upon a disputed fact in the case.

In view of the fact that the jury found that the defendants instructed the carpenters to build the staging, and that they undertook to become responsible for the safe building of such staging, we cannot see that such erroneous instruction was prejudicial to the defendants, particularly as the court, in submitting the questions to the jury, instructed as follows: "In answering the questions I have put to you, numbered from 1 to 7, you are wholly to disregard the law I have laid down to you to the effect that it was the duty of Bailes & Perkins to use ordinary care to furnish a reasonably safe staging for plaintiff to work on, and you must consider the evidence bearing on such questions just as though the court had said nothing to you about the duties of the defendants in this regard under the law."

The other errors assigned by the defendants have either been abandoned or are not material.

The order and judgment appealed from are affirmed. All concur, except ELLSWORTH, J., dissenting.

ELLSWORTH, J. (dissenting). The district court in its charge to the jury by the instruction quoted at length in the majority opinion and by several others of the same tenor either assumed or directly charged that the scaffold from which plaintiff fell was "a place to work," which it was, from the nature of the employment, the duty of defendants to furnish and keep in reasonably safe condition. This instruction, wherever given or implied, is now conceded to have been erroneous and a misstatement of the law appliacable to this case. After the charge, complete in all particulars even to the direction of a form of verdict, was delivered, the court by an apparent, afterthought submitted seven special findings, and directed the jury that, in making these findings, it should wholly "disregard the law as I have laid it down to you to the effect that it was the duty of Bailes & Perkins to use ordinary care to furnish a reasonably safe staging for plaintiff to work on and you must consider the evidence bearing on such questions just as though the court had said nothing to you about the duties of the defendants in this regard under the law." The jury thereupon returned a general verdict in

favor of plaintiff assessing his damage in the sum of $2,500, and at the same time returned a special verdict consisting of the questions submitted to it by the court answered in such a way as to find as a fact that defendants by special agreement assumed the responsibility of furnishing a scaffold in safe condition for plaintiff to work upon. Upon receiving these verdicts, the court rendered judgment in favor of plaintiff for $2,500.

It seems clearly apparent that the general verdict, being unquestionably based wholly upon an erroneous instruction, is void throughout. The special verdict, assuming that the jury as directed disregarded that part of the charge bearing on defendants' duty with reference to the scaffold, was rendered without any definite instruction whatever on the law points applicable to this feature of the case. There was no special finding as to the amount of damage. The judgment rendered must, therefore, have been either based wholly upon the general verdict or the data necessary for its rendition obtained by piecing together the special findings with reference to the assumption of liability by defendants and the amount of damage which appears only in the general verdict. I do not see how a judgment thus based either upon a general verdict that is admittedly void or partially upon it and on a special verdict which is entirely insufficient in an important particular can be sustained.

Further than this, the charge as given was so confusing that by fair presumption the jury were misled by it. The principles upon which it was directed to find its general verdict are first set out in such detail that any jury might reasonably assume that its first consideration should be applied to this particular. But in agreeing upon its general verdict it was required to accept as matter of law the very facts which it was directed to find in its special verdict. Proceeding in this order the minds of the jury would be fully made up on the questions submitted by the special verdict before the consideration of the same was properly reached. A charge so bewildering and so liable to mislead should, I think, be regarded as necessarily prejudicial to the interests of defendants; and I believe requires a reversal of the judgment and a new trial of the case.
(125 N. W. 891.

## HOUGHTON IMPLEMENT COMPANY v. FRANK VAVROWSKI.

Opinion filed March 10, 1910.

**Sales — Breach of Warranty — Waiver of Return of Goods.**

1. Under the evidence in this case it was a question for the jury to determine whether a waiver of the return of an engine on a breach of a warranty was intended or not.

**Appeal and Error — Directing Verdict — Question for Jury — Waiver.**

2. It was error to direct a verdict for the plaintiff, as the evidence as to such waiver was not undisputed, or, at least, was such that reasonable persons might draw opposite conclusions therefrom.

**Principal and Agent — Authority of Expert.**

3. Unless shown to possess authority from his principal to that effect, an expert, sent to repair an engine, cannot bind his principal by changing an existing contract.

**Sales — Conditional Sale — Authority of Agent — Waiver.**

4. It is error to exclude evidence of a conditional sale by an agent of a machine company with consent of the company, as such evidence has a bearing on the question of possession of the property in this case, and upon the question whether a return of same to the company was waived.

**Sales — Breach of Contract — Pleading.**

5. A defense to the effect that the engine involved in this suit was not purchased on the order set forth in the complaint and admitted by the answer cannot be raised under such pleadings.

Appeal from District Court, Walsh county, *Kneeshaw, J.*

Action by the Houghton Implement Company against Frank Vavrowski. Verdict directed for the plaintiff. New trial granted. Plaintiff appeals.

Affirmed.

*Skulason* and *Burtness,* for Appellant.

*Jeff M. Myers,* for Respondent.

MORGAN, C. J. This case was before this court on a former appeal, and is reported in 15 N. D. 308, 109 N. W. 1024. It is an action for damages for an alleged breach of a contract of sale of a gasoline engine. The facts will only be partially set forth now as they are fully set forth on the decision in the other appeal. An amended answer was filed since that appeal, wherein the defendant amits the contract of sale of the engine, and specifically sets forth the warranty in the sale, and wherein there was a breach of the same. The

answer also alleges: That the engine was ordered as a sample engine to be used in making sales as the agent of the Kansas City Hay-Press Company, of which the plaintiff was the general agent in North Dakota. That, after the defendant ascertained that the same did not comply with the warranty, he notified the Kansas City Hay-Press Company and this plaintiff that he would not settle for the same. After such notice to said parties, it was agreed that, if the defendant would retain such engine for a time, they would procure the same to be overhauled and have it put in first-class shape to do satisfactory work before the commencement of the threshing season of 1902, providing the defendant would notify said Kansas City Hay-Press Company 30 days in advance of the time he desired to use said engine. The answer also contains this allegation: "The defendant immediately, and some time in the spring of 1902, notified the Kansas City Hay-Press Company, and also the plaintiff, that if he was to complete the conditional sale of said engine made by him upon the authority of the plaintiff, it would be necessary to have it put in proper shape at once." The answer also contains this allegation: "That the conditional sale of said engine referred to was made by the defendant to one M. Vavrowski in the fall of 1901, upon the condition that the Kansas City Hay-Press Company would, before the threshing season of 1902, put said engine in shape to do good and efficient work as a threshing engine, which said contract of sale the plaintiff, as the agent of the Kansas City Hay-Press Company, the owners at said time of said engine, duly authorized this defendant to make." The defendant further alleges that the Kansas City Hay-Press Company entirely refused to make an effort to put said engine in proper repair until towards the close of the threshing season of 1902, and that, when defendant ascertained that said company were delaying said matter to the time when it would be too late to use said engine during the threshing season of 1902, he notified the plaintiff and said hay-press company that he would not accept said engine and that he held it thereafter subject to their order and as the agent of the Kansas City Hay-Press Company. The answer also alleges another claim, to the effect that the defendant is entitled to a partial offset of the plaintiff's claim, if found valid, on account of certain commissions claimed to be due to defendant on the sale of said engine. On this trial a verdict was directed in favor of the plaintiff for the sum of $2,360.66, being the full amount claimed by the plaintiff. The defendant made a

motion for a new trial, containing 34 specifications of error. This motion was granted by the judge of the district court of the Seventh judicial district, but the trial took place before another judge.

If these specifications of error present one or more prejudicial errors, the order appealed from must be affirmed.

In the court below, the defendant contended that the plaintiff is not the owner of the claim sued upon. This question is not urged in this court, and will therefore be deemed abandoned.

On the first appeal it was found that the warranty was not complied with, as the engine failed to work according to its terms. It was also held on that appeal that the failure to show that the engine worked in compliance with the warranty became immaterial in view of the fact that the plaintiff and defendant had subsequently entered into a new arrangement under which the plaintiff agreed to remedy the defects in the engine before the harvest season of 1902. It was also decided, on that appeal, that the fact that the defendant had not returned the engine on its failure to work according to the warranty left the verdict without sufficient evidence to sustain it. In other words it was held that the evidence was insufficient to show a rescission of the sale for the reason that the engine had not been returned by the defendant, or a showing made that its return had been waived by the plaintiff.

The question now presented is in reference to what transpired in 1902 as to the repair of the engine so as to comply with the warranty, under the agreement made in 1901. Upon a determination of these matters will depend whether the plaintiff was entitled to a directed verdict for the full amount claimed to be due. To determine this question, we will only review the record so far as it pertains to matters occurring on and after May 8, 1902.

On that day the plaintiff, through its president, wrote the defendant at Pisek, N. D., that the Kansas City Hay-Press Company agreed to fit up the engine before threshing time, and that the defendant was to give 30 days' notice before the time that he wanted the engine put in repair. Up to this time the evidence shows that the defendant had never unconditionally accepted the engine. He had always claimed that it would not work, and had refused to execute the notes and mortgage for the purchase price. Under the agreement made in 1901 and mentioned by plaintiff in the letter of May 8, 1902, everything, including the acceptance of the engine by the defendant, was dependent upon its being fixed to do satisfactory work.

Up to this time there had been no completed rescission and no unconditional acceptance under the original order. Soon after the letter of May 8th, defendant notified the Kansas City Hay-Press Company, as testified to by him, to send the man to do the repairing. The engine was also hauled to Pisek by the defendant's brother for the purpose of giving the Kansas City Hay-Press Company, or its general agent, the plaintiff, an opportunity to comply with the contract to fix it so that it would do satisfactory work. Up to this time nothing had been done to change the relation of the parties to the contract, as existing in 1901, when the new contract was agreed upon. There was no compliance with the defendant's request that the Kansas City Hay-Press Company send an expert to repair the engine, until Korsmeyer, an expert, appeared in August, after threshing had been in progress about two weeks. In respect to what transpired when Korsmeyer appeared, the defendant testified as follows: "A man did come to Pisek the last part of August, 1902, to fix the engine. That man was the inventor, Korsmeyer. I had a talk with him. I had a talk with Houghton, of the Houghton Implement Company, over the 'phone the same day I talked with Korsmeyer. I told Mr. Houghton there was no use fixing the engine, it was too late, that threshing was pretty near over, and I do not have a separator, the separator was sold to try them, and we could not do anything with the engine. He said it was better to try; he would sell it to somebody else. I told him then it was too late, and I think I could not sell it for them. He then said that: 'Well, let us keep her there; let us get it fixed and keep her there anyway, and get a chance to sell it to somebody.' I had a talk about shipping the engine to some other place. I told him at the same time, 'Better ship it somewhere else.' He did not tell me what to do with it. He said, 'Let it stay there and try and sell it to some one there.' * * * I did not help Korsmeyer about running that. I do not know whether he asked me to help him or not, but I told him it was no use, it was too late, the threshing season was about two or three weeks, and I told him it was no use to do anything with it that fall. They had been threshing about two weeks, two or three, I do not know exactly when; I think some of them started the 7th of August."

Under this evidence it is plaintiff's contention that it conclusively appears that there was no return of the engine and no waiver of its return by the plaintiff. The testimony, it is claimed by the plaintiff,

goes no further than to show an effort to persuade the defendant to retain the engine and sell it. This conversation took place after the harvest of 1902 was in progress, and shows unequivocally that the engine had not been fixed at that time, pursuant to the agreement of 1901. Respondent contends that this evidence, together with the letters between the parties, sustain the conclusion that he sold the engine in the fall of 1901, with plaintiff's express consent, acting as the agent of the Kansas City Hay-Press Company. This was the defendant's contention on the former appeal also; but this court then decided that under the record in that case the contention was conclusively refuted. The same contention is again presented under an amended answer and additional evidence and under offers of evidence which were excluded.. The contention now is that the defendant made a conditional sale of the engine in 1901 to one Vavrowski, defendant's brother; said sale being made on condition that the engine would be repaired so as to do satisfacory work. It is also contended by the defendant that these conditions were acquiesced in by the plaintiff as such agent, and that the sale was never completed for the reason that the plaintiff and the Kansas City Hay-Press Company failed to put the engine in working order in 1902.

It is claimed by the defendant that the delivery of the engine to his brother was made under such conditional sale, and that his brother retained its possession until May, 1902, when he brought it to Pisek, so that the company could repair it. Whether the engine was then turned over to the plaintiff, or to whom it was delivered is not stated. If possession was given to the plaintiff, then the jury might be warranted in finding that the contract was rescinded and the engine restored to the plaintiff and accepted by it. As bearing on the question of possession of the engine after May, 1902, this evidence as to a sale should have been admitted. It was error to reject it. It was error, also, to direct a verdict on that evidence, as it does not show, as a matter of law, that a return of the engine under the contract was not waived. It was clearly a question for the jury to determine in whose possesison the engine was under the new contract of 1901, and after May, 1902, and whether a return of the engine to the plaintiff or the Kansas City Hay-Press Company was or was not waived. What was intended by the parties at the August meeting was peculiarly a question for the jury. In this case the order for the engine does not provide the manner in which

the contract may be rescinded, and it does not provide where or to whom it was to be delivered in case the contract was disaffirmed or rescinded. The acts of the parties and what was said by them must determine whether that was accomplished or not.

The defendant's testimony as to what transpired between him and Houghton in August, 1902, considered in connection with the correspondence in this case, present a question for the jury as to whether a return of the engine was waived by the plaintiff, and as to where the possession of the engine was after May, 1902.

It is claimed that it was error to exclude evidence as to what one of the plaintiff's experts said to the defendant when he was attempting to fix the engine. Unless it is shown that such expert had authority from the plaintiff or the Kansas City Hay-Press Company, nothing that was said by him would be binding on said parties, so far as changing the contract is concerned.

It is also claimed that the defendant's order in writing for this engine has become inoperative and of no effect, and that the plaintiff cannot recover under that order, as it was not accepted by the defendant, and for the reason that the engine was not sold under that order, but was sold to the defendant by the plaintiff. It is not necessary to say anything on that contention further than to say that the answer does not set forth any such defense or claim.

In view of the fact that there must be a new trial, it is unnecessary to dispose of the contention in reference to a commission on the sale of this engine in reduction of the amount due if determined that the plaintiff is entitled to recover. That issue depends upon whether the contract under which the engine was sold provides for a commission.

There is nothing in the written order under which the engine was delivered to show that it was sold as a sample engine.

The judgment is affirmed. All concur.

(125 N. W. 1024.)

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RICHARD MCGREGOR v. HENRY HARM AND JOHN C. OESCHGER, CO-PARTNERS AS HARM & OESCHGER.

Opinion filed March 8, 1910.

Rehearing denied April 13, 1910.

**Master and Servant — Compensation — Extra Hours.**

1. Compensation for work, within the scope of a regular employment in addition to the usual but not fixed hours for a day's work,

cannot be recovered in the absence of a contract therefor, unless the contract was entered into in reference to a controlling custom.

**Master and Servant — Cause for Discharge — Question for Court.**

2. Where the evidence is undisputed as to the cause for a discharge from service under an existing contract, it is a question of law for the court as to sufficiency of such cause.

**Master and Servant — What Will Justify Discharge — Reasonable Hours.**

3. Where the employer requests the servant to do additional work not unreasonable in view of the nature of the employment, and the servant refuses such request without cause, such refusal will justify his discharge by the master.

**Master and Servant — Contract Construed — Employment by Week.**

4. Where a contract for services as entered into for a sum certain per week, with an additional sum to be paid if the service is continued for one year and the servant remains sober, it is a contract for employment by the week, and not an entire one for a year.

**Appeal and Error — Reversal — Immaterial Error.**

5. Evidence of payment in full for all services considered, and it is *held* therefrom that it was not error to refuse to direct the jury to find in plaintiff's favor for a small balance of 39 cents claimed to be unpaid.

**Appeal and Error — Harmless Error.**

6. No question of costs being involved, an error affecting that small sum would not be considered, as the principle of de minimis non curat lex applies.

**Appeal and Error — Harmless Error — Striking Out Testimony.**

7. Question as to whether it was error to refuse to strike out the answer of a witness on the ground that it was not the best evidence considered, and *held*, not to be prejudically erroneous.

Appeal from District Court, Grand Forks county; *Templeton*, J.

Action by Richard McGregor against Henry Harm and John C. Oeschger. Judgment for defendants, and plaintiff appeals.

Affirmed.

*H. A. Bronson, D. T. Collins* and *L. A. Chance*, for appellant.

Contract is not severable because wages are made payable weekly. Diefenback v. Starck, 56 Wis. 462, 14 N. W. 621; Dugan v. Anderson, 36 Md. 567, 11 Am. Rep. 509; Olmstead v. Bach, 78 Md. 132, 22 L. R. A. 74, 44 Am. St. Rep. 273.

Where servant is discharged before the expiration of the period of his employment, he can recover on a quantum meruit. Tiffany on Domestic Relations, 474; 26 Cyc. 1000 and cases there cited; 8 Current Law, 843; 20 A. E. C. L. 36; Keedy v. Long, 71 Md. 385, 18 Atl. 704; Caldwell v. Myers, 2 S. D. 506, 51 N. W. 210; Ehrlich v. Aetna Life Ins. Co., 88 Mo. 249; Mackubin v. Clarkson, 5 Minn. 247; Milage v. Woodward, 78 N. E. 873; Smith v. Cashie, etc., Co., 142 N. C. 26, 54 S. E. 788; Davidson v. Laughlin, 138 Cal. 320, 71 Pac. 345; 5 L. R. A. (N. S.) 579, and note appended; Price v. Minot, 107 Mass. 49; Hood v. Hampton Plains Exploration Co., 106 Fed. 408.

Whether there were sufficient grounds to discharge a servant is for the jury. Knutson v. Knapp, 35 Wis. 86; Lippus v. Columbus Watch Co., 7 N. Y. S. 478; Stover Mfg. Co. v. Latz, 42 Ill. App. 230; Waxelbaum v. Limberger, 78 Ga. 43; Conklin v. Woodbury Dormatological Institute, 51 N. Y. App. Div. 638; Peniston v. John Huber Co., 196 Pa. St. 580.

Servant need not work unreasonable hours after a full day is served. Wood on Master & Servant (2d Ed.) 227; Koplitz v. Powell, 56 Wis. 671, 14 N. W. 831; Wyngert v. Norton, 4 Mich. 286.

Contract and discharge being shown, it was for the master to show a justification. Webb v. Whitesell, 87 N. Y. S. 454; Sun Print. & Pub. Ass'n v. Edwards (C. C. A.), 136 Fed. 591; Eubanks v. Alspaugh (N. C.), 52 S. E. 207; Johnson v. Crookston Lumber Co., 100 N. W. 225; Marsh v. Bergman, 84 N. Y. S. 469; Day v. Am. Machinist Press, 86 App. Div. (N. Y.) 613.

Not liable to discharge for disobedience of orders involving no serious consequences to employer. Turner v. Kouwenhoven, 100 N. Y. 115, 2 N. E. 637; Hamilton v. Love, 152 Ind. 641, 53 N. E. 181; 71 Am. St. Rep. 384; Leatherberry v. Odell, 7 Fed. 641; Shaver v. Ingham, 58 Mich. 649, 55 Am. Rep. 712.

On justifiable discharge servant may recover for services rendered, less offset in damages. Hildebrand v. American Fine Art Co., 109 Wis. 171, 53 L. R. A. 826; Fisher v. Wash, 102 Wis. 172, 43 L. R. A. 810, 78 N. W. 437; Fulton v. Heffelfinger, 23 Ind. App 104, 54 N. E. 1079; Lambert v. King, 12 La. Ann. 662; McWilliams v. Elder, 52 La. Ann. 995, 27 So. 352; Lawrence v. Gullifer, 38 Me. 532; Shute v. McVitie, 72 S. W. 433; Bedow v. Tonkin, 59 N. W. 222; Pixler v. Nichols, 8 Iowa, 106; Duncan v. Baker,

21 Kan. 99; Parcell v. McComber, 7 N. W. 529; Hillyard v. Crabtree, 11 Tex. 264; Children of Israel v. Peres, 2 Coldw. (Tenn.) 620; Mellonee v. Duff, 72 Md. 383, 19 Atl. 708.

*Skulason & Burtness* and *F. C. Massee,* for respondent.

Servant cannot recover for extra work outside of his employment. Luske v. Hotchkiss, 37 Conn. 219, 9 Am. Rep. 314; Levi v. Reid, 91 Ill. App. 430; Mathison v. New York Cent. etc., R. Co., 76 N. Y. S. 89; Koplitz v. Powell, 56 Wis. 671, 14 N. W. 831; Steam Dredge No. 1, 87 Fed. 760; Forster v. Green, 69 N. W. 647; Schurr v. Savigny, 48 N. W. 547; Cany v. Halleck, 9 Cal. 198; 34 Cent. Dig. "Master & Servant," section 87; 20 A. E. C. L. 19.

MORGAN, C. J. Action for an alleged balance of wages. The plaintiff was employed by the defendants as bartender in East Grand Forks, Minn., and worked as such from April 23 to August 26, 1907, for the agreed wages of $25 per week. On August 26th a new contract was entered into, under which defendants were to pay the plaintiff $20 per week, and, if he worked one year and kept sober, he was to receive $5 per week in addition. According to the record, there is no substantial controversy as to the terms of the contract. A careful reading of the plaintiff's evidence clearly shows the above to have been the substance of the contract. In respect to this contract, one of the defendants testifies as follows: "At that time we made a new arrangement with him to pay him $20 a week salary, and, if he remained sober in our employ one year, we agreed to give him $250 at the end of the year. I cut him from $25 to $20 per week in order to keep him sober." In reference to the contract, the plaintiff testifies as follows: "At that time Mr. Oeschger told me he wanted to put me back to work, and he told me he would pay me the same wages he had been paying me. That was $25. He says, 'We will pay you $20 every week,' and at the end of the year they would pay me this holdback, and I told them this was satisfactory to me. That is, at the end of the year, if I stayed one year, I was to get an amount equal to $5 per week through the year, and if I kept sober." The plaintiff worked to the satisfaction of the defendants under the new contract from its date to March 30, 1908. On that day the plaintiff refused to work for an hour after his quitting hour that day at the request of one of the defendants. On the next morning the defendants discharged him, and this action was brought to recover the sum of $163.95 as the balance claimed to

be due on the new contract. The action is brought to recover the $5 per week, and for certain extra time that plaintiff worked. The answer is a general denial and an allegation of payment in full. The trial court submitted the question of payment as to one item to the jury under proper instructions, and they found for the defendants. Plaintiff appeals, and assigns five errors as grounds for a reversal of the judgment. We will notice the controlling assignments.

Some of them are based on the action of the court in reference to additional compensation for working outside or in addition to the regular hours. There was no showing whatever that the contract provided for pay for such extra work, if it may be called extra work, in view of the character of the employment, and that the working hours were not regular. In the absence of such showing, we deem it well settled as a proposition of law that no extra compensation is allowable. There was no error, therefore, in refusing to submit the question of compensation for working on some days more than the regular time during which the plaintiff was generally asked to work.

It is claimed that the plaintiff was discharged without cause, and is therefore entitled to pay for the $5 per week during each week from August 26th. The facts in reference to the discharge are not in dispute. The trial court held from such undisputed evidence that the discharge was for cause. We affirm that conclusion after a careful examination of the evidence. One of the defendants requested the plaintiff to remain at work on March 30th while said defendant went to supper, which would be about an hour's extra time. The plaintiff refused to do so. No fixed hours of work for each day, nor the hours during which the plaintiff should work during the day were specified in the contract. There were at times three bartenders, and at others two, and the hours during which each should work were fixed by the defendants, and these varied at times. During a part of the time the hours during which the plaintiff should work were fixed, and were at times varied at the request of the defendant. March 30th, when this request was made of the plaintiff, was an election day in said city, and plaintiff had only been on duty from 9 a. m. to 5 p. m., excepting an absence for dinner. During his employment plaintiff had occasionally worked 12 hours, and on several occasions had worked more than the allotted hours at the request of the defendants.

Nothing had ever been said by the plaintiff or defendants as to special compensation for service during those additional hours. In view of the nature of the business and the fact that the contract did not provide how many hours should be considered a day's work, and no other fact appearing from which it may be reasonably deduced that a certain number of hours should be deemed a day's work, or that the plaintiff could not be called upon to work longer hours, there is no foundation for the claim that the discharge was without cause. On this day plaintiff had only worked seven and a half hours, or at the most, eight hours. We deem the refusal to comply with the defendant's request an unreasonable one, and it justified the defendants in discharging the plaintiff. As to whether the discharge was justified, the evidence is undisputed. It is therefore a question of law whether the discharge was without cause. There was no question of fact in respect to the cause of the discharge. It was therefore not error to take that question away from the jury. We think it would have been error to submit it to the jury.

Considerable is said in the briefs as to whether the contract in question is an entire one or severable. In view of the fact that we find that the plaintiff refused to perform the contract with out just cause, it is immaterial as to the nature of the contract. If the plaintiff had been discharged without cause, a different question would have been presented. We think it clear, however, that this was not a contract for a year at $20 per week. It was a contract for $20 per week, and, if the plaintiff worked a year, he would be entitled to an additional $5 per week if he remained sober. Under this contract, the plaintiff could have quit at any time without affecting the obligation of the parties at all, except as to paying the extra money. There is a dispute as to whether the plaintiff had been paid for one day, being the first Monday he worked under the new contract. The trial court expressly submitted this question to the jury, and it found for the defendants. The first check which plaintiff received under the new contract was for $24.25, and it is defendant's contention that this was a payment in full under the old contract and up to the first Monday, at 7 o'clock p. m. under the new contract. Plaintiff has been paid $20 each week since said day by checks which show that they are in full for all services up to date. The plaintiff is uncertain as to whether the $24.25 check does or does not include pay for this

one day, and is uncertain as to what it did include. His acceptance of these checks each week since August 26th is strong evidence that he has been paid for this day, and, the jury having so found, the verdict should not be disturbed.

We do not think that there is any question of quantum meruit compensation in this case. The discharge from service was for an adequate cause, and no claim for the $5 per week extra arises, as plaintiff has not performed the contract so as to entitle him to any more than the pyment of the $20 per week, and this is admitted to have been paid.

It is also claimed that the trial court erred in refusing to direct a verdict for the plaintiff for the sum of 39 cents claimed to be due the plaintiff. It is claimed that the check for $24.25 should have been given for $24.64. The weekly checks from August 26th were given and accepted for full payment for all services up to date. The checks show this fact, and the witness Thompson so testifies. The plaintiff does not testify what the items composing the check for $24.25 were, and is unable to state what this sum was made up of. From April 26th to March 30th the parties dealt with each other in a manner showing unequivocally that there had been full payment of all sums due on the old contract, and on the new contract as well. This check was made up of eight days' work under the new contract and one-half day's work under the old contract, and was undoubtedly intended to include all sums due the plaintiff on account of all services at its date. We do not therefore think that it was error to refuse to submit this question to the jury in view of the conduct of the plaintiff in accepting these weekly checks as full payment. If, however, it clearly appeared that there was due to the plaintiff the sum of 39 cents, we should not deem ourselves called upon to reverse the judgment for that reason, as the only question is whether the sum of 39 cents has been paid. It is a question where the doctrine or principle, "De minimis non curat lex," should be applied. No question of costs is involved. Hass v. Prescott, 38 Wis. 146; Sutherland on Damages (2d Ed.) section 11; Kenyon v. N. W. Union Tel. Co., 100 Cal. 454, 35 Pac. 75.

It is claimed that it was error not to grant plaintiff's motion to strike out certain portions of the testimony of the witness Thompson, who was the bookkeeper of the defendants during the time that the plaintiff worked for them. Thompson drew the check for $24.25, and testified that it was delivered and accepted as pay-

ment in full for all past services. His entire testimony considered together shows that he was testifying from memory principally, although on cross-examination he stated that all he knew about the matter was from the books. In view of the positive testimony of this witness that the plaintiff accepted this check as full payment, we do not think that it was prejudicially erroneous to refuse to strike out that portion of the witness' testimony relating to the payment of all sums due March 30th. If this testimony had been stricken out, the plaintiff's testimony would still remain upon the record as to this check, and also Thompson's testimony as to the fact that the plaintiff had accepted this check in full payment for all services. There was no motion to strike out all of the testimony of Thompson. In view of this fact, it was not prejudicial error to refuse to strike out the testimony on the ground that it was not the best evidence.

The judgment is therefore affirmed. All concur.

(125 N. W. 885.)

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## OCER WEBB v. JOSEPH WEGLEY.

Opinion filed March 3, 1910.

**Pleading — Amendments Liberally Allowed — Discretion of Court.**

1. Trial courts are vested with a broad judicial discretion regarding the subject of the allowance of amendments to pleadings and the action of the trial court, in permitting amendments, will not be disturbed by this court except in cases of a clear abuse of discretion. Liberality should be shown by the courts in the allowance of amendments where it appears that such amendments will promote the ends of justice.

**Continuance — Discretion.**

2. Trial courts are vested with a wide discretion in the matter of granting or refusing continuances, and, under the facts in the case at bar, *held*, that the denial of plaintiff's motion for a continuance of the cause over the term was not error.

**Continuance — Counter Affidavits.**

3. Certain counter affidavits were received and considered in opposition to plaintiff's motion for continuance. Such affidavits merely tended to show that the motion was not made in good faith.

*Held*, that such counter affidavits were admissible for such purpose.

**Trial — Judgment on Directed Verdict — Where No Issue Is Tried Judgment Not Res Judicata — Error Without Prejudice.**

4. Plaintiff refused to offer any evidence in support of the allegations of his complaint, and in response to a motion for nonsuit by defendant's counsel the trial court directed the jury to return a verdict in defendant's favor, which direction was complied with, and thereafter a judgment was entered on such verdict.

*Held* error, but without prejudice, as the judgment discloses upon its face that no testimony was introduced, and no issue of fact or law was tried or adjudicated; hence such judgment can form no bar to another action by plaintiff.

Appeal from District Court, Williams County; *Goss*, J.

Action by Ocer Webb against Joseph Wegley. Judgment for defendant, and plaintiff appeals.

Modified and affirmed.

*Aaron J. Bessie* (*Chas. E. Wolfe*, of counsel), for Appellant.

*Engerud, Holt & Frame*, for Respondent.

FISK, J. The complaint in this action alleges two causes of action; the first for damages for malicious prosecution, and the second for damages for false imprisonment. By his original answer defendant admitted the first four paragraphs of plaintiff's first cause of action, wherein it is alleged in substance that defendant, at the times mentioned, was mayor of the city of Williston, and that in February, 1907, one Smith, acting chief police of such city, at the instigation, advice, and request of defendant, instituted proceedings before the police magistrate, charging plaintiff with the crime of gambling, and also keeping a place for gambling, in violation of the city ordinance, and pursuant to such proceedings plaintiff was arrested on such charges, but that subsequently the same were dismissed, and defendant discharged. Also that at said time the defendant appeared before such magistrate charging plaintiff with the crime of perjury; that a warrant was issued, and plaintiff arrested on such charge and imprisoned for 17 days in the county jail, but that subsequently plaintiff was discharged through habeas corpus proceedings, and such criminal action in all things fully terminated. The remaining allegations of such first cause of action, wherein it is alleged that such criminal proceedings were malicious and instituted without probable cause, and alleging special, as well as general, damages, were expressly denied by such answer, and certain matters, not necessary here to state, are alleged by way of defense to such first cause of action. As to the second cause of action defend-

ant expressly admitted all the allegations thereof, except those relating to damages, which latter allegations were denied. After the jury was impaneled plaintiff moved for judgment on the pleadings as to the false imprisonment charge, asking that the jury be required merely to assess plaintiff's damages. Such motion was denied tentatively, subject to renewal. Thereafter and before any evidence was offered defendant asked leave to serve and file an amended answer changing the issues relative to the falsity of the arrest declared upon. Such amended answer was allowed over objection and exception. Thereafter plaintiff movel for a continuance of the cause over the term, basing his motion upon the ground of the absence of a material witness, one Roberts, and at the suggestion and request of the court plaintiff prepared and furnished an affidavit setting forth reasons why plaintiff deemed a continuance necessary. Such affidavit stated that such witness was in the city of Spokane, and that his testimony could not be procured in time for trial at that term. Such affidavit also sets forth the facts which it is claimed such witness would testify to if present, and without setting forth such facts it is sufficient to say that they are material and relevant to the new issues under the amended answer. The affidavit also states that such matters could not be proved by any other witness. Thereafter defendant was permitted, over objection, to read certain counter affidavits bearing upon the good faith of plaintiff's application for continuance. Such affidavits are as follows, omitting the formal parts:

"Edwin A. Palmer, being first duly sworn, says that he is one of the attorneys for the defendant in the above-entitled action; that on the 17th day of June, 1907, one John W. Roberts appeared before this affiant at Williston, in said county, and voluntarily made, signed, and swore to the annexed affidavit, which is marked 'Exhibit A' and made a part of this affidavitt; that said John W. Roberts was a colored man, commonly known as Bob Roberts in the plaintiff's affidavit for a continuance here; that heretofore, and on or about the 17th day of June, 1907, affiant caused a subpœna to be issued for said Roberts in the above-entitled action as a witness therein, on the part of the defendant; that said subpœna was served upon said Roberts on or about said 17th day of June; that thereafter said Roberts remained in attendance upon this court pursuant to said subpœna for several days, and he then disappeared and neither this affiant nor the defendant, nor any of the attorneys con-

nected with the defense herein, has been able to ascertain the whereabouts of said Roberts until the plaintiff's affidavit for continuance was served upon defendant's attorneys. Edwin A. Palmer.

"Exhibit A: John W. Roberts, being first duly sworn on his oath, says that he is the identical person who, on or about the month of February, 1907, when the Ocer Webb joint was raided and Webb was arrested on a charge of gambling, and who at that time was playing poker with said Webb and others. That on the afternoon of June 17, 1907, the said Ocer Webb, the plaintiff in the action of Ocer Webb v. Jos. Wegley, told affiant that Aaron J. Bessie, his attorney, would pay to the said affiant the sum of $45, and give him a new suit of clothes and buy him a ticket out of the city, if affiant would leave the city at once and not return until after the trial of the case of Ocer Webb v. Jos Wegley, and that this conversation occurred just outside the door of Jack Tolliver's blacksmith shop, and that Jack Tolliver was just inside at the time, and told affiant not to do that but to stick. That affiant further was told by the said Ocer Webb, the same as above, at the house of Webb, while they were drinking a glass of beer, that Webb set up the beer, and that affiant then bought some whisky from the said Webb and paid him 25 cents per drink; that affiant bought four drinks, one for Cy Mathews, one for Al Maderson, one for a fellow that goes by the name of Curley, and one for a man who was a stranger. Then Cy Mathews bought two bottles of beer from the said Webb, and then Al Maderson bought two bottles from the said Webb. That there were others who bought beer at that time from the said Webb, but affiant does not know their names. That the above facts were voluntarily given. John W. Roberts.

"Geo. A. Gilmore, being first duly sworn on his oath, deposes and says: That he was present at all the times referred to in the preceding affiadavit of Edwin A. Palmer, and that he has read the foregoing affidavit of Edwin A. Palmer, and that he has read the foregoing affidavit and understands the contents thereof, and that the same is true of his own knowledge. George A. Gilmore."

Upon such showing a continuance was denied, and counsel directed to proceed with the trial. Plaintiff declined to proceed, and stated that he elected to stand upon the record as already made, whereupon defendant's counsel moved for a judgment of dismissal of the action "with prejudice." Thereafter the court, instead of granting defendant's motion to dismiss the action, directed a jury

to return a verdict in defendant's favor, which direction was complied with, and thereafter a judgment was entered on such verdict, dismissing the action and adjudging the payment of costs taxed at $138.40, from which judgment this appeal is prosecuted.

Appellant's assignments of error may be grouped under three heads: First, was it prejudicial error to permit the amended answer to be served? Second, did the court err in denying appellant's application for a continuance? and, third, was the direction of a verdict and the entry of the judgment of dismissal prejudicial error?

Our statute (section 6883, Rev. Codes 1905), permitting amendments of pleadings, is very liberal in favor of such amendments. It reads: "The court may, before or after judgment in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." If an amendment is in furtherance of justice, it may be allowed. Trial courts are vested with a broad judicial discretion regarding the subject of the allowance of amendments, and it is firmly established that an appellate court will not interfere with the action of the trial court, except in cases of a clear abuse of discretion. As said by this court in its syllabus to Martin v. Luger Furniture Co., N. D. 220, 77 N. W. 1003: "The authority vested in courts under the law to allow amendments to pleadings is conferred to promote the ends of justice, and should therefore be liberally exercised by the courts, and, in cases of reasonable doubt about the propriety of an amendment, the better and safer practice is to allow the amendment to be made. The controlling principle is, or should be, whether a proposed amendment if allowed, would further the ends of justice. The discretion to allow or refuse amendments to pleadings is a legal, and not an arbitrary, discretion. To arbitrarily refuse to allow an amendment which should be allowed is an improper exercise of judicial discretion." From the record in the case at bar we are not prepared to say that the trial court abused its discretion in permitting the amendment complained of, although no showing of cause therefor was made. The original answer, while inartistically framed, clearly

shows on its face that defendant did not intend to admit liability, as numerous alleged defenses are attempted to be pleaded. In deciding this point as above indicated we find ample support in the authorities. Martin v. Luger Furniture Co., 8 N. D. 220, 77 N. W. 1003; Miller v. Perry, 38 Iowa, 303; Brown v. Bosworth, 62 Wis. 542, 22 N. W. 521; Nash v. Adams, 24 Conn. 33; Phœnix Ins. Co. v. Walrath, 53 Wis. 676, 10 N. W. 151; Swift v. Mulkey, 14 Or. 63, 12 Pac. 76.

The contention that error was committed in denying a continuance of the case over the term is, we think, untenable for several reasons. It is not contended that such continuance was rendered necessary by the change in the issues as to the second cause of action. In his affidavit for continuance plaintiff expressly states that he was ready and prepared to try the action upon the merits as to the question of false imprisonment, and had ready for production upon the trial the evidence and testimony necessary to substantiate every fact in issue under said cause of action. Furthermore, the facts set forth in his affidavit, which he swears he will be able to prove by the absent witness Roberts, are material and relevant merely as bearing upon the question of malice on defendant's part in instituting, and causing to be instituted and prosecuted, the several criminal cases, and therefore, admissible upon the first cause of action only. From an inspection of the pleadings it is apparent that no material change was wrought by the amendment upon the issue as to defendant's malice. Paragraph 5 of plaintiff's first cause of action contains the allegation as to want of probate cause and malice in instituting and prosecuting such cases, and the allegations in this paragraph were expressly denied in paragraph 1 of the original answer. Hence it was equally incumbent upon plaintiff to furnish proof of such facts under the original answer as it was to furnish such proof under the pleadings as amended. In other words, no material change was wrought by the amendment as to the issues regarding the first cause of action. Regarding such issues, plaintiff cannot justly complain that he was taken by surprise, and was unable to proceed with the trial by reason of the amendment. Moreover, we think it clear, in the light of the record facts, that the trial court did not abuse his discretion in denying such motion. The court properly received and considered the affidavits presented by defendant in opposition to such motion. They tended to show that appellant was not acting in good faith in asking for such contin-

uance. That they were admissible for such purpose is clear. State v. Belvel, 89 Iowa, 405, 56 N. W. 545, 27 L. R. A. 846; People v. Delacey, 28 Cal. 590, Ogles v. Commonwealth (Ky.) 11 S. W. 816. Other reasons might be assigned by us in support of the ruling complained of but we deem it useless to devote further time to this point.

The only remaining contention of appellant's counsel which we are required to notice is that the court erred in directing the jury to return a verdict and in entering judgment thereon for the dismissal of the action. Respondent's counsel tacitly concede such error, but contend that the same was without prejudice. No evidence having been introduced there was manifestly nothing to be submitted to the jury. As stated by respondent's counsel: "When appellant refused to go forward with his case, there was nothing for the court to do but order a nonsuit." We fully agree with respondent's contention that the action of the court in directing the jury to return the verdict was nugatory and should be disregarded. We are unable to see, however, how the action of the court in this respect was in the least prejudicial to appellant. The judgment as entered upon its face discloses the fact that it was entered on the refusal of plaintiff to introduce any evidence; hence of necessity it discloses, as a matter of law, that no issue of fact or law was tried or adjudicated, and therefore it cannot operate in bar to another action by plaintiff. It is well established that the dismissal of an action, not on the merits, but because plaintiff declines further prosecution of it, operates merely as a nonsuit and constitutes no bar to a subsequent action on the same cause of action. 23 Cyc. 1151, and numerous cases cited; also Id. 1136-1139.

To obviate any future controversy which may arise we deem it proper to direct the trial court to modify its judgment to conform to the views above expressed, and as thus modified the same will be affirmed. No costs on this appeal shall be allowed to either party. All concur.

(125 N. W. 562.)

NOTE—Affidavit for continuance must state facts to be proven by absent witness, if to get his deposition is the ground for continuance. State v. Murphy, 9 N. D. 175, 82 N. W. 738. In criminal cases, application for a continuance can be heard only in connection with an application for commission to take deposition of absent witnesses, to get which the continuance is sought. Id. Affidavit for continuance, on information and belief, as to what an absent witness will testify to, not giving the source of such informa-

tion, is insufficient. State v. Carroll, 13 N. D. 383, 101 N. W. 317. Affidavit for continuance on account of an absent witness must show that diligence has been futilely exercised to procure his attendance. Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605. Illness of defendant no excuse for continuance, if presence is unnecessary and plaintitff admits what he would testify to. Saastad v. Okeson, 92 N. W. (S. D.) 1072. Affidavit for continuance must show materiality of evidence of absent witnesses, due diligence to procure it, and probable future attendance of witnessess or procurement of their testimony. Stone v. Ch., M. & St. P. Ry. Co., 3 S. D. 330, 53 N. W. 189 It must also show material facts, and affiant's belief of the truth thereof, Gaines v. White, 1 S. D. 434, 47 N. W. 524; Case Threshing Mach. Co. v. Eichinger, 15 S. D. 536, 91 N. W. 82 Evidence of an absent witness must be admissible under the pleadings N. & D. Land & Livestock Co. v. Burris, 10 S. D. 430, 73 N. W. 919. Refusal of continuance for absence of assistant counsel not error. Chambers v. Modern Woodmen, 18 S. D. 173. In the absence of manifest abuse, judgment will not be reversed for refusal of continuance. Id. To get a continuonce, absence of witness, what he would testify to, materiality of his evidence, diligence to procure, reasonable assurance of his attendance at future trial must be shown. Id. Affidavit for continuance on ground of surprise and inadvertence, must state facts showing wherein plaintiffs were surprised and in what inadvertence consisted. Hood v. Fay, 15 S. D. 84, 87 N. W. 528. Refusing continuance error only for abuse of discretion. Neb. & Dak. Land Co. v. Burris, 10 S D. 430, 73 N. W. 919. Not error to refuse continuance when the testimony to be procured is inadmissible. Id.

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## LOUISA JUSTICE v. WILLIAM T. SOUDER.

Opinion filed March 3, 1910.
Rehearing denied April 13, 1910.

**Homestead — Actions — Limitations.**

1. On January 25, 1904, one J., a married person, for the purpose of securing a loan of $800, executed and delivered to D. a mortgage on his homestead fraudulently representing that his wife's signature thereto was genuine, when, in fact, it was a forgery. J.'s wife deserted and abandoned him in September, 1903, removing to the state of Washington where at the date such mortgage was executed by J., she was living with another man as his assumed wife.

In December, 1904, J. abandoned such homestead, and has never resumed his residence thereon. On April 20, 1905, respondent obtained a divorce from J. in the state of Washington and also a judgment for alimony, suit money and attorney's fees, and in October, 1906, commenced an action against J. in the district court of Eddy county upon such foreign judgment, attaching the premises in question and obtaining a judgment in such action in December 1906 for the sum of $903.74.

Appellant, assignee of the mortgage, duly foreclosed the same in December, 1905, and on December 31, 1906, obtained a sheriff's deed of the premises pursuant to such foreclosure proceedings. The present action was commenced on December 29 1906, the object of which being to have such mortgage, the foreclosure proceedings thereunder, and such sheriff's deed canceled as null and void, and to obtain an adjudication to the effect that appellant, the purchaser at such foreclosure sale, has no interest in or incumbrance upon the premises in question. *Held,* for reasons stated in the opinion, that the relief awarded respondent is unwarranted under the facts.

**Homestead — Actions — Limitations.**

2. Respondent is before the court, not as a claimant of homestead rights in such premises, but merely in the capacity of an attaching creditor, and as such she acquired, through her attachment proceedings, no greater rights in the premises than J., the judgment debtor, had at the date of the levy of the attachment.

**Homestead — Actions — Limitations.**

3. By operation of section 5054, Rev. Codes 1905, all remedies possessed by J. against such mortgage became barred on January 1, 1906, and as a necessary result the mortgage and the foreclosure proceedings thereunder becoming, after January 1, 1906, unassailable by J., appellant acquired, by lapse of time, a perfect title to the premises as against him, and those claiming under him, and plaintiff's action should be dismissed.

Appeal from District Court, Eddy County; *Burke,* J

Action by Louisa Justice against William T. Souder. Judgment for plaintiff, and defendant appeals.

Reversed and dismissed.

*Maddux & Rinker* and *A. B. Darelius* (*F. N. Hendrix* of Counsel), for Appellant.

*Turner, Wright & Lewis,* for Respondent.

FISK, J. This is an appeal from the district court of Eddy county, and a review of the entire case is requested in this court. The facts are not in dispute, and, as stated in appellant's brief, are as follows:

"On the 18th day of January, 1901, George W. Justice, then the husband of plaintiff, received his final receiver's receipt of the southeast quarter (S. E. ¼) of section ten (10), township one hundred forty-eight (148) north, range sixty-three (63) west, in the county of Eddy and state of North Dakota, having made his final proof under the homestead laws of the United States, and obtained

his patent December 31, 1904. On the 25th day of January, 1904, Alice M. Dibble, of Wyoming county, New York, loaned to George W. Justice $800 payable on the 1st day of November, 1909, and to secure the payment of this loan he executed and delivered to Alice M. Dibble a mortgage on these premises, which mortgage was dated on the 18th day of January, 1904, acknowledged on the 25th day of January, 1904, and recorded in the office of the register of deeds of Eddy county, North Dakota, on the 10th day of February, 1904. This mortgage purports to be executed by George W. Justice and Louisa Justice, his wife, the plaintiff in this action, but in fact was not signed by her. Her signature to the mortgage is a forgery. She was, at the time it was executed, in the state of Washington. The trial court found that George W. Justice, at the delivery of this mortgage to Alice M. Dibble, falsely represented the same to be the mortgage of himself and wife. This mortgage was, on the 20th day of October, 1905, duly assigned to William T. Souder, of Hennepin county, Minnesota, the appellant in this action. This assignment was recorded in the office of the register of deeds of Eddy county, North Dakota, on the 27th day of October, 1905. The mortgage was duly foreclosed and the mortgaged premises sold by the sheriff of Eddy county to appellant, for the sum of $959.09, on the 30th day of December, 1905, and sheriff's certificate of foreclosure sale issued to him, which was recorded in the office of the register of deeds of Eddy county, on the same day. No redemption having been made from this mortgage foreclosure sale, the sheriff of Eddy county, on the 31st day of December, 1906, executed a sheriff's deed of the premises in question to appellant, which was recorded in the office of the register of deeds of Eddy county, on the 31st day of January, 1907. Louisa Justice left her husband and the premises in question in September, 1903, and went to the state of Washington, where she has ever since resided, and has never since returned to her husband or to the state of North Dakota. She took her little girl with her without the consent of her husband. In January, 1904, she was living with a man by the name of Matthews apparently as his wife, and was known to her neghbors as Mrs. Matthews. On the 20th day of April, 1905, she obtained a divorce from her husband, George W. Justice, in the superior court of Spokane county, state of Washington, and also a judgment for alimony, suit money, and attorney's fees. After plaintiff left him in September, 1903, Mr. Justice, with one of his five children,

lived upon these premises until December, 1904, when he left and abandoned them as his homestead, and has never since returned to or lived upon these premises. In the month of October, 1906, plaintiff commenced an action against George W. Justice in the district court of Eddy county, North Dakota, upon the judgment for alimony, rendered in the superior court of Spokane county, Washington, on the 20th day of April, 1905, attaching the premises in question and obtained judgment against him for the sum of $903.74, on the 22d day of December, 1906. On the 29th day of December, 1906, this action was commenced to have the mortgage, the assignment, the foreclosure proceedings, and the sheriff's deed set aside and canceled of record, and to have it decreed that appellant has no interest in, or incumbrance upon, the premises in question. Appellant, in his answer, alleged the giving of the mortgage, assignment to him, the foreclosure proceedings, and the execution and delivery of the sheriff's deed; that plaintiff had deserted her husband, removed from and abandoned the premises in question prior to the giving of the mortgage, and that her husband had left and abandoned the premises as his homestead in January, 1904; and that the cause of action alleged in the complaint, being founded upon a claim of homestead right in property conveyed and incumbered, was barred by the statute of limitations. This action was tried at the May, 1907 term of the district court of Eddy county by the court, and resulted in a judgment against appellant substantially as demanded in the complaint, which judgment was entered on the 16th day of July, 1907. And this appeal is from this judgment."

In the light of these facts we are required to determine the legal rights of the parties. It is perfectly apparent that the equities strongly preponderate in appellant's favor, and that respondent ought not to prevail unless the strict legal rules inevitably demand such a result. It is important in considering the case to keep in mind the fact that plaintiff is not here in the capacity of a homestead claimant seeking to assert a homestead right. On the contrary, she is here asserting that the real property in question long since ceased by abandonment to be impressed with the homestead character. Her sole claim of right to her attachment lien on such property and for the satisfaction of her judgment out of the same is based on the theory that the said land has ceased to be the homestead, and that her former husband and judgment debtor's interest in said property is still intact and subject to the payment of his

debts, notwithstanding appellant's mortgage and sheriff's deed under foreclosure thereof; it being respondent's contention that such mortgage and the foreclosure proceedings thereunder are nullities by reason of the fact that at the date such mortgage was executed the property was the homestead of George W. Justice, the mortgagor, and that respondent, his then wife, did not join in the execution of such mortgage. Respondent therefore is here merely in the capacity of an attaching creditor of George W. Justice, seeking to subject his interest, if any, in such property to the payment of her demand. Hence, in so far as appellant's rights under the mortgage are concerned, respondent stands in no more advantageous position than her former husband. To the extent of his interest, if any, in such property at the date of her attachment, she is entitled to recover in this action and not otherwise. If we are correct in the above conclusions, and we think we are, then it only remains for us to determine what interest, if any, George W. Justice had in this property in October, 1906, the date respondent's attachment was levied.

It is asserted by appellant's counsel that under the facts George W. Justice is estopped to question the validity of said mortgage and that such estoppel extends to all persons claiming under or through him, including this plaintiff. Numerous authorities are cited in support of such contention including the following: Schwartz v. National Bank, 67 Tex. 217, 2 S. W. 865; Pitman v. Mann, 71 Neb. 257, 98 N. W. 821; Adams v. Gilbert, 67 Kan. 273, 72 Pac. 769, 100 Am. St. Rep. 456; Lucy v. Lucy, 107 Minn. 432, 120 N. W. 754, and Engholm v. Ekrem (N. D.) 18 N. D. 185 119 N. W. 35. On the contrary, respondent's counsel contend that the doctrine of estoppel can have no application to the facts of this case, but they concede that such doctrine might, with propriety, be invoked were the controversy between George W. Justice and this appellant. They cite and rely upon Bolton v. Oberne, 19 Iowa, 278, 44 N. W. 547, and cases cited. To the foregoing many other cases might be added. See dissenting opinion of Brown, J., in Lucy v. Lucy, supra, and cases therein cited. Also Withers v. Love, 72 Kan. 140 3 L. R. A. (N. S.) 514, 83 Pac. 204; Jerdee v. Furbush, 115 Wis. 277, 91 N. W. 661, 95 Am. St. Rep. 904, and exhaustive note at page 909; Alt v. Banholzer, 39 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681, and numerous authorities cited in note.

The conclusion which we have arrived at on another feature of the case to be hereafter noticed renders it unnecessary to express any opinion upon this most interesting question, and we refrain from expressing any opinion thereon.

The same may be said with reference to appellant's second contention, which is that the abandonment of the homestead rights in this property operated to validate the mortgage. Upon this question the authorities are in hopeless conflict. The weight of authority, however, under homestead statutes similar to our own, appears to be against appellant's contention. Numerous authorities, both pro and con, are collected in the valuable note in 95 Am. St. Rep., at page 920.

It has been decided in this jurisdiction by numerous authorities that the mortgage in question, not having been signed by the wife, is utterly void and of no effect. See Gaar, Scott & Co. v. Collin, 15 N. D. 622, 110 N. W. 81; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Silander v. Gronna, 15 N. D. 522, 108 N. W. 544, 125 Am. St. Rep. 616, and cases cited. Such mortgage being void and not merely voidable, it is difficult to see how it can consistently be said that the subsequent conduct of the mortgagor in abandoning his homestead rights could operate to validate his previously void instrument.

This brings us to what we consider to be the controlling and decisive question in the case which is the legal effect section 5054, Rev. Codes 1905, has upon the rights of these parties. This section is as follows: "No action, defense or counterclaim founded upon a right of homestead in property conveyed or incumbered prior to the taking effect of this article and since the taking effect of section 5053 otherwise than is provided by the law in force at the time of the execution of such conveyance or incumbrance and for which no declaration of homestead shall have been filed previous to the taking effect of this article, shall be effectual or maintainable unless such action is commenced or such defense or counterclaim interposed on or before the first day of January, 1906. * * *"

Conceding the correctness of all that is said by respondent's counsel with reference to the nonapplicability to this case, for the reasons stated by them, of the foregoing statute, still, we are convinced that the necessary effect of such statute of limitations was to cut off and terminate on January 1, 1906, long prior to plaintiff's attachment, any right on the part of George W. Justice to question

the validity of said mortgage. Any remedies possessed by him against such mortgage were, on January 1, 1906, forever terminated and destroyed if we are to give force and effect to such statute. This being true, it inevitably follows that thereafter such mortgage could be asserted by its owner against the interest of the said mortgagor in said land without any hindrance or objection on his part. It was so asserted and a foreclosure had in 1905, prior to plaintiff's attachment proceedings.

The statute aforesaid was evidently aimed at just such cases as this. Its manifest purpose was to limit the time in which a person in the situation of the mortgagor, Justice, may question his conveyance or incumbrance of the homestead. It is a statute of repose, and should be liberally construed with a view of effectuating its evident object and purpose. While it no doubt could not be successfully urged against plaintiff in an action by her to assert her homestead claim for the reason that she did not sign the mortgage nor, so far as the record discloses acquire any knowledge thereof until after January, 1906, still, as before stated, she is not here asserting any such right, but on the contrary is asserting, in effect, that at the date of her attachment George W. Justice was still the owner of this property, and that such mortgage and the foreclosure proceedings hereunder were nullities. If, by force of the above statute, Justice's right to question the mortgage and the foreclosure proceedings terminated on January 1, 1906, plaintiff acquired, by virtue of her attachment, no right to question the same. She could not acquire, through her attachment, any greater rights than Justice possessed. The statute can be invoked, therefore, for the purpose of showing that George W. Justice, on January 1, 1906, ceased to have any attachable interest in such real property, except subject to defendant's rights under the mortgage and the foreclosure proceedings. All remedies possessed by George W. Justice against such mortgage were, on such date, barred by this statute. This being true, the rule announced by this court in Nash v. Land Co. 15 N. D. 566, 108 N. W. 792, and Mears v. Land Co., 121 N. W. 916, is applicable on principle, and operated to vest in appellant, as owner of such mortgage, an unassailable lien on the property as against the mortgagor, Justice, and those claiming under him. As against such persons it must be held that appellant, through the foreclosure proceedings, acquired title to the premises in question. This conclusion necessitates a reversal of the judg-

ment and the entry of a judgment dismissisng plaintiff's action. It is so ordered. All concur.

ELLSWORTH, J., being disqualified. CRAWFORD, J., of the district court, sat in his place by request.

(125 N. W. 1029.)

NOTE—See note to Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245. Execution sale of homestead conveys no estate. Johnson v. Twichell, 13 N. D. 426, 101 N. W. 318. Officer making execution sale of homestead liable only for expense of clearing title. Id. Section 3605, Rev. Codes 1899, defines "homestead exemption," not "homestead." Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684. Widow and minor children entitled to homestead of deceased husband, although it exceeds $5,000 in value. Id. The excess over $5,000 goes to pay decedent's debts, but after balance of estate is exhausted. Id. In determining such value liens and mortgage are not deducted. Id. Decree assigning such homestead must show its excess in value, and that it is indivisible. Id. Husband's sole contract to sell homestead is void, and he is not liable for its breach. Silander v. Gronna, 15 N. D. 552, 108 N. W. 544. Requirement of wife's joinder in conveyance of homestead not open to objection that, by legislative action, it defeats or impairs husband's right of individual conveyance. Gaar, Scott & Co. v. Collin, 15 N. D. 622, 110 N. W. 81. When owner of land acquiesces in its dedication as a homestead, it becomes subject to laws regulating its conveyance. Gaar, Scott & Co. v. Collin, supra. Wife's assent to extension of mortgage on homestead not necessary, and he can prevent statute of limitations running. Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677. Wife who joins husband in mortgaging the homestead does not become a surety entitled to notice of extension of mortgage debt. Id. Residence upon land generally necessary before homestead can be claimed. Smith v. Spafford et al., 16 N. D. 208, 112 N. W. 965. Declaration of homesteader competent evidence to sustain homestead but not conclusive. Id. Evidence showing abandonment of homestead. Id. Husband entitled to homestead exemption although fee thereto is in the wife. Bremseth v. Olson, 16 N. D. 242, 112 N. W. 1056. Where vendee under a contract of purchase defaults, and alone transfers his interest thereunder, and with his wife removes therefrom, held, an abandonment of both contract and homestead. Ferris v. Jensen, 16 N. D. 462, 114 N. W. 372. Wife's homestead rights, under such contract, are no greater than, and are dependent upon, husband's rights under the contract. Id. Where husband and wife agree with a purchaser verbally to sell their homestead, and the latter takes possession and improves with their knowledge and acquiescence, they cannot question their contract. Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35. Neither statute of frauds nor homestead law does away with estoppel in pais. Id. Homestead law not construed to enable owner of homestead to perpetrate fraud. Id. Who are heads of family? See Holcomb v. Holcomb, 18 N. D. 561, 120 N. W. 547. A divorced husband not entitled to homestead when deprived by decree of custody of children, and is not other-

wise "head of a family." Id. Construing the statutes of succession, where decedent was not entitled to a homestead at his death, none can descend as such homestead to a minor child of decedent. Id.

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LARRY DOWNEY v. NORTHERN PACIFIC RAILWAY COMPANY.

Opinion filed February 25, 1910.

**Constitutional Law — Common Carriers — Carriage of Live Stock — Regulation of Speed — Police Power.**

An absolute requirement that it shall be the duty of every railroad, railroad corporation, railway company, express company, car company, and of every common carrier other than by water, by whatever name it may be called or by whomsoever operated, and which is wholly or in part engaged in the transportation of any kind of live stock by railroad within or to or from any point in this state, to transport any and all such live stock so by it being transported with the utmost diligence, and to maintain within this state in all trains so transporting any such live stock an average minimum rate of speed of not less than 20 miles per hour from the time any such live stock is loaded upon or into its cars until such train reaches its destination, deducting only in the computation of such average minimum rate of speed such reasonable time as any such live stock may be necessarily delayed in unloading to feed, water and rest, and in feeding, watering and resting and in reloading, is unconstitutional and void as an unreasonable exercise of the police power of the state.

Appeal from District Court, Grand Forks county, *Templeton*, J.

Action by Larry Downey against the Northern Pacific Railway Company.

Judgment for plaintiff and defendant appeals. Reversed with directions.

*Ball, Watson, Young & Hardy,* for appellant.

The statute is void as an unreasonable attempt to exercise the police power of the state. Houston & Texas Cent. R. R. v. Mayes, 201 U. S. 321; Cleveland etc., R. R. v. Ill., 177 U. S. 514.

*Skulason & Burtness,* for Respondents.

The statutes in question are a reasonable exercise of the police power. Lake Shore and Michigan Southern Railway Co., v. Ohio, 173 U. S. Reports, 285, 19 Sup. Ct. Rep. 465; 7 Cyc. 446; Western Union Telegraph Co., v. James, 162 U. S. 650, 16 Sup. Ct. Rep. 934; Erb v. Morasch, 177 U. S. 584, 20 Sup. Ct. Rep. 819; Hennington v. State of Georgia, 163 U. S. 299, 16 Sup. Ct. Rep. 1086; Davidson v. State 30 Am. Rep. 166; Clark v. Boston and M. R. R. Co

10 Atl. 676; Crawford v. Southern Ry. Co. 34 S. E. 80; Gulf C. and S. F. Ry. Co., v. Gray, et al., 24 S. W. 837.

CARMODY, J. On June 13, 1907, plaintiff shipped two horses over defendant's road from Grand Forks, N. D., to Valley City, N. D., by way of Winnipeg Junction Minn. He brought this action to recover upon two causes of action: (1) For alleged actual damages resulting from defendant's delay in completing the shipment; and (2) to recover the statutory penalty provided in sections 4398, 4399, Rev. Codes 1905. At the trial of the action, it was stipuated as follows: "That the Northern Pacific Railroad Company owns and operates a branch line of railroad running from Grand Forks, N. D., across the Red river to and through East Grand Forks, in the state of Minnesota, and thence to Winnipeg Junction, where said branch line connects with the main line of said railway; that said main line owned and operated by the defendant runs from St. Paul, Minn., westerly to and through Winnipeg Junction, thence westerly through Minnesota, across the Red river to Fargo, N. D., and thence westerly to and beyond Valley City, N. D., that said company also owns and operates in the state of North Dakota a branch line running from Sanborn, a station on the main line near Valley City, to and through Rogers, N. D.; that the distance by the route described from Grand Forks, N. D., to East Grand Forks, Minn., is .6 of a mile; thence to Winnipeg Junction is 95 miles; thence to Fargo is 26 miles; thence to Valley City is 57.9 miles, a total of 179.5 miles, of which about 121 miles are in the state of Minnesota, and the remainder in the state of North Dakota; that it was expected and intended by both parties to the shipment made by the plaintiff that the horses so shipped should be carried between Grand Forks, N. D., and Valley City, N. D., over the route and the lines just described." The car arrived in Fargo about 5 o'clock Friday morning, and was spotted at the stock chute in Valley City, N. D., so that it could be unloaded at 6 o'clock Saturday evening. The distance between Fargo and Valley City is 57.9 miles. It was 37 hours from the time the car arrived in Fargo until the horses were unloaded at Valley City; while if defendant had maintained the minimum rate of speed of 20 miles per hour, provided for in section 4398, Rev. Codes, the distance would have been covered in three hours. The case was tried to a jury. The court ruled at the close of the evidence that no actual damages had been sustained, and that no recovery could be had upon the first cause of

action. Defendant moved for a directed verdict upon all of the issues, which was denied; the court holding that the statute fixing the penalty for delay in shipment was vaild, and, the number of hours delay being agreed upon at 34, the court directed a verdict in plaintiff's favor for $170. An exception was reserved to the court's refusal to direct a verdict for defendant and to his direction to find a verdict for the plaintiff. In due time the defendant moved for judgment notwithstanding the verdict or for a new trial upon a statement of the case. The motion was denied, and judgment entered upon the verdict. From the judgment so entered and from the order denying defendant's motion for judgment notwithstanding the verdict, or for a new trial, this appeal is taken.

The decision of this case depends wholly upon the construction of sections 4398, 4399, Rev. Codes. Section 4398 reads as follows: "It shall be the duty of every railroad, railroad corporation, railway company, express company, car company and of every common carrier other than by water, by whatever name it may be called or by whomsoever operated and which is wholly or in part engaged in the transportation of any kind of live stock by railroad within or to or from any point in this state, to transport any and all such live stock so by it being transported, with the utmost diligence, and to maintain within this state in all trains so transporting any such live stock an average minimum rate of speed of not less than twenty miles per hour from the time any such live stock is loaded upon or into its cars until such train reaches its destination, deducting only in the computation of such average minimum rate of speed such reasonable time as any such live stock may be necessarily delayed in unloading to feed, water and rest and in feeding, watering and resting and in reloading." Section 4399 provides for a penalty for the violation of said section 4398.

Appellant contends that said sections 4398 and 4399, are void for the following reasons: (1) They are repugnant to article 1, section 1, of the Constitution of North Dakota; are an unreasonable exercise of the police power. (2) Said statutes are repugnant to the fourteenth amendment to the Constitution of the United States. (3) Upon the facts established in this case the shipment in question was an interstate shipment, and said statutes as to such shipment are repugnant to the Constitution of the United States as a regulation of commerce of the United States.

Article 1, section 1, of the state Constitution, provides that accquiring, possessing, and protecting property is an inalienable right. The fourteenth amendment to the Constitution of the United States, as far as material here, is as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Congress has the exclusive power to regulate commerce with foreign nations and among the several states and with the Indian tribes. Respondent contends that the sections of the statutes referred to can be and ought to be upheld on the broad ground that the control of states over the speed of railway trains carrying live stock within their borders is merely a reasonable exercise of their police power for the health, comfort, protection, or convenience of their citizens. The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. It can only be illustrated from decided cases, by applying the principles therein enunciated, determining from these whether in the particular case, the rule be reasonable or otherwise. The line which separates the powers of the states from this exclusive power of Congress is not always distinctly marked. Judges not infrequently differ in their reasons for a decision in which they concur. The correct rule, however, seems to be that state legislation which seeks to impose a direct burden upon interstate commerce or interfere directly with its freedom does encroach upon this exclusive power of Congress.

A statute requiring all railroad companies operating lines within the state of Ohio to cause three each way of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village containing over three thousand inhabitants for a time sufficient to receive and let off passengers, held a valid exercise of the police power of the state, even though it applies to interstate trains. Lake Shore & Mich. Southern Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702. In this case the opinion is written by Justice Harlan and covers 20 pages, containing a full review of the authorities. The case, however, was decided by a divided court; Justices Shiras, Brewer, White, and Peckham dissenting. A state statute imposing a penalty for lack of due diligence in delivering a telegram, if made in a

reasonable exercise of the police power of the state, is not an unconstitutional interference with interstate commerce as applied to interstate messages, in the absence of any legislation by Congress on the subject. Western Union Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105. A state statute prohibiting the running of freight trains on the Sabbath was held not invalid as interfering with interstate commerce, though, in effect, it prohibits trains from passing through the state on that day from and to adjacent states, but held an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the state. Hennington v. State of Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166.

Article 284, Rev. St. Tex., requiring a common carrier of live stock to feed and water it sufficiently pending carriage, otherwise to be liable to the owner in damages and a penalty, is a police regulation, and, as applied to an interstate shipment, where the default complained of occurred entirely in Texas, is no infringement of the power of Congress to regulate interstate commerce, nor in conflict with Rev. St. U. S. section 4386 et seq. (U. S. Comp. St. 1901, page 2995), forbidding an interstate railroad to confine stock in cars longer than 28 hours without unloading, for rest, water, and feeding, for 5 hours, under penalty recoverable by civil action. Gulf, C. & S. F. Ry. Co., v. Gray et al (Tex. Civ. App.) 24 S. W. 837. In this case the court says: "The shipment in this case had its initial point in this state at Santa Anna, and its terminus at West Point, Miss., and may be conceded to be an interstate shipment; but the matter complained of for which the penalty is asked all occurred within this state on defendant's road. In such case it is believed our statute should be enforced. To do so would not be an illegal interference with the act or the powers of Congress. Our statute intended to protect both animals and the owner, and its enforcement would be the legitimate exercise of the state's police power. So applied, it is not an attempt to regulate interstate commerce in such sense as to infringe upon the exclusive right of Congress. Const. U. S. art. 1, section 8. Our statute does not regulate interstate commerce, or have the effect of doing so in an interstate shipment any more than if it were to punish the company for theft of the shipment in transit in this state to another state. It is a police regulation, and, as such, is within the power of the state legislature."

The case of Crawford v. Southern Ry. Co., 56 S. C. 136, 34 S. E. 80, relied upon by the respondent, is not in point. In that case the court held that the law providing that no railroad company in the carrying or transportation of animals shall overload its cars, when applied to shipments made from a point within to a point without the state, is not unconstitutional as violating the provision in the Constitution of the United States granting Congress power to regulate interstate commerce. The court further held that under a statute which provides that railroad companies shall load and unload stock in transit every 24 hours for rest, and that the shipper shall feed and water them while resting, and, in case of his default, the company shall do so, a company failing to perform said duties is not relieved from liability to the shipper for injury to stock in transit, by reason of the shipper's failure to keep a special contract, under which he should ride on the transporting train and look after such loading and unloading. In Railroad Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688, it was held that a statute of a state providing that no contract shall exempt any railroad corporation from the liability of a common carrier or carrier of passengers, which would have existed if no contract had been made, does not, as applied to a claim for injury happening within the state under a contract for interstate transportation, contravene the provision of the Constitution of the United States empowering Congress to regulate interstate commerce. The case was this: The plaintiff while traveling in the caboose of a freight train of defendant, upon which his cattle were being transported under a special contract, was injured by reason of defendant's negligence, and brought his action for damages. One of the defenses set up was that by a clause in the special contract under which plaintiff and his cattle were carried it was, among other things, agreed that, in consideration of a reduced rate of charges, "the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount exceeding the sum of $500." The plaintiff obtained a verdict for $1,000, and the case was eventually carried to the Supreme Court of the United States, where the only question was whether the statute of Iowa in which state the injuries were received, was in conflict with the interstate commerce clause of the United States Constitution; it being conceded that the shipment of the cattle was an interstate shipment. We quote liberally from the opinion of

the court delivered by Mr. Justice Gray: "Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of the state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within the state, to the protection of that state, as those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance committed within its limits. * * * It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to punish and redress. The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by this use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the rights and duties of all persons and corporations within its limits. States may lawfully regulate the sale of railway tickets when such regulation does not operate so as to effect or impair the cost of tickets or the rate of fare charged for interstate travel. States may also by reasonable laws control the speed of trains, the stops of trains, unless interfering materially with interstate commerce, the running of trains on Sunday, the licensing of engineers, or track connections and terminal facilities, or may limit the hours of labor of railroad employes. We think the law in question does not come within any of the principles hereinbefore stated, nor within the principles laid down in the cases hereinbefore cited, and is unconstitutional and void, being an unreasonable exercise of the police power of the state. Houston & Texas Central Ry. Co. v. Mayes, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772;

Cleveland, etc., Ry. Co. v. Ill., 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868; Ill. Central Ry. Co. v. Ill., 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107.

An analysis of all the prior important cases upon the constitutionality of such laws is found in the opinion of the court in Cleveland, etc., Ry. Co. v. Ill., supra. In this case the railroad company attacked the constitutionality of a law, which is as follows: "Every railroad corporation shall cause its passenger trains to stop upon its (their) arrival at each station advertised by such corporation as a place of receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: Provided, all regular passenger trains shall stop a sufficient length of time at the railroad stations of county seats to receive and let off passengers with safety." In this case the railroad company operated the Knickerbocker Special, a train devoted to carrying interstate transportation between the city of St. Louis and the city of New York. The state admitted that the railroad company furnished a sufficient number of regular passenger trains, four each way a day, to accommodate all the local and through business along the line of its road, and that all of such trains stopped at the county seat, but sought to uphold the law on the ground that it was a proper police regulation. The court says: "It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the state of Illinois to compete with other lines running through states in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats, it is difficult to see why the legislature may not compel them to stop at every station. * * * If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others." The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares, requiring its tracks to be fenced, and a bell and whistle to be at-

tached to each engine, signal lights to be carried at night, and tariff and time-tables to be posted at proper places, and other similar requirements contributing to the safety, comfort and convenience of their patrons—is too obvious to require discussion." The case of Houston & Texas Central Ry. Co. v. Mayes, supra, is nearer in point to the case at bar than any cited by appellant or respondent. This case involves the constitutionality of certain laws of Texas requiring any railroad company to furnish cars at any point of its road within a certain number of days after the written request of a shipper for such cars, and providing a penalty of $5 a car for each day after the limited time to be recovered by the shipper in civil action. The law was held unconstitutional by a divided court, Mr. Justice White taking no part, and the Chief Justice, Mr. Justice Harland and Mr. Justice McKenna dissenting. In this case the court says: "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified, day, regardless of every other consideration, except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather."

The statute in question makes no exception in cases of sudden congestion of traffic, and no allowance for interference of traffic occasioned by wrecks or other accidents, the breaking of bridges, accidental fires, washouts, snow storms, or other unavoidable consequences of heavy weather.

The judgment and order appealed from are reversed, and the district court will render a judgment dismissing the action. All concur; ELLSWORTH, J., concurring specially.

ELLSWORTH, J., (concurring specially). I concur in this opinion on the sole ground that sections 4398, 4399, Rev. Codes 1905, as enacted, are an unreasonable exercise of the police power of the state, and therefore repugnant to section 1 of the state Constitution and void.

(125 N. W. 475.)

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H. C. DELANEY, J. J. DELANEY AND ALEXANDER THOMPSON v. WESTERN STOCK COMPANY.

Opinion filed February 24, 1910.

**Appeal and Error — Supreme Court — Questions First Raised Therein.**

1. This cause was tried in the court below as an equity case; all of the issues having been tried and determined by the court without a jury with the implied consent of all parties. This being true, defendant will not be permitted to urge in this court for the first time that the issues presented a case for trial by jury instead of by the court. Whether the contract set forth at length in the opinion created a partnership relation between the parties, and whether the issues presented by the pleadings were legal or equitable in character, is not determined, as no such questions were raised in the court below, and appellant, under well-settled rules of appellate procedure, will not be permitted to urge in this court a theory of the case contrary to that upon which the case was tried and decided in the trial court.

**Trial by Court — Jurisdiction — Trial Jury.**

2. Regardless of the nature of the issues, the district court possessed the requisite jurisdiction to try and decide the same without a jury, where the parties impliedly consented thereto.

**Findings Supported by Evidence.**

3. Evidence examined, and it is *held,* that the findings and conclusions of the trial court are substantially correct and amply supported by the testimony.

Appeal from District Court, McIntosh county; *Allen,* J.

Action by B. C. DeLaney and others against the Western Stock Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

*A. W. Clyde,* for appellant.

When pleading shows right to both legal and equitable relief, and there is a failure to establish the latter, action should not be dismissed but issues tried by jury. Pomeroy Rem. (4th Ed. by

Boyle) pp. 16-19; 38-9; 40-42; sections 11, 23, 25; Davis v. Morris, 36 N. Y. 569; Parker v. Laney, 58 N. Y. 469; Richmond v. Dubuque, 33 Iowa, 422, 489, 491.

*Rourke & Kvello, W. S. Lauder* and *J. H. Wishek,* for respondent.

Where there is no objection to the trial of a cause as an equitable one and not as a case at law, the mistake is waived. Brewer v. Winston, 46 Ark. 163; Parshall v. Moody, 24 Iowa, 314; 2 Cyc. 683 and notes 53 and 54; 1 Pom. Eq. Jur., section 131 and note 2; Richmond et al. v. Dubuque, etc., Ry. Co., 33 Iowa, 422; Cent. Dig. Vol. 2, Col. 1580 et seq.; 2 Cyc. 67 and notes 89, 90, 91; Cent. Dig., Vol. 2, Col. 1557 et seq.

In an equitable cause a court will administer complete justice although legal relief alone is ultimately awarded. 12 Enc. Pl. & Pr. 165, notes 3 and 4; Hawley v. Simons, 14 N. E. 7; Martin v. Martin, 24 Pac. 418; Collins v. Colley, 11 Atl. 118; Milkman v. Ordway, 106 Mass. 232; 1 Pom. Eq. Jur. (2d Ed.) section 237.

FISK, J. This litigation arose in the district court of McIntosh county. Plaintiffs DeLaney Bros. recovered judgment, from which defendant appeals and requests a review of the entire case in this court.

The issues as framed by the pleadings are simple. By the complaint it is alleged that at all times therein mentioned plaintiffs, H. C. and J. J. DeLaney, were and are co-partners doing business under the firm name of DeLaney Bros., and that defendant is a foreign corporation. It is next alleged that on October 11, 1904, the plaintiffs and defendent entered into an agreement as follows:

"Lehr, N. D., Oct. 11th, 1904. Agreement between De Laney Bros. and Western Stock Company and Alexander Thompson to run a certain band of sheep, being thirteen hundred and nine head in number. Western Stock Company and Alexander Thompson have this day bought one-half interest, and agree to bear all expense of running and caring for them for one year, including shearing and deliverig the wool to Lehr, N. D. De Laney Bros. agree to furnish shed room and all necessary hay for the winter of 1904 and 1905. One year from this date this contract will terminate and sheep are to be divided equally between De Laney Bros. and the Western Stock Company and Alexander Thompson, De Laney Bros. taking one-half, and the Western Stock Company and Alexander Thompson one-half of all the sheep and increase. Bucks are

to be furnished at an equal cost to all. De Laney Bros. also agree to furnish sheds and corrals known as the Thistle Ranch, from now on until the first day of June, 1905. De Laney Bros. West. Stock Co., L. Silver, Pt. Alexander Thompson."

The complaint then alleges the following facts:

"(4) That since the commencement of said partnership the defendant has not performed its duties in accordance with the said agreement of partnership hereto annexed, and has been guilty of negligence in carrying out the said agreement, in that it failed to care for the said sheep described in said articles of agreement hereto annexed, and failed to dip the same so that the said sheep became infected with the disease of scab, whereby great loss was caused to the partnership, said plaintiffs, and that the defendant failed to bear its share of the expenses of running and caring for said sheep, and that the defendant has been guilty of willful misconduct and gross negligence in that it removed from the flock of said sheep the male sheep or bucks, and allowed said bucks to run with sheep of L. Silver, which were known by defendant to be and which were infected with the scab, whereby the said sheep last aforesaid infected the said bucks with the scab, and said bucks in turn infected the sheep of the partnership with said disease of scab,

"(5) That if the said partnership is allowed to continue in force great damage will be caused to the plaintiffs, and the partnership business. Wherefore, for and by reason of all the acts of negligence and misconduct on the part of the defendant which are above set out, great damage has been caused to the plaintiffs, to-wit, the sum of $2,875."

The prayer for judgment is in substance that such co-partnership be dissolved, an accounting had, the property sold, and the surplus, if any, after payment of the debts, divided between the parties according to their respective interests; that the damages occasioned to plaintiffs by defendant's alleged negligence and misconduct in such partnership affairs be assessed and deducted from defendant's proportion of the assets, and for general relief.

The answer is as follows:

"(1) That defendant denies each and every allegation of said amended complaint.

"(2) And for further defense said defendant alleges that the agreement mentioned in said complaint and thereto annexed, marked

'Exhibit A,' was not the contract or the whole contract executed by and between the parties at the time, but was signed by Alexander Thompson, one of said plaintiffs, upon the express understanding and agreement executed at the time and as part of the same transaction in writing by true copy of said agreement hereto annexed, marked 'Exhibit A,' and made a part of this answer, and that said agreement in said complaint mentioned was so executed with full knowledge on the part of said plaintiffs of the agreement by and between said Western Stock Company and the said Thompson as aforesaid, and with intent that said Thompson should have the management of said sheep and the care and keeping thereof until the time when they were to be divided; that said sheep were accordingly kept and managed by said Thompson pursuant to the terms of said contract in said complaint mentioned, and the further contract hereinbefore described, until October 11, 1905, when a complete settlement and division of the property in question was made by and between the defendant and the plaintiff Thompson pursuant to the terms of the contract actually made, whereby each party received his full share of the sheep in question; and that, by reason of the premises said Alexander Thompson has not had, and does not now have, any interest in the subject."

The cause was tried in the court below as an equity case; all the issues having been tried and determined by the court without a jury with the implied consent of all parties. This being true, defendant will not be permitted to urge for the first time in this court that the issues presented a case for trial by jury rather than by the court. Whether the contract created a partnership relation between the parties, and whether the issues presented by the pleadings were legal or equitable in character, we deem it unnecessary to determine. No such questions were raised in the court below, and it is too late to now urge a theory of the case contrary to the theory upon which the case was tried and decided in the trial court. 2 Cyc. 683, 670, and cases cited; 2 Cent. Dig. 1557 et seq., and cases therein cited; 21 Enc. Pl. & Pr. 664.

Regardless of the nature of the issues, it is entirely clear that the district court, in the absence of any objection, and with the implied consent of the parties, possessed the requisite jurisdiction to try and determine such issues, and hence the sole question presented by this appeal is whether the trial court's conclusions are in accordance with the evidence and the law applicable thereto.

After a careful examination of the testimony, we are convinced that the findings of facts of the trial court are, in the main, correct and amply supported by the preponderance of the evidence. It would serve no useful purpose to review such testimony at length in the opinion. Suffice it to say that in our opinion the evidence discloses that defendant, through its president and general manager, L. Silver, so negligently performed its duties under the contract as to cause serious damages to plaintiffs. It satisfactorily appears that through Silver's wrongful act the band of sheep became inoculated with the disease of scabies which resulted in the damage complained of. The extent of such damage and the method of proving the same is not seriously questioned by appellant; its chief contention being that the question of damages cannot properly be tried in this action, being an action in equity instead of at law. This contention, for reasons heretofore stated, is untenable. Nor is there any force to the contention that plaintiffs De Lancey Bros. are precluded by the division of the sheep made by defendant's manager, Silver. Plaintiff's were neither present nor in any manner participated in or assented to such division. The attempt on appellant's part to shift the responsibility from itself to Thompson for the proper care and custody of the sheep is unavailing. The subsequent agreement between defendant and Thompson, whereby the latter agreed to feed and care for such band of sheep during said year, and was in no way binding on De Lancey Bros. Furthermore, the proof clearly discloses that the damage was occasioned solely by defendant's acts, by and through its president and manager, L. Silver, and that Thompson was in no way to blame therefor.

Judgment affirimed. All concur.

(125 N. W. 499.)

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## O. L. Hilde v. E. J. Nelson.

Opinion filed February 24, 1910.

**Appeal and Error — Taxation of Costs.**

1. To authorize a revision by this court of alleged errors in the taxation of costs, the record must contain sufficient data to enable the court to determine whether such errors have been committed. Where the evidence on which the trial court acted in taxing costs is

not contained in the record on appeal, the decision of the trial court will not be disturbed, unless error is apparent on the face of the judgment roll.

**Appeal and Error — Statement of Case — Specifications of Error.**

2. The so-called statement of case on this appeal radically fails in numerous respects to conform to the statute or to the rules of this court. It fails to contain proper specifications of error, and, furthermore, even if errors were specified, the alleged errors are not available to appellant, as the record fails to disclose timely objections and exceptions to the various rulings complained of. Such statement of case also fails to specify that appellant desires a review of the entire case or of any particular questions of fact as the statute requires in cases triable de novo in this court.

**Appeal and Error — Reversal for Denying Costs.**

3. There is nothing contained in the record on this appeal from which the Supreme Court is enabled to intelligently determine what costs appellant is entitled to have taxed, but the judgment roll does disclose reversible error in denying any costs to him, and for such error the judgment is reversed.

Appeal from District Court, Williams county; *Goss*, J.

Action by O. L. Hilde against E. J. Nelson. Judgment for defendant, plaintiff appeals.

Reversed.

*William Maloney*, for appellant.

*A. L. Knauf* and *Bessie & Greer*, for respondent.

FISK, J. This is an appeal from a judgment of the district court of Williams county, and whether the same is here for review of alleged errors or for trial de novo in whole or in part it is utterly impossible to determine from the record and briefs presented to us. Appellant's counsel on oral argument stated that the appeal was perfected "for an adjustment of the costs." The record discloses a remarkable departure from all known rules of legal procedure, and presents a veritable comedy of errors from the inception of the litigation down to the present time. While it appears that defendant conceded a liabliity to plaintiff of $60, and offered to permit judgment to be taken against him in justice court for this amount, defendant seems to have recovered judgment in district court against the plaintiff for $183.24, being a balance awarded to him as costs and disbursements after deducting the sum of $56.58, found by the jury in the district court to be due plaintiff from defendant.

The history of this litigation is as follows: Appellant brought suit in justice court in September, 1906, to recover the possession of certain grain upon which he claimed a thresher's lien. The amount claimed to be due him under the lien was the sum of $153.59. Defendant interposed several alleged counterclaims which he claimed reduced the amount owing plaintiff to something less than $60. Before the trial of such claim and delivery action in justice court, defendant offered to allow judgment for $60 and accrued costs to be entered against him, which offer was denied. The trial in justice court resulted in a judgment in defendant's favor awarding him costs in the sum of $19.70, and plaintiff appealed therefrom to the district court. Thereafter appellant also commenced an action in the district court in which he prayed for a foreclosure of his said lien. These two actions were on plaintiff's motion consolidated and tried in the district court as one action. A jury was impaneled, and the trial court apparently submitted to the jury the issues which had been framed in the claim and delivery action. Both the trial court and counsel apparently proceeded upon the assumption that, under the issues, the only question for the jury to determine was what amount was due plaintiff on his threshing bill after deducting such amounts as might be found due defendant under the alleged counterclaims, and the jury, pursuant to instructions, returned a verdict in plaintiff's favor for the sum of $56.58. As a verdict in claim and delivery it is a curiosity, and we here quote it in full: "We, the jury in the above-entitled action, find for the plaintiff, O. L. Hilde, and against the defendant, E. J. Nelson, and assess plaintiff's damages at the sum of fifty-six dollars and fifty-eight cents ($56.58). We further find that the property was taken by the sheriff under claim and delivery proceedings in this action and is unsold in the St. Anthony and Dakota Elevator at Wheelock, North Dakota, and is two hundred bushels of wheat and four hundred ninety-four bushels of oats and that said grain is held awaiting order of this court." Thereafter the trial judge, by agreement of counsel, taxed the costs, instead of directing the clerk to do so, and he found and adjudged that defendant was entitled by way of costs and disbursements to the sum of $239.82, and, after deducting the amount of the verdict in plaintiff's favor, he ordered judgment entered in defendant's favor for the said sum of $183.24. Plaintiff insisted that he was entitled to have costs taxed in his favor in the sum of $341.70, but the trial

court held that, in view of the fact that the amount found by the jury to be due plaintiff was less than the amount for which defendant had offered to permit judgment to be entered, defendant should recover his costs and disbursements. It is entirely clear that the trial court committed gross error in such ruling, as an offer merely to permit a money judgment to be entered in an action, the object of which was the recovery of specific personal property, is of no force or effect.

While there is an apparent miscarriage of justice, we are unable, on account of the condition of the record, to afford appellant any relief, except such, if any, as the face of the judgment roll shows him entitled to. He comes here in almost total disregard of all the well-settled rules relating to appellate procedure. The so-called statement of case radically fails, in numerous respects, to conform to the statute or to the rules of this court. It fails to contain proper specifications of error, and, furthermore, the alleged errors, if properly specified, could not be noticed, as no proper foundation was laid for such review by timely objections and exceptions. If it could be successfully contended that the case is here for trial de novo, still appellant is in no better situation, as he has failed to specify in his so-called statement of case either that he desires a review of the entire case or of any particular questions of fact, as the statute imperatively requires. We therefore have nothing before us which we can properly review, except such errors, if any, as appear upon the judgment roll. Whether the abstract discloses any prejudicial error upon the face of the judgment roll is somewhat doubtful. We are unable to determine definitely from the judgment roll whether or not the costs and disbursements, if properly taxed, would necessitate a different result. What items of cost should have been taxed in plaintiff's instead of defendant's favor we are unable to determine. The allowance of costs in the equity suit to either or neither party was discretionary. Section 7179, Rev. Codes 1905. The so-called order for judgment taxes and adjusts costs between the parties, and discloses that the trial court declined to award costs to plaintiff upon the erroneous ground therein stated that plaintiff's recovery did not exceed the amount for which defendant had offered to permit judgment to be taken, and also for the erroneous reason of plaintiff's failure to prove a demand prior to suit (the answer disclosing that such demand would have been unavailing and therefore useless). From

what we are able to glean from the record plaintiff should have been awarded his costs properly incurred in the claim and delivery action. The allowance of the other costs was discretionary. Of course, in the allowance of such costs a sound judicial discretion must be exercised. While a party complaining of error in the allowance of costs has the burden of affirmatively showing such error so as to enable the Supreme Court to correct the same by readjustment of the costs, and while there is nothing contained in this record from which we are enabled to intelligently adjust such costs, we have concluded, for the errors aforesaid, to reverse the judgment appealed from, and to remand the case with instructions to retax the costs in accordance with the foregoing views, and when thus retaxed, to enter judgment accordingly.

Judgment reversed. Appellant to recover his costs in this court. All concur.

(125 N. W. 474.)

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ALBERT G. WHITNEY AND ALICE W. WHITNEY v. LEWIS W. AKIN, JOHN R. WALTERS, CHARLES J. AKIN, JOHN J. GARVIN, L. T. WIPER, CHARLES A. WHEELOCK, GREEN & DELAITTRE COMPANY, JOHN BOOS, COLEAN MANUFACTURING COMPANY, C. F. NOBLE, ACME HARVESTING MACHINE COMPANY, MARION GRANGE, WILLIAM FINNEY, JAMES P, AYLEN, WYMAN, PARTRIDGE & COMPANY, DOWAGIAC MANUFACTURING COMPANY, NORTHERN TRUST COMPANY, OLE A. SEM AND ANDREW SEM.

Opinion filed February 17, 1910.

**Appeal and Error — Statement of Case — Presumptions In Absence of Proof.**

1. Upon an appeal, where, as in this case, the findings and decree of the court respond to the allegations of the complaint and prayer for relief, but the evidence is not brought into the record by a properly authenticated statement of the case, it will be presumed that all material facts alleged in the complaint are supported by competent proof.

**Same — Appeal upon Judgment Roll — Presumptions as to Findings.**

2. In a case such as this, where the sufficiency of the evidence to support the findings of the court cannot be considered because the appeal is based entirely upon the judgment roll proper, it will be presumed that the findings of the court are fully supported by competent evidence.

**Vendor and Purchaser — Specific Performance — Judgment — Sufficiency of the Evidence.**

3. In an action by vendors to compel specific performance by the vendees to a contract for the purchase of real property of their agreement to pay each year upon the purchase price a sum equivalent to the value of one-half of the crop grown upon the land during that year, an allegation of the vendors as plaintiffs in their complaint, admitted by defendants' answer, that the entire balance of the purchase price in a stated sum is due and unpaid, will support a decree of the court requiring defendants within a reasonable time to pay that sum to the plaintiffs, and the plaintiffs thereupon to execute and deliver to defendants a conveyance of the land.

**Vendor and Purchaser — Appeal — Sufficiency of the Evidence to Support Findings.**

4. Where the court finds that during two years the crops grown upon land held under a contract of sale providing for payment of the purchase price by application each year of the proceeds of one-half the crop have not been in any part delivered by the vendees to the vendors, and that thereafter there was due upon the contract a certain sum, on an appeal based on the judgment roll, alone, it will be presumed in support of the findings that the evidence showed the value of the crops for the two years in which they were not delivered was, at least, equivalent to the sum so found to be due on the contract.

**Costs — Discretion.**

5. Costs allowed under section 7179, Rev. Codes 1905, are in the discretion of the court, and, unless the facts show an abuse of the court's discretion, its rulings refusing certain costs will not be disturbed.

**Costs — Who Entitled — Construction of Statute.**

6. The costs or attorney's fee which may be allowed by the provisions of section 7176, Rev. Codes 1905, apply only to actions which are indisputably for the foreclosure of a mortgage upon real or personal property. The fact that the parties in equity stand in a relation that is practically that of mortgagor and mortgagee does not of itself require or authorize an allowance of costs under this section.

Appeal from District Court, Cass county; *Pollock*, J.

Action by Albert G. Whitney and others against Lewis W. Akin and others. Decree for defendants, and plaintiffs appeal.

Affirmed.

*Ball, Watson, Young & Lawrence* and *Reynolds & Roesser*, for appellants.

*Engerud, Holt & Frame*, for respondents.

ELLSWORTH, J. Appellants, who were plaintiffs in the court below, allege as their cause of action that they are vendors in a contract for the purchase of a tract of land situated in Cass county; that the vendees who are named as defendants have made default in the terms and conditions of such contract, in that they have failed to turn over and deliver to plaintiffs one-half or any portion whatever of the crops which were in fact raised upon the land described in the contract during the year 1906; that, after giving defendants credit for any and all payments made upon said contract, there yet remains due and unpaid to the plaintiffs thereon the sum of $1,658.32, with interest thereon from November 1, 1905; and that by reason of the default alleged the plaintiffs have elected to declare said contract void. The contract on which the action is based is attached as an exhibit to plaintiffs' complaint, and from an examination of its terms it appears that payment of the purchase price is to be made by delivery of one-half the grain raised each year at some convenient point near the land to the plaintiffs, who shall thereupon dispose of the same, and apply the sum realized from such sale first upon any interest then due and afterward in reduction of the principal sum. No other provision than this is made for payment. Time is declared to be of the essence of the contract, and it is agreed that upon any failure of the defendants to perform any of the covenants and stipulations thereof the vendors shall have the right to declare a cancellation and forfeiture of the same after giving proper notice of their intention. The prayer for relief of plaintiffs and appellants is that the defendants "within a time to be fixed by the court, comply with and perform the conditions of said contract, * * * and that, failing so to do, it be adjudged and decreed that said contract is forfeited and void;" that any claim, interest, or lien of the defendants be foreclosed and determined, and that plaintiffs be awarded immediate possession of the premises. By their answer the defendants admit the execution of the contract; that it was in full force, and that during the season of 1906 there was a crop of grain raised upon the land, no portion of which was delivered to the plaintiffs; that there yet remains due and unpaid to the plaintiffs on said contract the sum of $1,658.32, with interest thereon from November 1, 1905; that defendants have been at all times ready, able and willing to pay the said sum, and bring the same into court and tender it to the plain-

tiffs. Defendants then alleged a counterclaim, in which the contract set out in plaintiffs' complaint is pleaded, with the further allegation that they have paid all taxes upon the land since the year 1901, the date of the execution of the contract, and have in every respect complied with its terms; that there is now due upon the contract the sum of $1,658.32, with interest thereon from the 1st day of November, 1905, at 8 per cent, which sum defendants have been at all times ready, able and willing to pay, and now bring into court and offer to the plaintiffs; that the value of the premises has become greatly enhanced since the making of the contract, and that any failure or refusal on the part of plaintiffs to perform the same would cause great damage to the defendants. They therefore pray that the complaint of the plaintiffs be dismissed, and that plaintiffs be required to convey the premises in question to the defendants by a good and sufficient deed of warranty, and that upon delivery of the same, but not before, the sum admitted to be due upon the contract and deposited in court by defendants be paid to plaintiffs.

After issue formed a trial was had before the district court and a considerable amount of evidence introduced by both parties. After the trial the district court decided the case favorably to the defendants, and made findings, among others, to the effect that crops of grain were grown on the land in the years 1906 and 1907, and that defendants had failed in either of these years to deliver to plaintiffs any portion whatever of the same, and that there is due and unpaid to the plaintiffs on said contract the sum of $1,658.32, with interest thereon from November 1. 1905, at the rate of 8 per cent per annum. It also found that this sum had been duly tendered by defendants to the plaintiffs as the amount due on the contract, and that plaintiffs had refused to accept the tender. Thereupon a judgment was entered that upon payment within five days of the sum of $1,658.32, with interest thereon from the 1st day of November, 1905, at the rate of 8 per cent per annum, together with the costs incurred by plaintiffs in the action up to and including May 20, 1907, the day of the tender, the plaintiffs should execute and deliver to defendants a good and sufficient deed of warranty to the land in question; and that, in the event of the failure or refusal of plaintiffs to deliver such deed, the judgment should operate as a conveyance to defendants of title to the premises in controversy. Plaintiffs then applied to the court to tax

costs in their favor, including a certain sum as attorney's fees under the provisions of section 7176, Rev. Codes 1905. The court taxed in their favor costs of the action to May 20, 1907, but refused to make any further allowance or to allow any costs whatever as an attorney's fee. To these orders plaintiffs excepted, and without preparing a statement of the case, or bringing to this court any of the evidence taken or other proceedings had upon the trial, appeal from the judgment, basing their specifications wholly upon errors which they claim appear from an inspection of the judgment roll.

In this court the points presented and relied upon by plaintiffs are: (1) That plaintiffs are entitled to the relief prayed for in their complaint, to-wit, a decree vacating and canceling the contract involved in the suit, unless within a reasonable time the defendants pay to the plaintiffs the value of one-half of the crops raised upon the land in the years 1906 and 1907. (2) That the court erred in entering a decree providing that upon payment of the total sum of $1,658.32, with interest, the plaintiffs should make to defendants a conveyance such as is provided for by the terms of the contract, as such relief could not be granted in any practicable view of the rights of the parties as presented by the issues. (3) That the court erred in refusing to tax in plaintiff's favor costs that accrued in the action subsequent to May 20th, 1907. (4) That the court erred in refusing to tax in plaintiffs' favor an attorney's fee as provided by section 7176, Rev. Codes 1905.

1. The principal grievance of appellants with reference to the provisions of the decree seems to be that it requires them to accept the entire amount still due upon the contract in one payment, and to thereupon execute a conveyance of the land. It is clear from the terms of the contract that plaintiffs cannot require defendants to pay at the end of any period of time any greater sum than would be realized from the sale of one-half the crops grown upon the land during that period. It is likewise apparent that defendants cannot compel the acceptance of a larger sum than is shown to be due in this manner, and that they cannot require the plaintiffs to make a conveyance until the entire sum is due, and they have paid or properly tendered it. It may be conceded that, even in an equitable action of the character of this, a court is unwarranted under any state of fact in wresting a contract from its reasonable construction and requiring of either party a per-

formance of conditions not reasonably within its terms. Plaintiffs contend that, under their complaint and the terms of the contract, no possible state of fact could warrant a decree with the provisions of that appealed from. But in a case where the evidence, as in this case, does not appear in the record on appeal, it will be presumed that it supported all material facts alleged in the complaint. Sandager v. N. P. Elev. Co., 2 N. D. 3, 48 N. W. 438. Further than this, in cases where no question as to the sufficiency of the evidence can be considered because the appeal is based upon the judgment roll only, it will be presumed that the findings of the court are fully supported by the evidence. Blackman v. Hot Springs, 14 S. D. 497, 85 N. W. 996. As heretofore noted, plaintiffs allege in their complaint "that, after giving defendants credit for any and all payments made upon said contract, there yet remains due and unpaid to the plaintiffs thereon the sum of $1,658.32, with interest thereon from November 1, 1905." They also allege that defendants have failed to make certain payments in an indeterminate amount which the contract shows are due. The relief they pray for is substantially that the defendants be required to "comply with and perform the conditions of said contract." Now, it is apparent that if from the facts shown by the evidence the amount due from defendants was equivalent to the sum of $1,658.32, with interest from November 1, 1905, that a compliance with the terms of the contract required the payment of this sum to plaintiffs, and, as the conditions of the contract are reciprocal, they would thereupon be required to execute a conveyance of the land. All presumptions unite to declare that this is the exact state of fact appearing on the trial, and, such being true, the relief accorded was not materially different from that prayed for in plaintiff's complaint.

2. We find, however, in the memoranda of the district court, an express statement that it "finds and decides favorably to the defendants." It appears, therefore, that in some at least of its material findings the court held adversely to the plaintiffs. Defendants in their answer not only denied all material allegations of plaintiffs' complaint except as to the execution of and the amount due on the contract, but also plead a counterclaim, which, under a certain state of fact, will sustain a decree such as was here rendered. Defendants' prayer for relief is substantially that plaintiffs be required to accept the amount due upon the contract,

which, it alleges, is the sum of $1,658.32, with interest from November 1, 1905, and thereupon to execute a conveyance of the land. That the balance of $1,658.32, with interest, was due at the time of issue, seems to be the material fact of all others concerning which there is an entire agreement between the parties. The findings of the court that there was such amount due has therefore ample and sufficient support in the admissions of the pleadings alone. There is, however, the additional consideration that the crops grown upon the land during the years 1906 and 1907 had not been delivered to the plaintiffs, and that a sum equivalent to the value represented by these crops was due upon the contract. The findings are silent as to the value of the crops, but in support of the findings and the decree it will be presumed that their value was at least the sum of $1,658.32. Therefore, upon the combined showing of the contract itself, the admissions of the pleadings, and the evidence, which it will be presumed was introduced upon the trial, there is the most abundant support for the decree entered by the court.

3. The costs in an action of this character may be allowed for or against either party in the discretion of the court. Rev. Codes 1905, section 7179. This discretion is, of course, one which must within certain limitations be soundly exercised. The court in this case in allowing costs evidently proceeded upon the theory that the plaintiffs were entitled to tax only such costs as had accrued at the time full performance was tendered by the defendants. In view of the facts presented by the record, we are unable to say that such action shows an abuse of discretion, and its order in this particular will not therefore be disturbed. Brown v. Skotland, 12 N. D. 445, 97 N. W. 543.

4. The costs allowed under the provisions of section 7176, Rev. Codes 1905, are applicable to "actions or proceedings for the foreclosure of a mortgage upon personal property or of a mortgage or other lien upon real property." Plaintiffs contend that the situation presented by this case is practically similar to the foreclosure of a mortgage, the parties standing in the relation of mortgagor and mortgagee; that, as the defendants seek and obtain relief upon the theory of redemption from a mortgage, they should be required to pay the costs that would be assessed against them in such a case. While it has been held that the relation of the parties to a contract of the character shown here is in equity prac-

tically that of mortgagor and mortgagee, a reasonable interpretation of section 7176, Rev. Codes 1905, inclines us to the belief that it was intended to apply, not to cases where the facts obtain through equitable construction, but where they exist as an undisputed fact. The allowance of costs, being entirely statutory, is strictly construed in accordance with the terms of the statute allowing it. In any event, the relief afforded defendants in this action does not seem to be in the nature of a right to redeem from a mortgage foreclosure, but rather as a permission to perform, after default, the terms of a contract. In other words, the court does not foreclose defendants' rights under the contract, but simply restores to them the right of full performance.

As the action of the district court in the particulars pointed out by plaintiff seems to be without prejudicial error, the judgment appealed from is affirmed. All concur.

(125 N. W. 470.)

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HUGH CAMPBELL, JR., v. WARREN COULSTON AND JOSEPH W. BULL.

Opinion filed January 14, 1910.

**Judgment—Who May Vacate—Purchaser of Property Subject to Void Judgment—Equity.**

1. A person who purchases property upon which a judgment, void for want of jurisdiction appearing upon its face, is a cloud, is not entitled as a matter of right to have such judgment vacated on motion.

**Judgment—Motion to Vacate—Judgment Void for Want of Jurisdiction—Discretion of Court.**

2. The court in which such motion is made may in the exercise of sound judicial discretion entertain the same, or it may require the moving party to resort to his remedy by action,

**Mortgage Foreclosure—Void Judgment—Vacation—Abuse of Discretion.**

3. B., having procured a quitclaim deed for a consideration of "one dollar and other valuable consideration," of lands which were sold pursuant to a judgment in foreclosure rendered nearly 22 years prior thereto, moved to vacate such judgment upon the ground that the same is void upon its face on account of defects in the affidavit for the service of the summons by publication.

*Held,* under the particular facts, for reasons stated in the opinion, that the trial court abused its discretion in entertaining and granting such motion.

**Territorial and State Courts—Succession—Effect of State's Admission—Jurisdiction of State Courts—Vacation of Judgment.**

Held, further, that the state district court is not the successor of the territorial district court which rendered such judgment for the purpose of inquiring into the merits of such litigation the action having at the date of the admission of North Dakota into the Union ceased to be pending. Hence such state court had no jurisdiction to vacate such judgment on motion. Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653, distinguished.

Appeal from District Court, Burleigh county; *Winchester*, J.

Action by Hugh Campbell, Jr., against J. Warren Coulston to woreclose a mortgage. From an order vacating a judgment of foreclosure on motion of Joseph Bull, plaintiff appeals.

Reversed.

*F. H. Register, John W. Noble, S. E. Ellsworth and Guy C. H. Corliss*, for appellant.

Judgment can be vacated on motion only in the court where rendered. 17 Am. and Eng. Enc. of Law, (2nd Ed.) 842; Garlock v. Calkins, 14 S. D. 90, 84 N. W. 393; Elder v. Mining Co., 58 Fed. 536; Buffham v. Perkins, 44 N. W. 1150; Coon v. Seymour, 37 N. W. 243; 1 Black on judgments, p. 297.

Cases without action therein, two years after final judgment therein, are not "pending." Glaspell v. N. P. Ry. Co., 144 U. S. 211, 12 Sup. Ct. Rep. 593, 36 L. Ed. 409; Miller v. Sunde, 1 N. D. 1, 44 N. W. 301.

None but parties to a judgment can set it aside. 15 Enc. Pl. & Pr. 250; Freeman on Judgments, Sec. 91; Packard v. Smith, 9 Wis. 184.

U. S. Courts can vacate a judgment on motion only at the term of its rendition. Cameron v. M' Roberts, 3 Wheat. 591; 4 L. Ed. 47; Bank of U. S. v. Mass. 6 How. 38-40; 12 L. Ed. 331.

*John W. Bull (R. N. Stevens, of Counsel)*, for respondent.

One having an interest in the subject matter of a suit, may move to vacate a judgment therein, although he is not a party to the record. 14 Enc. Pl. & Pr. 97; Coffin v. Bell, 37 Pac. 240; People v. Mullan, 4 Pac. 348; Chappel v. Chappel, 12 N. Y. 215.

FISK, J. That in an appeal from an order of the district court of Burleigh county dated September 28, 1907, vacating a judgment entered on July 8, 1885, by the territorial district court in said county.

The facts necessary to an understanding of the questions involved are as follows:

The judgment thus vacated was rendered in an action claimed to have been commenced by appellant against one Coulston for the foreclosure of a mortgage executed by one Patterson and wife covering 3,040 acres of real property in Burleigh county to secure a note of $5,000; such land having been conveyed subsequent to such mortgage to the said Coulston. On August 10, 1906, Coulston executed, for a stated consideration of $1.00 and other valuable consideration," a quitclaim deed of the lands to respondent Bull, who in April, 1907, procured from the judge of the district court of the Sixth judicial district an order requiring appellant to show cause "why the judgment and decree in this action should not be set aside and canceled of record on the ground that the court had no jurisdiction to enter said judgment and decree." Respondent based his sole right to move for the vacation of such judgment upon the quitclaim deed aforesaid, and he bases his right to such relief upon the sole ground "that the court has no jurisdiction to enter such judgment and decree, which want of jurisdiction appears on the face of said judgment and the judgment roll." The particular jurisdictional defect relied on was and is, alleged insufficiency of the affidavit for an order for publication of the summons in not stating any facts showing that the defendant, after due diligence, could not be found within the jurisdiction of the court.

The only service made on appellant of the order to show cause was by mailing in a registered letter a copy thereof addressed to him at St. Louis, Mo.

On May 21, 1907, plaintiff appeared specially before the district court and moved for the vacation of such order upon the grounds, among others, "(2) that the service of the order to show cause was entirely insufficient to give the court issuing the order jurisdiction; (3) that the district court of the Sixth judicial district of the state of North Dakota is not the court in which the action in which the order to show cause was issued, was commenced, or in which the decree which it was sought to vacate was entered, or the legal successor of said court, and that it was without jurisdiction to hear or determine any proceedings affecting the decree; (4) that it does not appear from the moving papers that Bull was a party to said action or the successor in interest of a party or entitled in any manner to move or proceed in said action; * * * (6) that, owing

to lapse of time, the judgment in said action was final and could not be disturbed; and that (7) the matters presented by Bull's application could not in any event be properly determined upon a summary application of this character or in any manner other than by civil action." This motion was denied, whereupon plaintiff filed a return to the order to show cause, in which he set forth at length many facts and reasons why the relief asked by the respondent Bull should not be granted. We deem it unnecessary to incorporate such return herein.

It conclusively appears that defendant Coulston was personally served with a copy of the summons and complaint at his home in Philadelphia, Pa., and had ample opportunity, if he desired, to appear and defend the foreclosure suit, but he suffered a default, and at no time during the long period of time has he sought in any manner to question the validity of such decree. That plaintiff possessed a meritorious cause of action is questioned neither by Coulston nor Bull, his grantee.

Pursuant to such decree of foreclosure, these lands were struck off at public sale to plaintiff on August 22, 1885, for the sum of $5,433.26, which sale was confirmed by an order of the district court dated September 2, 1885, and on October 11, 1886, a sheriff's deed in due form of the premises aforesaid was executed and delivered to the plaintiff by the sheriff of said county, which sheriff's deed was duly recorded on October 13, 1886, ever since which time plaintiff has in good faith claimed to be the owner of said lands and has exercised acts of ownership therein by the payment of taxes and otherwise.

It is thus apparent that Respondent Bull stands before this court in the inequitable position of attempting to obtain through a mere technicality, namely, a defect in the affidavit for publication of the summons, and in the light of the strongest possible equities in plaintiff's favor, and at a time nearly 22 years subsequent to the entry of judgment, affirmative equitable relief by motion with the ultimate end in view of obtaining a large and valuable tract of land, which apparently had been abandoned by his grantor, and this without so much as tendering or being required to pay any portion of the mortgage debt, or reimbursing the plaintiff for the taxes paid. A case more destitute of equity cannot well be imagined. It would therefore seem plain that the relief prayed for should not be granted unless the movant has shown a clear, legal right thereto. Is he

entitled to such relief as a matter of strict legal right? We think not. Conceding, for the sake of argument, that the judgment is void, the respondent, by his motion to vacate the same, invokes the equitable powers of the court to the same extent as though he had resorted to an action in equity to cancel such judgment as a cloud upon his title, or had brought an action to quiet title or to determine adverse claims. Whether the court would entertain such motion or compel the movant to resort to his remedy by action in equity was discretionary, but, under the particular facts in this case, we hold that it was manifestly an abuse of discretion to permit respondent to proceed by motion instead of by an action. Bull being a stranger to the judgment, but claiming to have purchased defendant's rights in the subject-matter of the action, the court is called upon, as stated by appellant's counsel, "to decide a question of fact having no relation whatever to the question whether the judgment is void." That question of fact is whether the moving party has as a matter of fact and law secured the title of the defendant to the subject-matter affected by the judgment. This important question of fact has to be tried on affidavits, and, what is more, it may in many instances be tried in the absence of the real party who owns the subject-matter. In the light of these facts, the language of that eminent jurist, Judge Mitchell of the Minnesota Supreme Court, is particularly applicable. We quote: "We think that a judgment absolutely void for want of jurisdiction appearing on its face may be set aside on the motion of any person who, although not a party to the action, has an interest in the property upon which it is a cloud. Such a motion is not, strictly speaking, a proceeding in the action, but an application to have the records purged of an unauthorized and illegal entry. Hervey v. Edmunds, 68 N. C. 243; Blodget v. Blodget, 42 How. Prac. (N. Y.) 19; Mills v. Dickson, 6 Rich. Law (S. C.) 487; Milnor v. Milnor, 9 N. J. Law, 93; Hunter v. Stove Co., 31 Minn. 511, 18 N. W. 645." But such a practice is liable to encourage the intermeddling of strangers, and is subject to the possible danger of affecting the rights of parties not before the court, and therefore to be indulged in very cautiously. Moreover, one not a party to the action is not entitled as a matter of right to such relief. The granting of it is a matter wholly within the sound discretion of the court. There is no necessity for granting such relief, for a judgment, void on its face, can neither affect, impair, nor create rights, and is always and everywhere open to collateral at-

tack." Mueller v. Reimer, 46 Minn. 314, 48 N. W. 1120. To the same effect is the holding in Wisconsin, where, in speaking for the court, Dodge, J., said: "Although void, the court would not be bound to set the judgment aside upon motion, unless it appeared to be inequitable. Purcell v. Kleaver, 98 Wis. 102, 73 N. W. 322. Hence an application to set it aside in a measure always appeals to the equitable power and discretion of the court." Reeves & Co. v. Kroll, 133 Wis. 196, 113 N. W. 440. And in Purcell v. Kleaver, supra, the Wisconsin court used the following pertinent language: "Equity little heeds the complaint of one impeded by a judgment which is merely void, but not unjust, but leaves him to struggle with his embarrassment as best he may at law." It is difficult to imagine any case where the facts more imperatively demand the application of the foregoing rule than the case at bar, and we entertain no doubt that the court below abused its discretion in entertaining and granting respondent's motion, after such a long lapse of time, nearly 22 years after the entry of judgment. Respondent by selecting his remedy by motion should not be permitted to obtain relief which manifestly would be refused him if he resorted to an action in equity. To say the least, his demand is grossly inequitable, and he does not come before the court with clean hands.

Thus far we have assumed that the lower court had jurisdiction to entertain the motion within the exercises of sound judicial discretion; and while the conclusions above reached, that such discretion was abused in granting respondent's motion, sufficiently disposes of this appeal, we desire to place our decision partly on another ground which we think equally conclusive in requiring a reversal of the order appealed from, and that is that the court below possessed no jurisdiction to vacate the judgment of the territorial court. As before stated, the purported judgment was rendered in the territorial district court on July 8, 1885. No appeal nor other steps were ever taken prior to statehood looking to any relief therefrom. In fact, the motion made in 1907 in the court below, which resulted in the order complained of, is the only attack ever made by any person upon such judgment. There can be no escape from the conclusion that the state district court is not the court which rendered such judgment, and hence it was without jurisdiction to vacate or annul the same *on motion,* unless such jurisdiction was in some manner conferred upon it so to do. It is asserted that it is the successor of the territorial court, and as such has the

requisite jurisdiction to entertain such motion. But, as will hereafter be seen, it is the successor of the territorial court to the extent only that it has been made such by competent authority. The only competent authority for creating the state court the successor of the territorial court is that of the United States government and the state acting together. In other words, the territorial courts were the creatures of the general government, and were created by Congress pursuant to the clause of the United States Constitution which empowers Congress to make all needful rules and regulations respecting territory belonging to the United States. McAllister v. United States, 141 U. S. 174, (Co-op.) 183, 11 Sup. Ct. 949, 35 L. Ed. 693. It inevitably follows, therefore, that the state cannot without the consent of Congress, either express or implied, confer upon its courts jurisdiction over the actions, judgments, or records of such territorial courts. It is equally plain that Congress has no power to prescribe the jurisdiction of the state courts, for they are exclusively the creatures of the sovereign power of the state. Such is the express holding of the United States Supreme Court in Hunt v. Palao, 4 How. 589, 590, 11 L. Ed. 1115, and Benner v. Porter, 9 How. 235, 13 L. Ed. 119. In the former case it was said: "A state law could not validly declare the records of a court of a territory, which is a court under the laws of the United States, to be a part of the records of its own state court. If the law of Florida had placed the territorial records in the custody of the state court, this would not have made them the records of that court, nor authorized any proceedings upon them. The territorial court was a court of the United States, and the control over its records belongs to the general government, and not to the state authorities, and it rests with Congress to declare to what tribunal these records and proceedings shall be transferred, and how these judgments shall be carried into execution, or reviewed upon writ of error." In the latter case it was among other things said: "On the admission of a territorial government into the union as a state, the concurrence of both the federal and state governments would seem to be required in the transfer of the records, in cases of appropriate state jurisdiction, from the old to the new government. An act of Congress would be incapable of passing them under the state jurisdiction, as would be an act of the Legislature of the state to take the records out of the custody of the federal government. Both should concur." Congress saw fit to give its express consent to the exercise

of such jurisdiction by the state courts only in certain pending cases. Enabling Act 23, makes the United States Circuit and District Courts the successors of the territorial courts in all pending cases, proceedings, and matters whereof such courts might have had jurisdiction had they existed at the time of the commencement of such cases; and in respect to all other pending cases, proceedings, and matters the state courts are made the successors of such territorial courts. It is provided, however, that in all civil actions in which the United States is not a party, transfers to the circuit and district courts of the United States shall not be made, except upon written request of one of the parties, and that, in the absence of such request, such cases shall be proceeded with in the proper state court. Miller v. Sunde, 1 N. D. 1, 44 N. W. 301; Gull River Lumber Co. v. School District, 1 N. D. 408, 48 N. W. 340.

It is entirely clear that the action here involved is one whereof the United States Circuit Court might have had jurisdiction had such court existed at the time the action was commenced, provided the necessary diverse citizenship of the parties existed, a fact not controverted. The fact that neither party was a citizen of Dakota Territory is immaterial. Jurisdiction of the federal court, had such court existed, would have been complete if plaintiff and defendant were citizens of different states. That such diverse citizenship in fact existed is, we think, at least impliedly admitted, but whether this be true or not, it is sufficient, for the purposes of the point now under consideration, that the federal court might, depending on extrinsic facts, have had jurisdiction. See Act Cong. March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), and 4 Encyc. of U. S. Sup. Ct. Rep. 936, and cases cited; also 11 Cyc. 949; 960; Grove v. Grove (C. C.) 93 Fed. 865; Merrihew v. Fort (C. C.) 98 Fed. 899. Assuming the existence of facts conferring jurisdiction on the federal court, if it was still a pending case, plaintiff would have had the undoubted right guaranteed to him by Congress to have had it transferred to and disposed of in the federal court. In view of the careful manner in which Congress has safeguarded such right to removal in pending cases of the character of this one, is it possible that they intended to leave the rights of non-residents as to judgments in actions which had ceased to be pending long prior to the admission of the territory as a state, subject to hostile action by state courts? We think not. Congress did not make, nor intend to make, the state court the successor of the territorial court

for the purpose of exercising jurisdiction, except in pending cases. This is apparent from the language used in the enabling act. There is nothing in the opinion in Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653, inconsistent with these views. The question there was whether the state court had jurisdiction to enforce a territorial judgment where the action had ceased to be pending at the date of statehood. It was held that it had such jurisdiction, but the court was careful to limit its decision to the precise question there involved. We quote: "As to actions which were no longer pending, there was no reason for providing that jurisdiction over such cases should be transferred to the federal courts. * * * In such cases the merits would no longer remain open to investigation, and therefore there would be no reason for taking jurisdiction of those cases away from the courts. No prejudicial, hostile state action could be apprehended." To the same effect is the holding of the United States Supreme Court in Glaspell v. Railroad Co., 144 U. S. 211, 12 Sup. Ct. 593, 36 L. Ed. 409. We quote from the opinion as follows: "The record of cases of exclusive federal jurisdiction which have gone to judgment should indeed be transmitted to the circuit court, and the judgment there enforced; but, where final judgment has been rendered in cases of concurrent jurisdiction, no reason can be assigned for, nor do the terms of the act of Congress contemplate, such a transfer." If the state court possessed the right to annihilate the judgment as was done in this case, how can it be said that "in such cases the merits would no longer remain open to investigation, and therefore there would be no reason for taking jurisdiction of those cases away from the state courts. No prejudicial, hostile state action could be apprehended."

The action of the lower court was most certainly prejudicial and hostile to plaintiff, and this is true whether the judgment be deemed by the state court to be void or merely voidable. In either event, the state court assumed to exercise jurisdiction not conferred upon it, either expressly or impliedly. We feel confident that the state court had no jurisdiction to proceed by motion, as it did, to inquire into the validity of such judgment. It could do so only by an appropriate action.

For the foregoing reasons, the order appealed from is reversed.

ELLSWORTH, J., being disqualified, took no part in the foregoing decision, Judge CRAWFORD of the district bench sitting in his place by request.

SPALDING, J. (dissenting). I am unable to concur in the conclusions in the majority opinion expressed by Judge Fisk. If, as found, the district court of Burleigh county had no jurisdiction of the pretended judgment and no power to vacate it, I can imagine no excuse for this court passing upon the validity or invalidity of such judgment or on the equities of the application. If the district court had no jurisdiction to pass on the merits or equities of the application, this court has none, and its decision thereon is a naked assumption of authority belonging to the federal court. It, however, has assumed to act, and this necessitates an expression of my opinion on all the points determined. I fail to gather from the authorities cited any substantial support for the decision. On the contrary, as I read them, with one or two exceptions which on a superficial examination may appear to support the majority opinion, they are in direct conflict therewith. Jurisdiction of the defendant, Coulston, was attempted to be obtained by constructive service under the provisions of the Code of 1877. Those provisions differ materially from the corresponding provisions of our present Code of Civil Procedure. Section 104, Rev. Code Dak. Terr. 1877, in force in 1885, as far as pertinent to the questions here reviewed, reads as follows: "When the person on whom the service of the summons is to be made cannot after due diligence be found within the territory and that fact appears by affidavit to the satisfaction of the court or judge thereof, * * * such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases: * * *The order must direct the publication to be made in some newspaper to be designated as most likely to give notice to the person to be served and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication the clerk or judge must also direct a copy of the summons and complaint to be forthwith deposited in the postoffice, directed to the person to be served at his place of residence, unless it appears that such residence is neither known to the party making the application nor could with reasonable diligence be ascertained by him.

When publication is ordered, personal service of a copy of the summons and complaint out of the territory is equivalent to publication and deposit in the postoffice." The affidavit on which the order for publication was obtained contained no statement of facts

having any legal tendency to show due diligence on the part of the plaintiff in attempting to find the defendant within the county of Burleigh or the territory of Dakota. On the contrary, the only facts stated in such affidavit tended to show a total want of due diligence and of any good-faith attempt to ascertain his whereabouts or to serve him within the territory. The affidavit was utterly inadequate to give the court jurisdiction to make the order of publication under the rule of Beach v. Beach, 6 Dak. 371, 43 N. W. 701, Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708, and many other authorities. It is apparent that the majority of this court failed to find that the district court of the territory acquired jurisdiction to order the publication of the summons or to enter judgment, as, had it so found it could have put an end to all litigation on the matter by so stating. The rule as established by the cases I have cited and others almost without number is that the affidavit must state facts on which the mind of the court can act, and from which it can properly draw the conclusion that due diligence has been used in an attempt to find the defendant within the jurisdiction of the court, and to make personal service on him. The allegation that due diligence has been used is no more nor less than a statement of a conclusion of law, and furnishes no fact upon which the court can predicate an order of publication. When the affidavit, as in this case, fails to state such facts, the court never acquires jurisdiction to support its order, and all subsequent proceedings are absolutely void. This deficiency is not a defect nor a technicality. The affidavit is totally lacking in substance.

This deficiency goes to the foundation of the power of the court to act at all, and it cannot be cured by a publication as ordered nor by service on the defendant outside of the state, which under the provisions of the Code quoted simply takes the place of, and does away with the necessity of publishing and mailing, the summons. It matters not how many times the defendant may have heard of, or in what manner he may have acquired knowledge of, the attempt to commence such action. The terms of the statute must be strictly complied with. When the court acquires no jurisdiction to make the order, it acquires no jurisdiction to enter judgment, unless the want of jurisdiction over the person of the defendant is cured by his subsequent service within the jurisdiction or by an appearance. In this case no subsequent service was made in the territory, and no appearance was ever entered on behalf of the defendant. No authority

can be found to the effect that the entire failure of the court to acquire jurisdiction is an informality, an irregularity, or mere technicality. I have always supposed, and still assume and assert, that jurisdiction is the first and most essential prerequisite to the validity of any judgment entered by any court.

It is said that the equities are with Campbell. I cannot agree to this proposition. One of the fundamental principles of the jurisprudence of civilized nations is that property shall not be taken without due process of law. It is beyond the reach of my imagination to assume that there can be equities greater than the right of a party to his liberty and his property unless deprived thereof by due process of law, and it matters not under what guise it is taken, nor whether it is done by courts, legislatures, or individuals. If it is taken in any other manner or by any other process, the taking is simple confiscation. The sustaining of a proceeding in conflict with this principle is sustaining the right to confiscate property. The fact that the defendant may have had hearsay knowledge, which is all the invalid service amounts to, of the pendency of the action under the statute quoted, does not deprive him of the right to due process, and the equities still remain in the man who holds the legal title to the property of which the plaintiff, with the concurrence of the court, attempts to deprive him in a manner unknown to the law or to recognized methods of procedure. "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." McGehee on Due Process of Law, 79. "If the proceeding is wanting in the elements constituting due process, whatever force and effect the judgment may otherwise have, it cannot bind the defendant. He is not and cannot be treated as a party without a violation of what is regarded as a fundamental rule of natural justice." Lavin v. Emigrant Industrial Savings Bank (C. C.) 18 Blatchf. 11, Fed. 641. "The basic principle of English jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law—without a course of legal proceeding according to those rules and forms which have been established for the protection of private rights. Judicial orders or judgments affecting the life or property of citizens, in the absence of a notice which is in accordance with the proceedings established by the law of the state and also which give a reasonable opportunity to be heard respecting the judgment sought, are violative of the fundamental principles of our laws, and cannot be sustained." In

re Rosser, 101 Fed. 562, 41 C. C. A. 497. "Due Process of law" is equivalent to "law of the land," and means being brought into court to answer according to law. It means that no person shall be deprived by any form of governmental action of either life, liberty, or property, except as a consequence of some judicial proceeding properly and legally conducted. Lowry v. Rainwater, 70 Mo. 152, 55 Am. Rep. 420. Due process of law cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. By the term 'due process' is meant that which follows the general rule established in our system of jurisprudence, and it must be pursued in the ordinary mode prescribed by law." Taylor v. Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; Carr v. Brown, 20 R. I. 215, 38 Atl. 9, 38 L. R. A. 294, 78 Am. St. Rep. 855; Risser v. Hoyt, 53 Mich. 185, 18 N. W. 611; Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Marchant v. Pa. R. R. Co., 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751.

Let us inquire more minutely into the procedure in this case. On doing so we find that, in addition to the failure to acquire jurisdiction to make the order, no publication was in fact made, and that the service, if one was in fact made (which may be questioned) outside the state, was inadequate to confer jurisdiction on the court to enter the judgment, in the absence of an appearance, even had the court acquired jurisdiction to enter the order. Section 62 of the Code of Civil Procedure of 1877 provides that an action is commenced when the summons is served upon the defendant, and that an attempt attempt must be followed by the first publication or service thereof when the summons is delivered, with the intent that it be actually served, to the sheriff or other officer, with the proviso that such an attempt must be followed by the first publication of service thereof within 60 days. In the case at bar the summons, if served on the defendant as alleged, in the city of Philadelphia, was not served until 77 days had elapsed after its delivery to the sheriff. It follows from this, as we have said, irrespective of the adequacy or inadequacy of the affidavit, that no action was commenced at all. Certainly, if no action was commenced, no judgment possessing any vitality or validity could possibly be entered. The pretended judgment was a mere fiction, a blot upon the record of the court, of no more value legally, and having no more effect in transferring property rights, than a blank sheet of paper. Yet, while it possessed the

form and appearance of a judgment, it might mislead courts, interested parties, and the public. In People v. Greene, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448, it is well said that a judgment void upon its face is a dead limb upon the judicial tree which should be lopped off if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant, and that the court will interfere for its own dignity and the protection of its officers to arrest further action, and that the most effectual method of doing this is by extirpating the judgment itself, by removing a form which is without substance, and that court directed the trial court to set aside a judgment entered 15 years before. Yet it is held by this court that such a judgment is sufficient to create such equities on the side of the judgment creditor that parties and courts must in practice and in fact give it full force and credit as against a direct attack , and that the court which, if it had a right, as held in the majority opinion, to exercise a legal discretion in the matter to purge its records of this fiction, this dead limb upon the judicial tree which is a constant menace to the public and the dignity of the court, wipes out the blot which undoubtedly was inadvertently placed on its records, is guilty of an abuse of discretion.

Assuming at this point that it does lie within the sound legal discretion of the district court whether to purge its record of such a judgment, I find many authorities holding it an abuse of such discretion to deny a motion to vacate a void judgment, but none anywhere squarely holding the lower court guilty of an abuse of legal discretion when it vacates such a judgment. Authorities are to the effect that, in case of doubt as to its validity, the doubt should be resolved in favor of the applicant who seeks its vacation. Watson v. Railway Co., 41 Cal. 17; Dougherty v. Bank, 68 Cal. 275, 9 Pac. 112; Wolff v. Railway Co. 89 Cal. 332, 29 Pac. 825; Pearson v. Fishing Co., 99 Cal. 425, 34 Pac. 76; Condon v. Besse, 86 Ill. 159; Steiner v. Scholl, 163 Pa. 465, 30 Atl. 159; 15 Ency. P. & P. 286, and cases cited. But I think that while many of the authorities holding that it lies within the discretion of the court appear to apply to void judgments, nearly all of them in fact apply to those only which are irregular and not void; that some courts have failed to distinguish between the two; and that the overwhelming weight of authority and the best reasoned cases are to the effect that, in the case of void judgments, the defendant seeks relief, not as a matter of grace or discretion, but as a matter of undeniable right, on the

ground that the court never obtained jurisdiction over him, and has therefore no power to enter judgment against him. Gillette v. Ashton, 55 Minn. 75, 56 N. W. 576; 6 Ency. P. & P. 204. See also Freemon on judgments, Sec. 98 and cases cited in note 7; Huffman v. Huffman, 47 Or. 610, 86 Pac. 593, 114 Am. St. Rep. 943; cases cited in note 99 Am. Dec. 532; Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732; Pettus v. McClannahan, 52 Ala. 55; 17 Am. & Eng. Ency. of L. 825, 842; People v. Mullan, 65 Cal. 396, 4 Pac. 348; cases cited in Freeman on Judgments, 230.

Reference is made to the length of time which has elapsed since the entry of the judgment, and this is given as a reason why the trial court should not have entertained the application. The authorities, however, are practically unanimous that a judgment which is void as shown by the files or records in the case may be vacated at any time, irrespective of the lapse of time. This court has so held. See Skjelbred v. Shafer, 15 N. D. 539, 108 N. W. 487, 125 Am. St. Rep. 614, where it is held that relief from a judgment void for want of service may be had without regard to the date of its entry and without showing the excuses required when jurisdiction had attached. In Sache v. Wallace, 101 Minn. 169, 112 N. W. 386, 11 L. R. A. (N. S.) 803, 118 Am. St. Rep. 612, it is held that a judgment shown by the record to be void may be attacked at any time, and it is stated in Mr. Freeman's note in 23 Am. St. Rep. p. 105, and cases cited, and in Flowers v. King, 145 N. C. 234, 58 S. E. 1074, 122 Am. St. Rep. 445, that void judgments may be vacated at any time irrespective of lapse of time, and that they should be set aside on application. To the same effect, see note to 60 Am. St. Rep. 643; White v. Ladd, 41 Or. 324, 68 Pac. 739, 93 Am. St. Rep. 732; 23 Cyc. 910; 15 Ency. P. & P. 266, 438; 7 Am. & Eng. Ency. of Law, 825 b. Mariner v. Town of Waterloo, 75 Wis. 438, 44 N. W. 512, is directly in point. In United States v. Gayle (D. C.) 50 Fed. 169, the federal court on motion vacated a void judgment 20 years after its entry. The vice of the argument of counsel before this court, as well as that of the opinion of the majority, appears to lie in the failure to distinguish between irregular and void judgments. In many cases it is held that courts should vacate such judgments on their own motion. It is true that cases are found where judgments were claimed to be void by reason of fraud or where the proof of their invalidity had to be shown by evidence outside and independent of the record or files which hold that the application must be made

within a reasonable time; as, for instance, where it is alleged that the judgment rests upon a false return of service, and such falsity must be proved by the testimony of the defendant or others. The reason for holding that motions in such cases must be made within a reasonable time are apparent, but have no application in cases like this, where the evidence of the invalidity is wholly contained within the records of the court. Those records and files show no more and no less now than they disclosed the day the judgment was entered, and, so far as proof of the invalidity of the judgment is required, no syllable of evidence is needed to establish it outside those records and files.

It is strenuously contended that Bull is not qualified to attack the judgment in this case by motion. It is undeniable that the general rule is that a motion to vacate must be made by a party to the action, but certain exceptions exist to this general rule. These exceptions are stated by Mr. Freeman in his work on Judgments at section 92, and among these are persons not parties to the action, but who are necessarily affected by the judgment, and who have equities or titles to be protected from its operation. Also an exception is made when the transfer of the title to the property on which the judgment operates as a lien works a change in the parties, in which case the transferee may move to vacate the judgment. See People v. Mullan, 65 Cal. 396, 4 Pac. 348; Coffin v. Bell et al., 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738; Reed v. Bainbridge, 4 N. J. Law 351; Chappel v. Chappel, 12 N. Y. 215, 64 Am. Dec. 496; 15 Ency. P. & P. 251, notes 4 and 6; Ladd v. Stevenson, 112 N. Y. 325, 19 N. E. 842, 8 Am. St. Rep. 748; 17 Am. & Eng. Ency. of Law 839; Schouweiler et al. v. Allen et al., 17 N. D. 510, 117 N. W. 866; Sache v. Wallace, Supra; Malone v. Big Flat Gravel Min. Co., 93 Cal. 385, 28 Pac. 1063; Forbes v. Hyde, 31 Cal. 342.

I find but two cases holding to the contrary. In Ward v. Clark, 6 Wis. 509, and Packard v. Smith, 9 Wis. 184, it was held that the grantee, being a stranger to the record, could not be heard until he procured a status in court by petition or bill, but in Aetna Ins. Co. v. Aldrich, 38 Wis. 107, this statement of law was materially modified. In any event, the early Wisconsin authorities are not applicable to the case at bar. Here the granting of the order to show cause why the judgment should not be vacated in legal effect made Bull a party to the proceedings. The affidavit submitted in support of the motion to vacate alleged in positive terms that at the time of the

commencement of the foreclosure proceedings February 9, 1885, and until the 10th day of August, 1906, the defendant Coulston was the owner of the land described and that on the 10th day of August, 1906, the said defendant Coulston sold and conveyed the same to Bull, the applicant, and that since said date Bull had been and then was the owner of all said land. These statements were contained in the affidavit on which the court granted the order to show cause why the judgment should not be vacated, and the same affidavit was used on the hearing to sustain Bull's motion. The question of jurisdiction to hear the motion was raised, but, if the court had not acquired jurisdiction on the date the motion was returnable, it acquired it in a manner which it is not necessary to consider. The application was made in the name of Coulston by Bull as his successor in interest in the subject matter, appearing specially, and it is conceded by appellant in his brief that it is immaterial whether Bull made the application in his own name or in the name of Coulston. In any event, it was conclusively shown, so far as these proceedings go, that Bull had acquired all the right, title, and interest in the subject-matter of the controversy formerly possessed by Coulston. No suggestion is offered that the deed to Bull is invalid or failed to convey his rights, provided Coulston possessed any, except as hereinafter noted. Coulston could no longer make the application, because he had ceased to possess any interest in the subject-matter of the controversy. Bull was the proper party to make the application. An almost uniform line of authorities holds that a motion to vacate is the only proper proceeding. The Wisconsin authorities cited in the opinion are not in point. They all relate to judgments entered on a warrant of attorney which released errors and the courts of that state possess supervisory control of such judgments. In McIndoe v. Hazelton, 19 Wis. 567, 88 Am. Dec. 701, the distinction is shown between judgments entered upon a warrant of attorney and other judgments, and in that case it is held that the only remedy of a party seeking to avoid a void judgment is by motion, and that a suit in equity for that purpose cannot be maintained. To the same effect, see Purcell v. Kleaver, 98 Wis. 102, 73 N. W. 322. In Wilkinson v. Rewey, 59 Wis. 554, 18 N. W. 513, it is stated that the Wisconsin doctrine and authorities are that courts will not give relief by suit in equity when a complete remedy at law exists by motion to vacate. To the same effect, see Thomas, Jr. v. West, 59 Wis. 103, 17 N. W. 684; Chip-

man v. Bowman, 14 Cal. 158; Imlay v. Carpentier, 14 Cal. 173; Logan v. Hillegas, 16 Cal. 201; Gibbons v. Scott, 15 Cal. 285; Nevlin v. Murray, 63 N. C. 566, 6 Ency. P. & P. 212, 213. The language of Judge Dodge, quoted from the Purcell case, related to a judgment entered on a warrant of attorney, and its application must be limited to such judgments. In Mariner v. Town of Waterloo, supra, the supreme court of Wisconsin passed upon a judgment void for want of service, and Judge Lyon for the court says: "The town not having appeared generally in the action, a valid service of the summons upon the town clerk as well as the chairman was essential to the jurisdiction of the court to render judgment in the action and was properly vacated. No question of laches can be raised in such case, the former judgment being null and void. No such service having been made, the judgment is absolutely void; it is a mere excresence upon the record which the court should expunge therefrom whenever its attention is called to it." The opinion of Judge Mitchell in Mueller v. Reimer, 46 Minn. 314, 48 N. W. 1120, from which a quotation is given, is very brief, contains no discussion of the subject, and it appears that there was at the same time pending an action between the parties to determine adverse claims to the property involved and including the same issues sought to be determined by the motion, and this was one of the controlling reasons why the court affirmed the district court in its refusal to vacate the judgment. The most that can be said is that this authority has a slight tendency to support the majority opinion, but it stands practically alone. In Dobbins v. McNamara, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626, the supreme court of that state held that where defendant was sued in the wrong county, and judgment taken without jurisdiction over his person, because of that fact he had a right to have such judgment vacated, without disclosing his defense, and that a judgment taken under such circumstances must yield to direct attack, however meritorious the cause of action may have been. I find several cases holding that rebutting affidavits should not be received or considered upon any of the collateral questions; that rebutting affidavits should only be received relating to the questions of the validity or invalidity of the judgment. Considerable is said about the court acting as a court of equity in considering an application to vacate a void judgment. The authorities supporting this, so far as I have been able to discover, relate solely to judgments entered on a cognovit or warrant of attorney or motions

based on irregularities, and do not apply to those to vacate void judgments.

The majority opinion seems to take it for granted, and in one place states, that Campbell had been in possession of and paid the taxes on these lands since his attempted foreclosure, and that by vacating the foreclosure decree, this court would prevent Campbell from showing by such facts the invalidity of the deed from Coulston to Bull. I have shown that Bull supported his motion by positive allegations in his affidavit. These allegations were met by no averments or denials on the part of Campbell, except such as were contained in an instrument verified only on information and belief. In this instrument he alleges on information and belief that Coulston and Bull have not been in possession for many years, and that he Campbell, has been in possession during such time. In the original opinion of this court sustaining the order of vacation, the competency of that evidence was considered, and it was held wholly incompetent and entitled to no weight or consideration. It would seem to be beyond the need of demonstration that an affidavit made by the party who of necessity knows the real facts and who states them only on information and belief should be disregarded by any court of justice. It is hearsay. No prosecution for perjury could be predicated upon it, and it furnishes no evidence of anything. The affiant would not be allowed to testify in any such manner on the stand, and should certainly be equally restricted in an ex parte affidavit where he is subjected to no cross-examination..

It has been so held by this court. Keppler v. Bank, 8 N. D. 411, 79 N. W. 869; state v. Newton et al., 16 N. D. 151, 112 N. W. 52; City of Atchison et al. v. Bartholaw et al., 4 Kan. 124; Thompson v. Higginbotham, 18 Kan. 42. In the Thompson case, supra, Judge Brewer, speaking for the court, held that an affidavit on information and belief proves nothing, and in the Atchison case, where on a hearing on an application for an injunction no affidavits or other evidence except the petition, which was verified on information and belief, was offered, it was held that such verification did not make the petition within the meaning of the law an affidavit of the party, and the court discusses the necessary elements of an affidavit at length. This question would not be entitled to notice except for the assumption which seems to run through the majority opinion that the evidence shows the continuous possession of Campbell, for the reason that in a most exhaustive application for a rehearing, after

the original opinion was filed, no reference was made to the subject of the competency of the so-called affidavit as evidence. It must be conceded that appellant thereby admitted the correctness of the former opinion on this question. I therefore conclude that in legal effect the statements of Bull as to his acquiring the interest of Coulston, and in all other respects, stand admitted by the appellant, and that neither the district court nor this court has any competent evidence before it of the possession by Campbell or of his payment of taxes.

Did the district courts of the state of North Dakota become the successors of the corresponding district courts of the territory of Dakota in actions no longer pending on the admission of the state of North Dakota to the Union? In the original opinion which I wrote in this matter, and which was concurred in by all the judges then participating, we found that it was established in the Merchants' National Bank of Bismarck v. Braithwaite, 7 N. D. 358, 15 N. W 244, 66 Am. St. Rep. 653, that the state courts did become such successors, and that the judgments of the territorial district courts passed under the jurisdiction of the corresponding state district courts, and that, therefore, the district court of the state of North Dakota for Burleigh county has jurisdiction over the records and judgments of the district court of the territory of Dakota for Burleigh county, and may entertain and act upon a motion to vacate a judgment of such territorial court for want of jurisdiction in that court to render the same. Every question which might be raised on appeal from the order of the district court vacating the judgment of the territorial court was briefed and most ably argued by distinguished counsel on the original hearing in this court. After the opinion was filed affirming the order of the district court, new counsel was employed, and an application for rehearing submitted. This application was a new brief of several of the questions previously argued and decided. It was submitted after a most unusual extension of time for that purpose, and two of the judges who concurred in the former decision have as a result changed their views, and now hold that the Braithwaite case is not authority in the present instance. How much their views may be affected by the belief which they entertain that the equities lie with the appellant, rather than with the respondent, I cannot say; but it is apparent that the importance of a correct decision of the question far transcends the interests or equities of any single suitor. From the admission of

North Dakota into the Union it has been universally understood, and both in official and private life, actions of vast numbers of people have been predicated upon the belief that on admission each department of the new state succeeded to the corresponding department of the territory of Dakota and all records were transferred accordingly. It seems to have taken 20 years to discover that this was a mistaken belief.

It has taken ten years since the opinion in the Braithwaite Case, written by the eminent jurist, then Chief Justice of this court, who now appears and contends that that opinion did not mean what it says, to discover the error of this court. We now learn that when he said therein that the state had taken jurisdiction of such judgments and that Congress had assented to its doing so, and that they became as much judgments of the state courts as though originally rendered therein, he was in error, and that this court meant that actions no longer pending were transferred to the state courts for certain purposes only, and that the state courts acquired optional jurisdiction and custody of the judgments of the territorial courts which might be exercised or not at the discretion of the state courts, and that in that class of cases not transferred by the enabling act to federal courts, and in which no demand for a transfer has been made, there is a divided and neither exclusive nor concurrent jurisdiction; that the federal court has jurisdiction over the title, and the state courts over the signature. I am unable to comprehend how a state court can acquire jurisdiction over the judgment of a territorial court one day in the week, and then, without action by any body lose it during the other six days, or how it can be possessed for one purpose and not for all purposes incident to a judgment, whether to enforce or vacate it. Certainly in such case the state court either acquired plenary jurisdiction, or it acquired no jurisdiction. There can be no divided jurisdiction.

The reasoning of Chief Justice Corliss in the Braithwaite Case is strong and convincing, and evidences such painstaking research and is so pertinent to the present case that any attempt on my part to improve upon it would be futile. It is so clear and apropos that I shall quote from it at length.

The quotations made in the majority opinion in the case at bar from that opinion and from the federal authorities are but excerpts, and do not fairly present the decisions. Most of them are state-

ments used in arguendo or presenting some of the reasons underlying the facts found. The decision in the Braithwaite Case was, broadly stated, that the state courts acquired jurisdiction over the records and judgments of the corresponding territorial courts in actions no longer pending, and that such judgments passed under the jurisdiction of the state courts as fully as though originally entered therein. The opinion in the case at bar does not assume to overrule the Braithwaite Case, but in effect holds that the state courts acquired jurisdiction for certain purposes, and not for others. The argument in the case at bar was that the state court has no jurisdiction or power over judgments of the territorial court of the same county, notwithstanding it finds such judgments in its possession, under its control, turned over to it by the Congress and accepted by the terms of the state constitution. Let us see what Chief Justice Corliss said in the Braithwaite Case: "The question is one of jurisdiction after statehood over the records and judgments obtained in actions brought in a territorial court. The jurisdiction which formally was vested in the territorial court over such records and judgments Congress must have intended to be transferred to some other tribunal. We cannot believe it was the purpose of that body to take from a great mass of judgments of the various courts of the different terrieories mentioned in the enabling act all force save that of a conclusive adjudication, and compel the plaintiffs therein to go through the formality of bringing suit upon them in the different courts of the different states to be admitted into the Union, the same as upon a foreign judgment or the judgment of a sister state. The old courts having jurisdiction over cases in which judgment had been entered were to be swept away. New courts were to take their places possessing similar jurisdiction.

These judgments were judgments rendered within the same territory to be embraced within the new states. Why, under such circumstances, congress should withhold its consent that the judgments should become judgments of the state courts which should succeed to the same general jurisdicton as that of the territorial tribunals in which such judgments were rendered, is inexplicable. That it did not withhold such consent is clear; and, even if we were in doubt on the point, our duty would be plain. It has been settled by an authority to which we must defer. In Glaspell v. Railroad Co., 144 U. S. 211, 12 Sup. Ct. 593, 36 L. Ed. 409, the federal Supreme Court

held that as to an action not pending at the time of the admission of North Dakota into the Union, but in which a judgment had been rendered in the territorial district court, there was no jurisdiction whatever in the federal court, but that exclusive jurisdiction of such a case was vested in the state district court, the federal Supreme Court holding that jurisdiction over the judgment in that action rendered by the territorial district court had been by the enabling act transferred to the state court. * * * In construing the enabling act, the court in the Glaspell case said that that act had transferred pending cases, in which the United States was a party, to the federal courts, and pending cases, over which a federal court would have no jurisdiction, to the state courts, and that the jurisdiction over all cases which were no longer pending, and over the records and judgments therein, was vested in the state courts without reference to the question whether such cases must have been brought in a state or federal court, had the territory been a state at the time such actions were commenced. The enabling act by its express provisions and the implications thereof divided all actions, so far as the jurisdiction thereof was concerned, into two great classes—those which were pending and those which were not pending at the time of statehood. It declared that as to pending actions jurisdiction over all actions to which the United States was a party should vest absolutely in the new federal courts created in such new states; that as to all suits over which the federal courts would have had no jurisdiction had the territory been a state at the time they were brought, the jurisdiction thereof should pass to the proper state courts, and that with regard to the middle class of cases—i. e., those in which the state and federal courts would have had concurrent jurisdiction had the territory then been a state—either of the parties to the proceedings might determine whether he would continue the litigation in the state or in the federal court. Until the necessary steps should be taken to transfer such cases, the enabling act contemplated that the proper court for them to be carried on in was the state court, and not the federal court. * * * Considering the provisions of the enabling act, in connection with the failure of Congress to vest jurisdiction over territorial judgments in the federal courts, and the fact that Congress in passing that act must have contemplated that the state Constitution would create state courts having jurisdiction similar to

that possessed by the territorial courts, and that those would be the courts better fitted to enforce judgments throughout the different counties of the state, we must infer an implied assent by Congress that jurisdiction over cases not pending should vest in state courts exclusively. Otherwise we must assume that those cases were to be left without any court possessing jurisdiction over them for any purpose whatever, for it is clear that no jurisdiction over them is vested by the enabling act in the federal courts." Then, referring to section 6 of the schedule of our state Constitution, the learned court proceeded: "This section transferred all records, papers, and proceedings of the territorial district court to the jurisdiction of the state district court without reference to the question whether the case was or was not pending. By this section the people, speaking through their fundamental law, have, with the assent of Congress, vested jurisdiction over the judgments of the territorial district courts in the proper state district court, and the judgments were thereafter as much judgments of the state district court as though they had been rendered by such courts. * * * The opinion of the federal Supreme Court in Benner v. Porter, 9 How. 235 (13 L. Ed. 119), appears to us to support our ruling on this point."

It should be borne in mind that no request has ever been made by either party in the case at bar for the transfer of the proceedings therein to the federal court. It must also be kept in the thought of the reader that there is no scintilla of evidence anywhere in the original record, or in the proceedings now under consideration, showing a diversity of citizenship of the parties. Diversity of citizenship is never presumed for the purpose of giving federal courts jurisdiction. This is attempted to be answered in the majority opinion by the statement that such diversity of citizenship is not controverted. Why should it be controverted when it is nowhere asserted? The federal decisions referred to are in no sense in point to sustain the majority opinion. The federal court was considering acts of Congress, admitting states, which contained no provisions corresponding to sections 22 and 23 of our enabling act. The act admitting Florida made no provisions for the transfer of cases. It simply provided that Florida should be admitted to the Union on an equality with the other states. The facts in the Florida cases were wholly different from those in the case at bar. The opinion in the case of Hunt v. Palao was explained in the Benner case,

where it was held that the objections raised in the Palao case were removed by subsequent acts of Congress, and it was stated that, the territorial courts being the courts of the general government, the records in the custody of their clerks could not legally be given to the possession or custody of others without the assent, express or implied, of Congress, and that, on the admission of a state, the concurrence of both the federal and state governments would seem to be required in the transfer of the records from the old to the new government.

The above paragraph is the one on which appellant relies most strongly and which seems to be most persuasive to the majority of this court, but in the Braithwaite case the language which is used to explain the foregoing paragraph is quoted. It will be observed that it is wholly omitted from the majority opinion in the case at bar. I again quote it because it is directly applicable: "The federal court, however, said: 'We have said that the assent of Congress was essential to the authorized transfer of the records of the territorial courts in suits pending at the time of the change of government to the custody of state tribunals. It is proper to add, to avoid misconstruction, that we do not mean thereby to imply or express any opinion in the question whether or not, without such assent, the state judicatures would acquire jurisdiction. That is altogether a different question, and besides the acts of Congress that have been passed in several instances on the admission of a state providing for the transfer of federal cases to the district court, as in the case of the admission of Florida already referred to, and, saying nothing at the time in reference to those belonging to state authority, may very well imply an assent to the transfer of them by the state to the appropriate tribunal. Even the omission on the part of Congress to interfere at all in the matter may be subject to a like implication.'" This is the phrase referred to in the Braithwaite case, supra, as appearing to support the conclusion there reached.

The view which this court took of the federal authorities is plainly set forth in the extracts from the opinion in the Braithwaite case which I have hertofore quoted, and is in marked contrast with the arguments now advanced and the opinion of the majority expressed through JUDGE FISK, I quote again in reference to section 6 of the Schedule of our Constitution:

"By this section the people, speaking through their fundamental law, have, with the assent of Congress, vested jurisdiction over the judgments of the territorial district courts in the proper state district court, and the judgments were thereafter as much judgments of the state district courts as though they had been rendered by such courts. The opinion of the federal court in Benner v. Porter, 9 How. 235 (13 L. Ed. 119), appears to us to support our ruling on this point." More than 10 years have elapsed since this court held that Congress had assented to the state courts taking jurisdiction of judgments of the territorial courts, and I have never heard of any dissent by Congress from this statement. If lapse of time may affect such assent, as intimated by the federal Supreme Court and held by this court, the reasons for supporting the decision of the Braithwaite case have far more weight now than they had in 1898. In my opinion the conclusions arrived at in the Braithwaite case are unanswerable, and, to overrule that authority, may work serious detriment to the rights of litigants in proceedings which have always been considered as transferred to state courts, and result in such irreparable confusion and injury that the interests of no single litigant should be considered in reaching a determination of the questions involved. Sections 22 and 23 of the enabling act were framed for the express purpose of obviating the defects which had been found in the acts admitting Florida and other states.

While it is not referred to in the majority opinion, it was argued before the court that, by reason of the lapse of 77 days between the order for publication and the alleged service in Philadelphia, no action had been commenced, and that no judgment exists on which the state courts can act in any exercise of jurisdiction. This argument I deem frivolous. The district court found what appears to be, and what is in the form of, a judgment on its records. These records are incumbered by something placed upon them without authority of law, an act of a mere intruder, constituting a false pretense of a record, an imposition upon the public, and misleading to those who have occasion to examine the records. To hold that such a falsehood interpolated into the records of the territorial district court and transferred to the state court must, because found there by the judge of the court, forever remain sacred, would be to hold the courts of this state out to the world as possessing no authority or jurisdiction over their own books of record and make them instru-

ments of fraud and imposition, and without authority to apply any direct remedy or to purge their records of such fiction.

It was also contended that because judgment had been entered the action is not pending. This is hardly worthy of notice, but courts have passed upon the meaning of the word "pending" in its applications to actions under such circumstances. It was held in Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095, that, while the court could entertain a motion affecting the decree, it could not be said in any proper sense that the decree was final. By the Constitution of New York (Const. 1846, art. 14, paragraph 5) it was provided that on the first Monday of July, 1847, jurisdiction of certain suits and proceedings pending in certain courts of the state should become vested in the Supreme Court established by the New Constitution, and in O'Maley v. Reese, 1 Barb. (N. Y.) 643, it was held that by such provision it was intended to cover all cases in which any further judicial action was to be had, such, for instance, as to set aside a judgment for irregularity.

The Court of Appeals of New York in Wegman v. Childs, 41 N. Y. 159, held that under the provisions of the New York Constitution a suit must be regarded as pending whether it had proceeded to final judgment or not, provided any further judicial action might be had in the suit and referred with approval to Sherman v. Felt, 2 N. Y. 186, where it was held that the Supreme Court had jurisdiction under the paragraph of the Constitution referred to, to entertain a motion to set aside a final decree and open the case for hearing upon the merits. In Suydam v. Holden, 4 Abb. Dig. 649, it was held that the same provisions gave the Supreme Court jurisdiction over suits pending in the court of chancery on the 1st day of July, 1847, to vacate an entry of the satisfaction of a final decree of that court entered on its records prior to 1847. Federal Judge Hanford, in United States v. Taylor (C. C.) 44 Fed. 2, in construing the identical provisions of the enabling act now under consideration which admitted North Dakota, Washington, and other territories to the Union, stated his opinion as follows: "In my opinion this act, when all its provisions are considered, manifestly shows that Congress intended to fully protect and preserve not merely the rights of parties in a few select and especially favored ones of the cases commenced in the territorial courts, but every right of every party in every case which at any time has been, or should be, commenced in those courts

during their existence; and the words "all cases, proceedings and matters * * * pending," used in the act, must be construed to embrace all cases, proceedings, and matters initiated in the territorial courts, and in which at the time of the actual transformation of the territorial judicial system into the state and national systems there should be yet any vitality, force or virtue. I have heretofore decided in a case which has proceeded to judgment in a territorial court that the court, which, as to that case, was successor to the territorial court, should proceed with it, from the precise point to which it has already progressed, exactly as if the case had been commenced and proceeded with to the same point in that court."

For the foregoing reasons, I am of the opinion that the district court of Burleigh county is the successor of the district court of the same county for the territory of Dakota and has jurisdiction over its own records, and may vacate a void judgment found therein transmitted to it by the territorial court of that county on the admission of this state into the Union, and that the order of the district court of Burleigh county vacating the judgment in the case at bar should be affirmed.

I am authorized to say that CHIEF JUSTICE MORGAN concurs fully in this dissent.

(124 N. W. 689.)

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## THE VILLAGE OF LITCHVILLE v. H. J. HANSON.

Opinion filed January 29, 1910.

**Municipal Corporations—City Ordinances—Prosecutions—Constitutional Law.**

1. City or village ordinances, though penal in character, are not "criminal laws." Prosecutions under city or village ordinances are not covered by that section of the constitution which reads: "All prosecutions shall be in the name and by the authority of the State of North Dakota." Consequently this action was properly brought in the name of the village.

**Municipal Corporations—Police Power—Licensing of Dogs—Constitutional Law.**

2. Municipal corporations may levy a tax on the privilege of keeping dogs. Such a tax is not assessed by valuation, but is a specific assessment, and is in the nature of a license under a special police regulation, and is a constitutional exercise of the police power.

**Municipal Corporations—Dog Licenses—Summary Destruction—Constitutional Law—Due Process of Law.**

3. An ordinance making it unlawful for any person to keep, own, or harbor within the village of Litchville any dog without first having obtained a license therefor, and imposing a fine for a violation of the ordinance, and authorizing the destruction of any dog found at large on any of the public streets, alleys or grounds of the village, upon which license shall be unpaid, is valid and constitutional.

Appeal from District Court, Barnes county; *Edw. T. Burke,* J. .

Action by the Village of Litchville against H. J. Hanson. Judgment for plaintiff, and defendant appeals. Affirmed.

*C. W. Davis*, for appellant.

A proceeding to punish violators of a city ordinance is a criminal proceeding. State ex rel. Erickson v. West et al., 42 Minn. 147, 43 N. W. 845; 8 Am. & Eng. Enc. Law (2d Ed.) 252, violation of Ordinance, note 1 on page 253; 15 Enc. Pl. & Pr. 414.

*Alfred Zuger, (H. A. Olsberg of Counsel)*, for respondent.

Legislature possesses police power, and may delegate it to municipal corporations. Blair et al. v. Forehead, 100 Mass. 136; City of Fairbault v. Wilson, 25 N. W. 449.

An ordinance authorizing the summary destruction of dogs running at large is not unconstitutional. Blair et al. v. Forehead, supra; Morey v. Brown 42 N. H. 373; City of Carthage v. Rhodes, 9 L. R. A. 352; Carter v. Dow, 16 Wis. 298; Cooley on Taxation, 1876, Chap. 19, p. 396, 397, 403, 407, 410 and 412; Mitchell v. Williams, 27 Ind. 62; Hendrie v. Kalthoff, 48 Mich. 306, 12 N. W. 191; People v. Salem, 20 Mich. 452; Woolf v. Chalker, 31 Conn. 121; 2 Desty on Taxation, 1404.

CARMODY, J. This action was commenced in the justice court of a justice of the peace of the village of Litchville, in Barnes county, by the plaintiff against the defendant for a violation by the defendant of an ordinance of said village known as Ordinance No. 7, being an ordinance to license the keeping of dogs within said village. The defendant was found guilty of violating said ordinance, and thereupon said justice imposed a fine of $5 and costs. From the judgment entered thereon defendant appealed to the district court of Barnes county. A jury was waived, and the case submitted to the court upon a stipulation of facts, by which stipulation both parties waived all irregularities, and stipulated that the

case be considered on its merits only. The district court made findings of fact and conclusions of law in favor of the plaintiff, and adjudged that the plaintiff recover judgment against the defendant for the sum of $5 and costs. From the judgment entered thereon defendant appeals to this court. No statement of the case was settled, and consequently all that we can consider is the judgment roll proper.

The first four errors assigned are as to proceedings in the justice court, and cannot be considered by us, as the justice court record is not before this court. Appellant contends (1) that the action is not a civil action, but a criminal action, and was improperly brought in the name of the village; and (2) that the ordinance is unconstitutional and invalid. These are the only two questions properly before us, and are really the only questions in the case. Subdivision 19, 2864, Rev. Codes 1905, defining the powers of the board of trustees of an incorporated village, as far as material here, is as follows: "To prescribe fines, penalties and forfeitures for violations of this chapter, or of any by-laws or ordinances by it established, not exceeding ten dollars for any one offense, which may be recovered by action in the name of the corporation * * * ." At common law punishments for the violations of municipal ordinances were treated in the light of civil actions; the imprisonment after the non-compliance with the order of the court imposing the payment of a fine being looked upon, not in the light of punishment, but as a means of compelling a compliance with the order of the court and of enforcing payment. A very full discussion of this question is found in note in 331 L. R. A., commencing at page 33. City or village ordinances, though penal in character, are not criminal laws. Prosecutions under city or village ordinances are not covered by that section of the Constitution which reads: "All prosecutions shall be in the name and by authority of the state of North Dakota." Cases under city or village ordinances, while resembling criminal cases in being penal proceedings, are not, strictly speaking, criminal proceedings. 8 Am. & Eng. Ency. of Law (2 Ed.) 252, 253. Consequently this action was properly brought in the name of the village. City of Huron v. Carter, 5 S. D. 4, 57 N. W. 947; 15 Ency. Pl. & Pr. 413, 414; City of Emporia v. Volmer, 12 Kan. 475; City of Davenport v. Bird, 34 Iowa 524; Ex parte Hollwedell, 74 Mo. 395; City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305; 17 Am. & Eng. Ency. of Law (1st Ed.) 260, 264. In Ex parte Hollwedell, supra, the court

says: "Nor do we regard the violation of the ordinance under consideration as a crime, since 'a crime is an act committed in violation of public law,' a law co-extensive with the boundaries of the state which enacts it. Such a definition is obviously inapplicable to a mere local law or ordinance passed in pursuance of and in subordination to the general or public law for the promotion of the preservation of peace and good order in a particular locality and enforced by the collection of a pecuniary penalty. * * * The right of a municipal corporation in this state to maintain in its own name a proceeding to recover a fine for non-observance of an ordinance has never been questioned, even though there be a general law of the state also imposing a fine for a like offense." In City of Mankato v. Arnold, supra, the court says: "Offenses against ordinances enacted by a municipal corporation in the exercise of its legitimate police authority, for the preservation of the peace, good order, health, or morals of the community, are not generally construed to be criminal cases in the proper sense of the term 'criminal,' and the prosecutions therefore are not 'criminal prosecutions' within the meaning of the Constitution, which refers to prosecutions for offenses essentially criminal under the general laws of the state."

Appellant contends that the ordinance is invalid because it imposes upon every person who owns, keeps, or harbors one or more dogs in the village of Litchville the necessity of annually paying to the village treasurer for said village a license tax of $1 for each male dog and $3 for each female so owned, kept, or harbored. A failure to do this dooms the offender to the payment of a fine of from $3 to $10 and costs of prosecution, and the unlicensed dog may be put to death if unfortunate enough to be found at large on any of the public streets, alleys, or grounds of the village. Appellant also contends that the ordinance is unconstitutional on two grounds: (1) Because it provides for depriving a person of his property without due process of law. (2) Because it imposes taxation that is not authorized by the Constitution, and claims the manifest purpose, as well as the express provisions of the ordinance, is to produce an annual revenue by levying a specific annual capitation tax upon all dogs owned, kept, or harborded within the village. Neither of these points are well taken. Subdivision 5, 2864, supra, authorizes the board of village trustees to regulate, restrain, and prohibit the running at large of horses, cat-

tle, swine, sheep, goats, geese, and dogs, and to impose a tax or license on dogs not to exceed $2 on each male dog and $3 on each female dog owned or kept within such village.

Section 1 of the ordinance, under which this prosecution is carried on, provides in substance: It shall be unlawful for any person to keep, own, or harbor within the village of Litchville any dog or bitch without first having obtained a license therefor and complied with the provisions of this ordinance.

Section 2 provides for an annual license fee of $1 for male dogs and $3 for female dogs. Section 3 provides for a fine of not less than $3 nor more than $10 and the costs of prosecution for a violation of this ordinance. Section 4 provides that any dog found at large on any of the public streets, alleys, or grounds of the village upon which license shall be unpaid shall be destroyed, and it is made the duty of the village marshal to enforce this ordinance. We think this ordinance constitutional and valid, even though dogs are property. "Municipal corporations may levy a tax on the privilege of keeping dogs. Such a tax is not assessed by valuation, but is a specific assessment, to be regarded as a license. It cannot be regarded as a tax on property within the act exempting personal property from taxation. It is a special privilege tax, a special and peculiar regulation for the purpose of repressing mischief likely to be done by them to more valuable property and to persons. It is not a charge on property to raise a revenue, but is in the nature of a license under a special police regulation, and is a constitutional exercise of the police power." 2 Desty on Taxation, p. 1403; City of Carthage v. Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352; Blair v. Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; City of Fairbault v. Wilson, 34 Minn. 254, 25 N. W. 449; Cranston v. Mayor, etc., of Augusta, 61 Ga. 573; Shelby Tp. v. Randles, 57 Ind. 390; State v. Holder, 81 N. C. 527, 31 Am. Rep. 517; Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175; Kalthoff v. Hendrie, 48 Mich. 306, 12 N. W. 191; Morey v. Brown, 42 N. H. 373; Carter v. Dow, 16 Wis. 298; Holst v. Roe, 39 Ohio St. 340, 48 Am. Rep. 459; Van Horn v. People, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159; Cole v. Hall, 103 Ill. 30; Mitchell v. Williams, 27 Ind. 62; Tenney v. Lenz, 16 Wis. 566. In City of Carthage v. Rhodes, supra, the court says: "There being an express grant of power to regulate, there can be no question as to the power in the city to regulate by

way of a license for which a specific sum may be charged, unless the exercise of the power is precluded by the constitutional provision requiring the property to be taxed in proportion to its value." Taxation may be for the purpose of raising revenue, or for the purpose of regulation. Where for the purpose of regulation, it is an exercise of the police power of the state. They are both distinct coexistent powers in the state, and either or both may be exercised through a municipal corporation. In this case, by the terms of the charter, both powers are granted to the city of Carthage as to the dogs of that city. The dog license tax required by the ordinance is easily referable to the exercise of the police power granted. The ordinance is also valid in authorizing the destruction of dogs found running at large. City of Faribault v. Wilson, 34 Minn. 254, 25 N. W. 449; Morey v. Brown, 42 N. H. 373; City of Carthage v. Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352 Blair v. Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; Mowry v. Salisbury, 82 N. C. 175; Cole v. Hall, 103 Ill. 30. The ordinance in the latter case was a great deal more drastic than the one in the case at bar.

Finding no error, the judgment appealed from is affirmed. All Concur.

(124 N. W. 1119.)

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FRANK H. STRECKER v. EDWARD RAILSON.

Opinion filed March 3, 1910.

**Appeal and Error—Appealable Order—Order Denying Motion to Dismiss.**

1. An order denying defendant's motion to dismiss the action, and granting plaintiff's countermotion for leave to amend the complaint, held not appealable.

Appeal from District Court, McIntosh county; *Allen*, J.

Action by Frank H. Strecker against Edward Railson. From an order denying defendant's motion for a dismissal and granting plaintiff's motion to amend his complaint, defendant appeals.

Dismissed.

*A. W. Clyde*, for appellant.

*Nels Larsen*, for respondent.

FISK, J. This cause was here on a former appeal. See 16 N. D. 68, 111 N. W. 612, 8 L. R. A. (N. S.) 1099. It was there held that

the complaint fails to state facts sufficient to constitute a cause of action, and also that certain testimony offered by plaintiff to prove a foreign judgment of a justice of the peace was inadmissable. The concluding portion of the opinion contained the following language: "For the foregoing reasons the judgment appealed from is reversed, and the cause remanded for further proceedings according to law; appellant to recover his costs and disbursements in both courts." The record discloses that after the remittitur was sent down defendant moved, in the district court, for a dismissal of the action, and a countermotion was made by plaintiff for leave to file an amended complaint curing the defects pointed out in the opinion of this court. Defendant's motion was denied, and plaintiff's motion granted on condition of his payment of all costs of both courts as taxed by the clerk. From such order defendant has appealed.

The questions discussed in appellant's brief are not properly before us, for the obvious reason that the order complained of is not an appealable order. It is well settled that no appeal lies from an order refusing to dismiss an action or to nonsuit a plaintiff. 2 Cyc. 596, and numerous cases cited in note 21. It is a well-known fact that our statute relating to appeals, being section 7225, Rev. Codes 1905, was borrowed from Wisconsin. Such statute was construed in Waldo v. Rice, 18 Wis. 405, and the Supreme Court of that state, speaking through Dixon, C. J., held that an order refusing to dismiss a cause for want of prosecution is not appealable. That court has subsequently adhered to the rule there announced. Reed v. Lueps, 30 Wis. 561. We are entirely satisfied with the correctness of the rule thus announced by the Wisconsin court. The statute was borrowed from Wisconsin in 1887, and the presumption is that the construction previously placed upon it by the Wisconsin court was borrowed with it.

That an appeal will not lie from the portion of the order allowing plaintiff to amend his complaint is too clear for discussion. Such an order is not included within any of the five subdivisions of section 7225, supra.

It follows that the appeal must be dismissed, and it is so ordered. All concur.

NOTE.—For note on appealable and non-appealable orders, see Olson v. Mattison, 16 N. D. 231. An order after judgment in condemnation suit, directing its clerk to retain money paid on the judgment, pending the set-

tlement of certain tax titles, is appealable. St. P. M. & M. Ry. Co. v. Blakemore, 17 N. D. 67. An order refusing to vacate a previous order, made without notice striking case from calendar, and for dismissal, is not an appealable order. Larson v. Myron, 17 N. D. 247.

(125 N. W. 560.)

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STATE OF NORTH DAKOTA v. JACOB LANG.

Opinion filed March 4, 1910.

**Bastardy—Venue of Action—Proceedings.**

1. The proceedings under Chapter 5, Code of Criminal Proceedure, Rev. Codes 1905, relating to bastardy, are not strictly either civil or criminal proceedings, but partake somewhat of the nature of both. Hence Section 6829, Rev. Codes 1905, providing that an 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, does not apply, and the district court erred in granting the defendant's application to change the place of trial to the county of his residence.

Appeal from District court, McIntosh county; *Allen*, J.

Action by the State against Jacob Lang. From an order changing the place of trial, plaintiff appeals.

Reversed and remanded.

*George M. Gannon*, State's Attorney, *W. S. Lauder* and *J. H. Wishek*, for the State.

A bastardy proceeding is sui genesis, partaking of the features of both criminal and civil action. Clark v. State, 60, N. W. 78. In re Lee, 41 Kan. 318, 21 Pac. 282; Baker v. State, 56 Wis. 568, 14 N. W. 719; Smith v. State, 73 Ala. 11; Holcomb v. People, 79 Ill. 409; Cummings v. Hodgson, 13 Metc. 246; State v. Hunter, 67 Ala. 81; M. J. J. v. J. C. B., 47 N. H. 362; Norwood v. State, 45 Md. 68; State v. Robert, 32 N. C. 350; State v. Hales, 65 N. C. 244; Allen v. Ford, 11 Vt. 367; Hodge v. Sawyer, 85 Me. 285; 5 Cyc. 652 and note 58 and 59; Commonwealth v. Davidheiser, 20 Pa. Co. Ct. 200; Keller v. Mertens, 55 N. Y. S. 1043.

A. W. Clyde, for respondent.

The nature and object of bastardy proceedings are distinctively civil, not criminal. Ingwaldson v. Skrivseth, 7 N. D. 388, 75 N. W. 772; State v. McKnight, 7 N. D. 444, 75 N. W. 790; In re Walker,

86 N. W. 510; In re Lee, 21 Pac. 282; State v. Tieman, 32 Wash. 294, 73 Pac. 375, 98 Am. St. Rep. 854.

The action is local and transitory and comes within the Code of Civil Procedure and defendant was entitled to a change. Smail v. Gilruth, 8 S. D. 287, 66 N. W. 452; 5 Cyc. 652.

CARMODY, J. This proceeding was instituted under the bastardy act of this state, being a chapter 5 of the Code of Criminal Proceduse; and embracing sections 9647-9664, both inclusive, of the Revised Codes of 1905. On the 25th day of August, 1908, a complaint in due form and properly verified was filed in the offiice of P. T. Kretschmar, a justice of the peace of McIntosh county, N. D., in which it was charged in substance that Christina Kramer is a resident of the county of McIntosh, state of North Dakota; that she is an unmarried woman, and is pregnant with a child which, if born alive, may be a bastard, begotten by the defendant, Jacob Lang, on or about the 13th day of March, 1908, at her home in said county and state. And the child so begotten when born will be a charge on the county of McIntosh, N. D. This affidavit concluded with a prayer that a warrant be issued for the arrest of the defendant, Jacob Lang, that he may answer such charge. This affidavit was signed and sworn to by the said Christina Kramer, upon such complaint, and on the 25th day of August, 1905, a warrant for the arrest of said defendant Jacob Lang was duly issued by the said justice of the peace. Upon this warrant the defendant was arrested and taken before the said justice of the peace. On motion of A. W. Clyde, defendant's attorney, he was discharged on the ground that the warrant did not comply with the statute. A second warrant was issued for the arrest of the defendant on the 3d day of September, 1908. Upon this warrant the defendant was arrested and taken before the said justice of the peace, and thereupon entered into an undertaking as provided in section 9650, Rev. Codes 1905, conditioned that he would appear at the next term of the district court of said county, and from term to term until the final disposition of the proceedings, to answer the complaint and abide the judgment and orders of the court therein. The said justice of the peace thereupon made due and proper return to the district court of McIntosh county, N. D., of all proceedings had before him as aforesaid. The action coming duly on to be heard in the said district court on the 30th day of September, 1908, the defendant filed an affidavit setting forth that

he is the defendant in the action and "that he is a resident of Emmons county, N. D., and has been a resident of the same for the five years last past, and that he desires the said action to be transferred to said Emmons county. Upon this affidavit and upon all the records and files in the proceeding and on the 2d day of October, 1908, the district court made an order transferring the said action or proceeding from the county of McIntosh, N. D., to the county of Emmons, N. D. To the order of the court thus changing the place of trial the plaintiff duly excepted.

From this order changing the place of trial as aforesaid, the plaintiff, the state of North Dakota, appeals to this court. But one error is assigned, and that is: The court erred in making the order changing the place of trial of this action or proceeding from said county of McIntosh, N. D., to the county of Emmons, N. D. Defendant contends that the act charged is not a crime or public offense, and the nature and object of the proceeding is distinctly civil and not criminal and therefore comes fully within the provisions of the Code of Civil Procedure, and the defendant was entitled to the change. In this he is in error. Under the provisions of chapter 5 of the Code of Criminal Procedure (Rev. Codes 1905), a proceeding under the bastardy act is commenced by filing the complaint and issuing a warrant of arrest commanding the officer to which it is delivered to forthwith arrest the defendant, and, unless he gives an undertaking in a sum (fixed by the magistrate) to be approved by the clerk of the district court of the county where arrested, to bring said defendant before such magistrate, or, in case of the absence or inability of such magistrate to act, before the nearest or most accessible magistrate authorized to act in such county. The officer to whom such warrant is delivered may execute the same in any part of the state by arresting the denfendant and taking him before a magistrate as in such warrant directed. Upon the arrest of the defendant, unless he gives an undertaking approved by the clerk of the district court, as hereinbefore stated, the magistrate before whom the defendant is taken, shall require him to execute and give an undertaking in a sum not less than $500 and not exceeding $1,000, with sufficient sureties, payable to the state of North Dakota, and conditioned that he will appear at the next term of the district court of such county, and from term to term until the final disposition of the proceedings, to answer the complaint and abide the judgment and

orders of the court therein; if the defendant fails to execute and give such undertaking, the magistrate shall make an order committing him as in criminal actions. "The warrant when executed, together with any undertaking given by the defendant, shall be returned by the officer making the arrest to the magistrate who issued the warrant or his successor in office, and the magistrate shall transmit any undertaking given by the defendant together with a transcript of his proceedings and all other papers in the case, without delay, to the clerk of the district court of the proper county." If the defendant shall at any time after his arrest pay or secure to be paid to the complainant such sum of money as she may agree in writing to receive in full satisfaction and as shall be approved by the board of county commissioners of the county in which she resides, and shall execute and give an undertaking with sufficient sureties to be approved by such board to the county in which she resides, conditioned to secure and indemnify such county from all charges for the maintenance of such child, and shall also pay all expenses incurred by such county for the support of the mother during her lying-in or of the child and the costs of prosecution, he shall be discharged. "If the court or jury finds that the defendant is the father of such child, or if the defendant fails to answer the charge, he shall be adjudged the father of such child and the court shall render such judgment as may seem necessary to secure, with the assistance of the mother, the maintenance and education of such child, until such time as the child is likely to be able to support itself, which judgment shall be docketed by the clerk as judgment in civil actions. Such judgment shall direct the person to whom and the times at which any parts of the same shall be paid and shall also require the defendant to secure the payment thereof by an undertaking executed by him with sufficient sureties and in default thereof the defendant shall be committed to jail until discharged according to law." If the woman fails to prosecute the father of her child, and such child is likely to become a public charge, any member of the board of county commissioners of the county where she resides may make the necessary complaint, and the same proceedings will be had as if the complaint was made by the woman.

Section 9653, Rev. Codes 1905, provides that the trial of such proceedings shall, except as herein otherwise provided, be governed by the law regulating civil actions. The clerk shall place such proceed-

ings upon the calendar for trial at the first term of the district court after the papers therein are received by him. No notice of trial and note of issue need be served or filed. Section 9660, Rev. Codes 1905 provides that the provisions of articles 8 and 9 of chapter 11 of the Code of Civil Procedure, relating to exceptions and new trials and the provisions of chapter 15 of such Code, relating to appeals, are applicable to proceedings under this chapter. The several state's attorneys within their respective counties shall prosecute all proceedings under this chapter.

Thus it will be seen that it is not strictly either a civil or a criminal proceeding, although its form and incidents partake somewhat of the nature of both. The action has many of the characteristics of a criminal proceeding. It is denominated a "prosecution," which is brought in the name of the state, based on a complaint upon which a warrant is issued. If the defendant fails to give a bond as required by the magistrate he is committed to jail. If he fails to comply with the final judgment of the district court he may be imprisoned in the county jail. The proceedings on the trial must be regarded as a civil action, and civil procedure must govern the trial in all respects not otherwise provided for in chapter 5. The remedy is a stringent and summary one, and to effect its purpose the Legislature has deemed it wise to authorize the employment of both criminal and civil procedure. The initiatory steps in the proceeding are mostly of a criminal character, and doubtless they are much more effective than any other in accomplishing the legislative object. The proceedings must be entitled in the name of the state as plaintiff and against the accused as defendant. The proceedings may be begun before any justice of the peace and hence in any county of the state. In a strictly civil action the defendant may be served by leaving a copy of the summons at his usual place of residence, and when so served a judgment may be given against him in his absence.

Under this act, the magistrate must cause the defendant to be brought before him or some other magistrate in the same county upon a warrant, unless he gives an undertaking as provided for in such act, and until the defendant is arrested no other proceeding, after issuing the warrant, can be had. Instead of beginning the action by the issuance of a summons, as in civil cases, a criminal proceeding is employed by filing a complaint on which a warrant is issued, and upon this warrant the defendant is arrested. The county

of McIntosh was the one entitled to be indemnified. The court erred in granting the change of venue. State v. Scott, 7 S. D. 619, 65 N. W. 31; State v. Hunter, 67 Ala. 81; State v. Smith, 73 Ala. 11; Holcomb v. People, 79 Ill. 409; Cummings v. Hogdon, 13 Metc. (Mass.) 246; People v. Smith, 65 Mich. 1, 31 N. W. 599; Baker v. State, 56 Wis. 568, 14 N. W. 718; Baker v. State, 65 Wis. 50, 26 N. W. 167, and cases cited in note thereto; Keller v. Mertens, 37 App. Div. 497, 55 N. Y. Supp. 1043. In the case of Baker v. State, supra, it was expressly held that the statute relating to the place of trial of civil actions had no application to a prosecution under the bastardy act.

The order appealed from is reversed, and the cause remanded to the county of McIntosh for further proceedings according to law. All concur.

(125 N. W. 558.)

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## George Hilbish and John Shaw, Co-Partners Doing Business Under the Firm Name and Style of Hilbish & Shaw as "The Seven Bar Meat Market." v. Sam Asada, Doing *Business* Under the Style of "The City Restaurant."

Opinion filed March 3, 1910.

**Attachment—Affidavit—Clerical Error.**

1. An affidavit for attachment, in reciting the statutory ground of nonresidence, etc., contained the word " plaintiff" instead of "defendant." *Held,* a manifest clerical error, not constituting ground for dissolving such attachment.

**Attachment—Affidavit—Clerical Error.**

2. Such irregularity constitutes a mere trivial defect, and should be disregarded pursuant to section 6886, Rev. Codes 1905.

**Attachment—Clerical Error—Complaint Aid to Affidavit.**

3. The verified complaint, which was filed with the affidavit for attachment, contained an allegation to the effect that defendant was a nonresident of the state, and had absconded therefrom, and it was proper to resort to such complaint in aid of the affidavit. By an examination of such complaint, as well as the context of the affidavit itself, it is obvious that the use of the word "plaintiff" instead of "defendant" was a mere oversight, in no manner prejudicial.

**Attachment—Defects Curable by Amendment—Intervener Cannot Attack.**

4. Such irregularity or defect, being curable by amendment, could not be urged by an intervener, even conceding that it might be successfully urged by the defendant in the attachment suit.

Appeal from District Court, Williams county; *Goss*, J.

Action by George Hilbish and another against Sam Asada, in which Fred Southard intervenes. From an order dissolving an attachment, plaintiffs appeal.

Reversed.

*Bessie & Greer*, for appellants.

*William Maloney*, for respondent Southard.

FISK, J. This is an appeal from an order of the district court of Williams county made on June 18, 1908, dissolving an attachment. Such order was made on motion of one Southard, an alleged intervener, who claimed the right to move for the dissolution of such attachment by reason of his having acquired a subsequent lien by chattel mortgage upon the property attached. We shall not concern ourselves with the question raised by appellants' counsel as to Southard's right to intervene for the purpose of making such motion, as we are clearly convinced that the order appealed from was erroneous, and must be reversed in any event.

The sole ground urged for the dissolution of such attachment was that the affidavit for attachment stated "that the plaintiff is not a resident of the county of Williams nor the state of North Dakota, but has absconded therefrom and keeps himself concealed, and that his present place of residence and address are unknown to this affiant, but that he has personal property within the county of Williams and state of North Dakota," etc. The sole objection to the affidavit was, and is, that the word "plaintiff" is used instead of the word "defendant." It is claimed that this is a fatal jurisdictional defect, and the trial court sustained such contention. We are unable to concur in such conclusion. It is perfectly apparent from an inspection of the affidavit that this was merely a clerical error. The context of the affidavit conclusively discloses this to be true. As disclosed by the above quotation, the singular number instead of the plural is used, whereas the title of the action discloses that there are two plaintiffs and a single defendant. Not only this, but the whole

context of the affidavit unmistakeably demonstrates that the use of the word "plaintiff" instead of "defendant" was a mere trivial and clerical error. As said by the Circuit Court of Appeals in Brock v. Fuller Lumber Co., 153 Fed. 272, 82 C. C. A. 402: "The use of the word 'plaintiffs' was obviously a mere slip of the pen. The plaintiff was already properly described; and the use in the motion of the plural in 'plaintiff' and in 'citizens and residents of' shows clearly that it was intended to amend, not as to the single plaintiff, whose citizenship was already properly alleged, but as to the several parties defendant. * * * The error is so obvious * * * that we cannot regard this point as substantial." To hold this sufficient for dissolving the attachment is placing form above substance. 1 Shinn on Att. 152, says: "Clerical errors which cannot mislead, because of the context clearly showing what was intended, will be immaterial and ineffective on a motion to quash." By section 6886, Rev. Codes 1905, the Legislature has said that: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not effect the substantial rights of the adverse party. * * *." We think this section is applicable to the facts of this case, and that no amendment of the affidavit was even necessary. If an amendment was deemed necessary, ample authority therefor is found in section 6883, which provides for correcting, by amendment, a mistake in the name of a party, or a mistake in any other respect. The error being clearly curable by amendment, the rule seems to be established that Southard, not being a party to the action, could not take advantage of the error. The alleged intervener is in no more advantageous position than a junior attachment creditor.

In Sannoner v. Jacobson & Co., 47 Ark. 31, 14 S. W. 458, the general rule relating to the right of an intervener to move to dissolve an attachment for irregularities in the attachment proceedings is correctly stated as follows: "An examination of the authorities shows that it is an almost universal rule, where the statutes permit a second attacher to intervene in the suit of the first, to confine the scope of his inquiry to such matters as might be inquired into in a collateral attack upon the attachment proceedings in the same or a different court. The intervener is treated as a stranger to the attachment proceeding, as much so as though he had gone into a court of equity to attack the proceeding upon some established equitable

principle. It is only a matter of convenience that he is let into the suit of the first attacher. As Mr. Freeman appropriately says: 'Every litigant, if an adult, is presumed to understand his own interests, and to be fully competent to protect them in the courts. He has the right to waive all irregularities in proceedings by which he is affected, and is entitled to exclusively decide upon the propriety of such waiver. To allow disinterested third persons to interpose in his behalf and to undertake the management of his business, according to their judgment, would create intolerable confusion and annoyance and produce no desirable result.'" Freeman on Judgments 91. Following this general principle, the authorities, with common consent, assert that one attaching creditor, unless specially authorized by statute, cannot intervene in the suit of another to defeat it for irregularities in the proceedings against the attaching debtor. Drake on Att. 262, 273, et seq; Waples on Att. 486, 487, and cases cited.

The case of Lowenstein v. Monroe, 52 Iowa 231, 3 N. W. 51, is one in which the verification of the grounds of attachment, having been made on belief only, was amended against the protests of an intervener, and this, by the vast preponderance of authority, is the rule whenever any defect complained of is regarded as an irregularity merely. See, also, Scrivener v. Dietz, 68 Cal. 1, 8 Pac. 609, where, among other things, the court said: "Admittedly this irregularity in the affidavit constituted good ground for a motion by the attachment debtor to dissolve the attachment, and if such a motion had been made by him to the court in which the action was pending it would have been the duty of the court to have dissolved the attachment. But neither the regularity of the affidavit, nor the validity of the attachment issued upon it, was questioned by the debtor; he, therefore, waived whatever irregularities existed in either, and, as against him at least, the attachment was valid and operative. So that its execution, if according to law, operated to create a provisional lien upon the property on which it was levied, in favor of the attaching creditors; and, as this lien, upon the recovery of a judgment in the action transit in rem judicatam, is merged in the judgment, the attachment proceedings are not attackable collaterally for an infirmity in the affidavit. Notwithstanding the infirmity, the attachment was not void; it was only voidable at the instance of the attachment defendant, and could

not be assailed collaterally by a stranger." To the same effect, see Harvey v. Foster, 64 Cal. 296, 30 Pac. 849.

In conclusion, it is entirely clear that this alleged intervener could not urge as a reason for dissolving the attachment the error or irregularity mentioned; furthermore, and as a conclusive answer to respondent's contention, it should be noted that the verified complaint in the action, which was filed at the same time the affidavit for attachment was filed in the clerk's office, contains the following allegations: "That defendant is not a resident of the state of North Dakota, but has absconded therefrom and conceals himself, his whereabouts being wholly unknown to plaintiff, plaintiff being wholly unable to locate him after making due and diligent search, but that defendant has property within the county of Williams and state of North Dakota." That such verified complaint may be resorted to in aid of the attachment affidavit, is, we think, elementary. In the light of these facts we have no hesitancy in reaching the conclusion that the irregularity aforesaid should have been disregarded, and that the order appealed from was therefore reversible error.

Order reversed. All concur.

(125 N. W. 556.)

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## In the Matter of the Estate of Henrietta Schultz, Deceased, William Schultz v. Gottlieb Schultz.

Opinion filed March 8, 1910.

**Wills—Construction—Praetermitted Heir—Intent—Evidence.**

1. Section 5119, Rev. Codes, 1905, provides: "when a testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section."

*Held,* construing such section, that parol testimony is admissable to establish the fact that a child omitted from the will was intentionally thus omitted.

**Wills—Omission of Child—Intent—Presumption.**

2. The fact of an omission by the testator to provide in his will for any of his children, or for the issue of any deceased child, merely raises a prima facie presumption that such issue was unintentionally omitted, and such presumption is rebuttable by evidence extrinsic the will.

Appeal from District Court, Barnes County; *Burke,* J.

Action by William Schultz against Gottlieb Schultz. Judgment for defendant, and plaintiff appeals.

Reversed with directions.

*John Knauf,* for appellant.

Praetermitted heir must show omission to be unintentional. Brown v. Brown, 98 N. W. 718; Gilmer v. Stone, 120 U. S. 586, 30 L. Ed. 734, 7 Sup. Ct. Rep. 689.

Praetermitted heir cannot object to probate of will, his remedy is after probate, by construction. Doane v. Lake, 32 Me. 268, 52 Am. Dec. 654; Schneider v. Koester, 54 Mo. 500; Pearson v. Pearson, 46 Cal. 610.

Testimony dehors the will is admissible to show testator's intent in omitting the child. Lerieux v. Keller, 5 Iowa, 196; Stebbins v. Stebbins, 54 N. W. 159; Loring v. Marsh, 73 U. S. 337, (18 Law Ed. 802); Wilson v. Fosket, 6 Met. 400, 39 Am. Dec. 736; Buckley v. Gerard, 123 Mass. 8; Wilkins et al. v. Allen et al., 13 How. 385, 15 L. Ed. 396; Patch v. White, 117 U. S. 210, 29 L. Ed. 860; Smith v. Smith, 4 Paige 271, 3 L. Ed. 432; Scott v. Neeves, 77 Wis. 305, 45 N. W. 421; Coulam v. Doull, 133, U. S. 216, 10 Sup. Ct. Rep. 253, 33 L. Ed. 596.

*Herman Winterer* and *David S. Ritchie,* for respondent.

Where there is no ambiguity in the will, parol proof of testator's declaration is inadmissable. In re Dominici's Estate, 90 Pac. 448; In re Young's Estate, 55 Pac. 1011; Cowdry v. Cowdry, 67 A. 111; Succession of Quinlan, 43 So. 249; App. v. App. 55 S. E. 672, 106 Va. 253; Shipley v. Mercantile Trust & Deposit Co., 62 A. 814; Wilson v. Bull, 54 A. 629; Reynolds v. Reynolds, 43 S. E. 878; In re Smith, 78 N. Y. S. 130; Turner v. Burr, 104 N. W. 379; Engelthaler v. Engelthaler, 63 N. E. 669; Morrison v. Morrison, 65 Pac. 779; Bower v. Bower, 31 Pac. 598; In re Barker's Estate, 31 Pac. 976; Hill v. Hill, 35 Pac. 360; Stratton's Estate v. Morgan, 44 Pac. 1028; In re Garraud's Estate, 35 Cal. 336; Estate of Stevens, 83 Cal. 322, 23 Pac. 379; Scott v. Scott, 114 N. W. 881

FISK, J. This is an appeal from the judgment of the district court of Barnes county, and is here for trial de novo of the entire case under the provisions of section 7229, Rev. Codes 1905.

The facts are not in dispute, and are as follows: One Henrietta Schultz, a resident of Barnes county, made her last will and testament in May, 1890. She died in 1892, leaving two sons, William and Gottlieb Schultz, as her sole heirs at law. In due time the will was admitted to probate, and by its provisions deceased left her entire estate to William, no mention being made therein of Gottlieb, either in terms of express disinheritance or otherwise, the will being entirely silent as to him. The testatrix designated the appellant as sole executor of the will, and in due time letters testamentary were issued to him. Notice to creditors was duly given, and on December 5, 1906, such executor filed his final report, praying for an order setting the estate over to himself as sole devisee. Therupon the county court designated January 7, 1907, as the date for final hearing on such report, and caused notice and citation to issue accordingly. On the date of such hearing respondent filed an answer alleging non-service of the citation for probate of the will; that respondent and appellant were the only children of deceased; that he had been omitted from the will and not mentioned therein, and praying for an equal distribution of the estate between his brother and himself. A reply was made to such answer, and a hearing of the issues had in April, 1907, and a final decree made vesting an undivided one-half interest in said estate in respondent. An appeal was taken to the district court from such decree, where a hearing was had, and parol testimony offered tending to show that respondent was intentionally omitted from participating in the estate under the terms of the will. Such testimony was objected to by respondent's counsel upon the ground that the will speaks for itself, and parol testimony to vary its terms is incompetent. Other objections were made to such testimony, which it is unnecessary to here set forth. Thereafter the district court made findings and conclusions, and ordered judgment to be entered vesting an undivided one-half interest in and to said estate in each of the parties. From such decision William appeals.

The chief contention between the parties is one of law, and involves the interesting question as to whether parol testimony is admissible to prove that a child not mentioned in a will was intentionally omitted by the testatrix. A determination of this question necessitates a construction of the provisions of section 5119, Rev. Codes 1905, which provides: "When any testator omits to provide

in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator, as if he had died interstate, and succeeds thereto as provided in the preceding section." This statute was involved in the case of Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276, recently decided by this court, and in disposing of the peition for rehearing we held that the fact that the lawful issue of a testator is omitted from his will merely raises a prima facie presumption that such issue was not intentionally omitted, and that such presumption is rebuttable by extrinsic proof. We there said: "That such facts merely raise a prima facie presumption that he was not intentionally omitted, and that such presumption is rebuttable by evidence extrinsic the will, is well established. In re Atwood's Estate, 14 Utah, 1 45 Pac. 1036, 60 Am. St. Rep. 878; Coulam v. Doull, 133 U. S. 216, 10 Sup. Ct. Rep. 253, 33 L. Ed. 596, and cases cited. These authorities deal with a statute identically the same as our own." We are aware that the authorities are in conflict upon this question, and that it has been definitely determined in some states, under a statute similar to our own, that parol evidence is inadmissible to show that such omission was intentional, and that the question must be determined from the will itself. We are entirely satisfied with the soundness of the rule announced in the foregoing cases, and it would serve no useful purpose to cite the authorities holding to the contrary. They may be found collated in the note to the case of Brown v. Brown, 8 Am. & Eng. Ann. Cas. 637. Applying such rule to the facts in the case at bar necessitates a reversal of the judgment, as the sufficiency of the parol evidence offered to prove that such omission of Gottlieb from the will was intentional on the part of the testatrix is not questioned by respondent, and seems to be undisputed.

The district court is directed to set aside its order and judgment, and to direct the county court to reverse its decision, and to enter a judgment vesting the entire estate in appellant, William Schultz. All concur.

(125 N. W. 555.)

## J. L. MATHEWS v. ANNA M. HANSON.

Opinion filed February 3, 1910.

**Fixtures—Agreement Making Them Personal Property.**

1. Parties are at liberty to make any agreement or arrangement with regard to their property that they see fit, and to give to fixtures the legal character of realty or personalty at their option; and, if the agreement is such a one as will make the property personal property, as between the parties, it is personal property, and may be so treated.

**Judgment—Judgment Against Third Person as Evidence.**

2. In an action to recover property, a judgment in a former action against a third person, which invested plaintiff with all the rights and title of such third person to the property, is admissible.

**Witnesses—Cross-examination—Discretion—Appeal and Error.**

3. The latitude to be allowed in cross-examination is largely discretionary with the trial court, and its rulings in that respect will not be disturbed, except in cases of abuse.

**Judgment—Evidence.**

4. It is immaterial whether the mechanics liens, on which the judgment was rendered, under which plaintiff obtained his right to the property in question, were valid or invalid.

Appeal from District Court, Sargent county; *Allen*, J.

Action by J. L. Mathews against Anna M. Hanson. There was a directed verdict for plaintiff, and defendant appeals from an order denying a new trial.

Affirmed.

*O. S. Sem* and *J. E. Bishop*, for appellant.

*Purcell & Divet*, for respondent.

CARMODY, J. This action is in claim and delivery to recover possession of a building situated upon lot 3, section 27, township 129, range 53, in Sargent county, N. D., known as a creamery. The answer is a general denial. At the close of all the testimony the trial court directed a verdict in favor of the plaintiff. From an order denying a motion for a new trial defendant appeals to this court.

The facts are as follows: On the 9th day of August, 1897, one Louis Hanson, also known as Lars Hanson and L. M. Hanson, filed a homestead entry on lots 1, 2, 3, and 4 of section 27, township 129, range 53, in South Dakota. This land lies on the state line

between North and South Dakota. These lots in South Dakota and the lot in North Dakota, on which the building in question stands, are parts of the same quarter section; that is, the state line divides the northwest quarter of said section 27. The South Dakota part of the quarter section contains 138.80 acres and the North Dakota part, 22.44 acres. He perfected his homestead entry, and made final proof on April 10, 1903, and the patent therefor was issued to him on August 13, 1904. He lived on this piece of land with his family until his death, which occurred in 1904. In April, 1900, he made homestead entry on the North Dakota lands on which the building in question stands. In April, 1903, he relinquished his entry to the government, and filed another homestead entry thereon. In May, 1904, he again relinquished, and the North Dakota land was filed on by one Lee, so that from April, 1900, to May, 1904, said Hanson was a homestead entryman under the United States land laws of the North Dakota lands. In the spring of 1901 the Interstate Creamery Association made an arrangement with Hanson to locate and build its creamery upon said lot 3. It was at first contemplated that there should be a written lease, but a question arose whether Hanson had a right to lease any portion of the homestead, and the proposed writing was abandoned. It was then agreed between Hanson and the creamery company that the building might be put upon the land and treated as personal property. In accordance with this understanding, the building was built on the tract in question, and the company entered into the possession and use of it. In the summer of 1901 several mechanic's liens were filed against the building for labor and material furnished in the construction of said building. The labor and material were all furnished previous to July 1, 1901. These liens were all assigned to the Lidgerwood State Bank. On June 20, 1903, an action was commenced in the district court of Sargent county, wherein the Lidgerwood State Bank was plaintiff, and the Inter-state Creamery Company and others were defendants, by personal service of summons and complaint, as recited in the decree entered thereunder. This action went to final judgment August 21, 1903; the judgment entered being for the foreclosure of the mechanics' liens against the building herein involved, and directing the sale thereof to satisfy the judgment. According to the mandate of this judgment, execution was issued, and the building sold to plaintiff herein October 3, 1903. Shortly after plaintiff's

purchase of the building he made arrangement with Hanson, whereby he (Hanson) was to have the use of the lower story in consideration of allowing the plaintiff to leave the building where it was, the upper story being occupied by one Wood. On the 24th day of October, 1904, Lee, who had heretofore filed on the land, relinquished to the government, and on November 9th of the same year the defendant, Anna M. Hanson, filed thereon; her husband, Lars Hanson, having in the meantime died. She then took possession of the building, and seeks to hold it against the plaintiff.

Defendant, on the 23d day of October, 1906, made final proof for said land, and received a patent therefor on the 15th day of June, 1907. After the institution of this action an action in equity was commenced by the defendant against plaintiff, in which he and the sheriff were enjoined from the moving of the building until the termination of this action. Appellant assigns numerous errors, but the determination of this action depends wholly on the question as to whether, under all the evidence, the court erred in directing a verdict in favor of the plaintiff, and in denying defendant's motion for a new trial. These rulings must be sustained.

Appellant contends that the building in question is not personal property, but a fixture attached to and a part of the land. In this she is in error. Parties are at liberty to make any agreement or arrangement with regard to their property that they see fit, and to give to fixtures the legal character of realty or personalty at their option; and, if the agreement is such a one as will make the property personal property, as between the parties, it is personal property, and may be so treated. Myrick v. Bill, 3 Dak. 284, 17 N. W. 268; Cooley on Torts, 427, 430.

The judgment, execution, report and sale, and sheriff's certificate were admitted in evidence over the objection of the defendant, who now strenuously insists that the judgment was incompetent because she was not a party to the proceeding. We think is was competent as establishing a link in the chain of title to the building. It was necessary for the plaintiff, in order to recover, to show that the title of the creamery company to the building had passed to him, and it was necessary for him to show such passage of title in whatever manner it took place. A judgment at law or decree in equity, when it constitutes a link in a chain of title, is competent and admissible evidence, in that character and for that purpose, not only against the

parties to the record, but against all the world. Black on Judgments, 607. In Freeman on Judgments, 446, it is said: "A judgment may be offered in evidence for two express purposes: (1) To establish the mere fact of its own rendition, and those legal consequences which result from that fact; (2) in addition to the first purpose, for the further purpose of proving some other fact as found by that verdict, or upon whose supposed existence the judgment is based. For the first of these purposes every judgment is admissable in evidence against the whole world."

The general and well-settled rule that a judgment binds only parties and privies is unquestioned. But there is an exception to this rule, as firmly settled as the rule itself, and that is that a former judgment establishing rights and relations between the parties to that judgment, while it is never admissible to defeat or divest any right existing in a person not a party or privy thereto, is admissible against such persons for the purpose of proving that the plaintiff in the former judgment sustained to the defendant therein the relation established thereby, and was clothed with whatever right the defendant therein had, which was awarded to the plaintiff by the judgment, saving only the right of the third person to impeach the former judgment for fraud or collusion. It was competent evidence that the plaintiff in that judgment, and by force thereof, extinguished any right of the creamery company and the other defendant in the building in question. It in no way determined the claim of the defendant here that she had a title prior to and paramount to the alleged title of the plaintiff. It did determine, however, as between these parties, that the plaintiff stood in the shoes of the creamery company to assert whatever title and right of possession it had as against the defendant. There are many cases where a former judgment is admissible against third persons not parties or privies. It may form a link in a chain of title, and be the foundation of a subsequent conveyance. The party claiming under the judgment may prove it as one of the muniments of his estate. The former judgment, execution, and sheriff's sale in this case operated as a transfer from the creamery company to the plaintiff in this action of all its rights and has the same force as if it had been made by an instrument in form executed by the creamery company to the plaintiff in this action. If the plaintiff could not show his title to the building by the judgment, execution, and sheriff's sale, then he could not

show it at all. Consequently no error was committed in the admission in evidence of the judgment, execution, sheriff's sale, report of sale and certificate of sale. Gage v. Goudy, 141 Ill. 215, 30 N. E. 320; Tierney v. Ins. Co., 4 N. D. 565, 62 N. W. 642, 36 L. R. A. 760; Martin v. Rutt, 127 Pa. 380, 17 Atl. 993; Glezen v. Haskins, 23 R. I. 601, 51 Atl. 219; Ellis v. Le Bow, 96 Tex. 532, 74 S. W. 528; Building, Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. 58; Kurtz v. Ry. Co. 61 Minn. 18, 63 N. W. 1; Minn. Debenture Co. v. Johnson, 94 Minn. 150, 102 N. W. 381, 110 Am. St. Rep. 354; Railroad Equipment Co., v. Blair, 145 N. Y. 607, 39 N. E. 962; 93 Cyc. 1532, and cases cited.

In Gage v. Goudy, supra, the court says: "It is true, in general, that judgments and decrees are evidence only in suits between the parties thereto and their privies; but that rule is inapplicable in a case like this, where the decree is not introduced as per se binding upon any rights of the defendant, but as tending to establish a link in the chain of the complainant's title. Without said decree it would be impossible for the complainant to prove the partition of said land, and the assignment of the several lots to the different tenants in common. It might with as much propriety be contended that the plaintiff was not at liberty to introduce in evidnce his title deeds because they were res inter alios acta. As said by Mr. Freeman: "A judgment may constitute a part of a chain of title to real or personal estate; or, though not amounting to title, it may show the character of the possession of one of the parties to the suit. In either case it is admissible in evidence for or against strangers, as well as for or against the parties to the original suit. Whenever a judgment transfers title, or is the foundation of a claim to possession, it is admissible upon the same principle as a voluntary conveyance."

Appellant attempted to show by the cross-examination of the plaintiff herein that there was no service of the summons in the action entitled Lidgerwood State Bank v. Interstate Creamery Association et al., upon the defendant therein. The court sustained the objection of the plaintiff to the evidence as incompetent, irrelevant, and immaterial, improper cross-examination. Appellant then made the following offer: "Defendant now offers to prove by the cross-examination of this witness that there was no service of summons in the action entitled Lidgerwood State Bank against Interstate Creamery Association et al., upon the defendants therein"—to which offer

plaintiff objected, as incompetent, irrelevant and immaterial, improper cross-examination, and an attempt to collaterally impeach the judgment of a court of record, which objection was sustained; to this ruling defendant excepted. This objection was properly sustained. The cross-examination had no relation to the matters concerning which the plaintiff had testified on his direct examination. It was clearly improper cross-examination. The objection that it was improper cross-examination was addressed to the sound discretion of the trial court, and the ruling of that court will not be disturbed except in case of abuse. State v. Bunker, 7 S. D. 639, 65 N. W. 33; Rea v. Mo. 17 Wall. 532, 21 L. Ed. 707; Kaeppler v. Bank, 8 N. D. 406, 79 N. W. 869; Schwoebel v. Fugina, 14 N. D. 375, 104 N. W. 848.

Appellant made no other attempt to go into the question of jurisdiction. Appellant attempted to show that the mechanics' liens, on which the judgment in the former action was rendered, were invalid. We think it is entirely immaterial whether such mechanics' liens were valid or invalid. That was a matter litigated in the former action, and one in which the parties thereto were the only parties interested. The other errors assigned are wholly without merit.

The order appealed from is affirmed. All concur.

(124 N. W. 1116.)

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MICHAEL SELZER v. HORACE BAGLEY, JUDGE OF THE COUNTY COURT OF MCHENRY COUNTY OF INCREASED JURISDICTION.

**Courts—Prerogative Writ—Supreme Court—Writ of Prohibition.**

1. An application to this court for the issuance of a writ of prohibition directed to a county judge will not be entertained upon a showing merely of a refusal by the district judge to issue such writ. It is only in exceptional cases, involving questions of great public importance, that this court will exercise its prerogative powers in the issuance of writs to such inferior courts.

**Supreme Court—Prerogative Writ—Refusal of District Judge.**

2. If the district judge refuses without cause, to afford relief, or abuses his discretion in denying such writ, relator is not without remedy, but such refusal or abuse of discretion affords no ground for the issuance of such writ by this court.

**Prohibition—Adequacy of Other Remedy.**

3. The writ of prohibition will not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law.

*Held,* under the facts presented, that relator does not bring himself within such rule, as he possesses such remedy by appeal.

Prohibition by Michael Selzer against Horace Bagley, Judge of the County Court of McHenry County, of increased jurisdiction.

Application denied.

*Butler Lamb,* for petitioner.

*Christianson & Weber,* for respondent.

FISK, J This is an original application to this court for the issuance of a writ of prohibition directed to the county judge of McHenry county, commanding him to refrain from taking any proceedings in a certain civil action commenced in his court.

The sole question attempted to be presented by the application is the power and jurisdiction of the county court to entertain an application to open and vacate a default judgment, rendered in such court, after the same has been transcripted to the district court. For obvious reasons hereafter stated we are not called upon to determine such question. While this court, no doubt, has power, under its general superintending control, over all inferior courts, expressly conferred by section 86 of the Constitution, to issue writs in proper cases to county courts, it will do so only in exceptional cases, and where questions of great public interest are involved. The application here made presents no such conditions. In the affidavit used as a basis for the application it is stated that the judge of the district court of the Ninth judicial district refuses to assume jurisdiction and to issue a writ of the nature here prayed for. If such refusal was an abuse of discretion, relator possesses an adequate remedy, but it affords no reason for invoking the jurisdiction of this court to issue such writ.

But, aside from the foregoing, there exists a conclusive reason why relator's application should be denied. Under section 7836, Rev. Codes, 1905, the writ of prohibition may be issued only when there is not a plain, speedy, and adequate remedy in the ordinary course of law. That relator possesses such remedy by appealing from the order vacating the judgment entered by the county court is entirely plain, and citation of authorities is unnecessary; but in this connec-

tion we quote briefly from the Wyoming court as follows: "In the first place, the inquiry arises, will there be any other available or adequate remedy at law open to the relator if his objections to the proceedings complained of are well founded? This must be answered in the affirmative. That such other remedy is not so speedy matters not. It is certainly more orderly, and more consistent with the underlying principles governing the administration of justice through the medium of our courts. If the contention of counsel for relator is correct, in that the court is not proceeding regularly under the statute in the particulars complained of, any erroneous action or decision of the court in those matters can be reviewed here on error. Rev. St. Wyo. 1887, Sec. 3126; Hettrick v. Wilson, 12 Ohio St. 136, 80 Am. Dec. 337; Myres v. Myres, 6 Ohio St. 221. This remedy being available and adequate, we perceive no injustice in confining the relator thereto. The writ of prohibition is not a writ of right, but it is in the sound discretion of the court issuing it; and in general, it is a good reason for denying the writ that the complaining party has a complete remedy in some other or more ordinary form. State v. District Court, 5 Wyo. 227, 39 Pac. 749.

Application denied.

(124 N. W. 426.)

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CASSIUS C. HAMMOND v. THE NORTHWESTERN CONSTRUCTION & IMPROVEMENT COMPANY ET AL.

Opinion filed January 17, 1910.

**Specific Performance—Parties Entitled to Enforce Performance—Part, Interest in Subject-Matter.**

1. A contract was entered into in 1888 between appellant construction company on the one side and respondent Hammond and appellants John H. Wishek and Lilly as a co-partnership under the name of the McIntosh County Bank, on the other, whereby the construction company agreed to sell and the bank agreed to buy two lots in the town of Ashley and pay therefor $300 on the occurrence of certain events. The partnership mentioned was subsequently dissolved and its assets distributed, with the exception of the contract mentioned. The events happened, but the vendees never paid any taxes as they agreed to do, and never paid the purchase price for the lots. The contract contained a provision that no assignment of it or of the property by the vendees would be recognized or binding on the vendor unless consent in writing was indorsed thereon by the vendor. It never was assigned to Hammond orally, or in writing, and no consent by the

vendor was ever given to any assignment. Wishek and Lilly never consented that title might be conveyed to Hammond by the construction company. Hammond's interest in the contract was a one-third interest. Hammond brought this action to compel specific performance by deed of the whole title to such lots to him alone. All the other parties to the contract defended.

*Held,* that Hammond cannot maintain such action.

Appeal from District Court, McIntosh county; *Allen,* J.

Action by Cassius C. Hammond against the Northwestern Construction & Improvement Company and others. Judgment for plaintiff, and defendant appeals.

Reversed and dismissed.

*W. S. Lauder* and *Franz Shubeck,* for appellants.

*A. W. Clyde,* for respondent.

SPALDING, J. Judgment was entered in the district court of McIntosh county in this action in favor of plaintiff and respondent. The complaint is of great length and the answer correspondingly long. The case was tried without a jury, and is here under the provisions of section 7229, Rev. Codes 1905, for review of the entire case. The printed record contains 633 pages, and many questions are raised and discussed in the briefs. We, however, find it a very simple matter to decide the appeal. In the year 1886, plaintiff and the defendants John H. Wishek and Lilly entered into a copartnership under the fictitious name of the McIntosh County Bank, which did business at Hoskins, in McIntosh county, for a time, and subsequently moved to Ashley. In December, 1888, the McIntosh County Bank entered into a contract with the appellant the Northwestern Construction & Improvement Company, which was the holder of the legal title to the townsite of Ashley, for the purchase of lots 6 and 7, in block 11, in the town of Ashley, and agreed to pay the sum of $300 therefor, "when the track shall have been completed and trains running into Ashley and the depot located on the present grade end near Main street in said town of Ashley." The contract contained the usual provisions, making time of the essence thereof, and requiring the bank to pay the taxes, and for the cancellation thereof in case of default, etc. It was also agreed that no sale, transfer, assignment, or pledge of such contract or any interest therein, or of, or in, the premises therein described, should be binding in any manner upon the construction company unless it should

first consent thereto in writing thereon. This contract did not disclose the names of the individuals composing the firm of the McIntosh County Bank, and no certificate was ever filed with the clerk of the district court or published, as required by law, showing the membership of such firm. In 1889, the firm name was changed to Wishek-Lilly & Co., and the banking business discontinued, but a general collection business was conducted under the new firm name as had theretofore been done by the banking firm. The last-named firm continued in business until the latter part of 1894 or the early part of 1895, when it was dissolved and its assets substantially divided between the partners by mutual consent. It is claimed by the appellants that when the firm of Wishek-Lilly & Co. dissolved, which, in fact, was brought about by the withdrawal of Lilly, and their affairs settled, it was agreed between all parties that the contract in question should be surrendered to the construction company; nothing having been paid on the purchase price and the vendees never having paid any taxes. This is denied by the respondent, but we deem the fact immaterial. In 1900 Appellant Beveridge purchased of the construction company through its agent, John H. Wishek, lot 6 for $200, and placed valuable improvements thereon, and in April, 1905, defendant Nina Wishek purchased from the construction company lot 7, receiving therefor a quitclaim deed. It is agreed that the contract in question was not physically surrendered to the construction company. It does not appear that it or its officers had knowledge of the alleged agreement to surrender it, or that they assented to it, other than as that may be inferred from the fact of their deeding the lots in question and paying taxes on them, and from the further fact that Wishek was their agent. The contract remained in the safe of the defendant Wishek until some time prior to the commencement of this action, when it was taken therefrom by the plaintiff Hammond, without the knowledge or consent of the other parties to the action. No claim is made that it ever was assigned to him either in writing or orally, or that the construction company ever assented to its being assigned to him or any other person. The plaintiff tendered the amount due on the contract, reimbursed the construction company for the taxes it had paid, and brought this action to compel the execution and delivery of a deed of the lots to himself personally.

We are at a loss to understand on what theory it was found that he, in his individual capacity, was entitled to a deed of the lots. The other persons comprising the firm known as the McIntosh County Bank did not assent to the execution and delivery of a deed to him, and the vendor in the contract did not, and all parties defend in this action. It is elementary that specific performance of a contract will not be decreed in favor of those not parties to the contract, and when it may be decreed, it can only be done in favor of all the parties jointly interested, either as vendors or vendees. The majority in number and interest of the vendee firm is not seeking specific performance in this case. The action cannot be maintained by one only of the partnership for his individual benefit. He is not the party with whom the construction company contracted. It never contracted to convey the lots to him, and the contract never was assigned to him. The construction company never assented to his being substituted as the vendee for the partnership known as the McIntosh County Bank. Hammond owned but a joint one-third interest in the contract even if, as contended by him, the agreement to surrender was never, in fact, made or accepted. The construction company would not be compelled to convey anything less than the whole property. Plaintiff demanded a conveyance, not of his one-third interest, but of the title to the whole of the property on his paying the amount due without any compensation to the other members of the copartnership for their interests or for its enhanced value. It is clear that the respondent cannot maintain such action.

The judgment is reversed, and the action dismissed. All concur. (124 N. W. 838.)

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JAMES RIVER NATIONAL BANK OF JAMESTOWN, NORTH DAKOTA, A U. S. CORPORATION v. FRIED WEBER.

Opinion filed January 27, 1910.

**Appeal and Error—Findings Have Some Weight as a Verdict.**

1. The findings of the trial court in actions at law where a jury has been waived are entitled to the same weight as the verdict of a jury, and the same will be thus treated on appeal. Therefore such findings will not be disturbed unless they are clearly against the preponderance of the evidence.

**Banks and Banking—Findings—Evidence.**

2. Evidence examined, and held clearly sufficient to support the findings.

**Payment of Money Under Mistake of Fact—Recovery.**

3. Money paid under a mistake of fact to one not entitled thereto, and who cannot in good conscience receive and retain the same, may ordinarily be recovered back. Under such facts the law raises an implied promise on the payee's part to refund the amount of such payment.

**Payment Under Mistake—Recovery—Failure to Avail of Knowledge of Facts.**

4. The fact that plaintiff had the means of knowledge of the facts at his command, and negligently failed to avail himself thereof, will not defeat his recovery, where such negligence has not resulted in loss or damage to defendant.

Appeal from District Court, Stutsman county; *Burke,* J.

Action by the James River National Bank of Jamestown, N. D., against Fried Weber. Judgment for plaintiff, and defendant appeals.

Affirmed.

*F. Baldwin,* for appellant.

One paying money without compulsion, claimed by another as a matter of right, and paying with full knowledge of the fact, cannot recover it. Wyman v. Farnsworth, 3 Barb. 369; N. Y. & C. R. Co. v. Marsh, 2 Kern 308, 1 Wait's Law & P. 702; Mowatt v. Wright, 1 Wend. 355; Morton v. Ostrom, 33 Barb. 256; Forest v. Magor, 13 Abb. 350.

Money paid by one under a mistake of facts, which he had means of knowing, cannot be recovered. Winddiel v. Carroll, 16 Hun. 101 to 103; See Vol. 39 Cent. Dig. Col. 438, Sec. 267; Peterborough v. Lancaster, 14 N. H. 382; Gooding v. Morgan, 37 Me. 419; Pensacola Ry. v. Braxton, 16 So. 317; McArthur v. Luse, 5 N. W. 451; Wheeler v. Hatheway, 24 N. W. 780; Simmons v. Looney, 24 S. E. 677; Wiles v. McIntosh Co. 10 N. D. 594, 88 N. W. 710; Wessel v. Mortgage Co., 3 N. D. 160, 54 N. W. 922; Frederick v. Douglas Co., 71 N. W. 798; Anderson v. Cameron, 97 N. W. 1085.

*John Knauf,* for respondent.

Where one pays money under a mistake of right and duty, with no obligation to pay, and the recipient no right to receive, it may be recovered, whether the mistake is of law or fact. Northrup's Ex'rs. v. Graves, 19 Conn. 548, 50 Am. Dec. 264; U. N. Bank v.

Sixth N. Bank, 43 N. Y. 452; Mfgrs. N. Bank v. Perry, 144 Mass. 313; 2 Morse on Banks and Banking, 272 Col. 426, Cent. Dig. Vol. 39.

Overdrafts created by mistake, where payee of check is not damaged, and has fraudulently induced the check to be honored, may be recovered. Mowatt v. Wright, 1 Wend. 355, 19 Am. Dec. 508; Bulow v. Goddard, 9 Am. Dec. 663; Bull v. City of Quincy, 52 Ill. App. 186; Reynolds v. Rochester, 4 Ind. 43; Sheard v. Sears, 119 Mass. 143; Ely v. Padden, 13 N. Y. St. Rep. 53; Sleep v. Heymann, 57 Wis. 495, 16 N. W. 17; Whiting v. Bank, 77 N. Y. 365; Continental Nat'l. Bank v. Tradesmen's Nat'l. Bank, 36 App. Div. (Hun N. Y.) 112; Burkhalter v. Second Nat'l. Bank, 42 N. Y. 538; Mutual Savings Institution v. Enslin, 46 Mo. 200; Citizens' Bank v. Graflin, 31 Md. 507.

Money received under a mistake of fact or law or which the recipient has no right in good conscience to retain, may be recovered. Kane v. Morehouse, 46 Conn. 300; Culbreath v. Culbreath, 50 Am. Dec. 375; City of Covington v. Powell, 59 Ky. 226; City of Louisville v. Henning, 64 Ky. 381; McMurtry v. Ky. Central Ry. Co., 1 S. W. 815; Foster v. Kirby, 31 Mo. 496.

FISK, J. This case originated in the district court of Stutsman county, and comes here on appeal from a judgment in plaintiff's favor. As the complaint discloses, the action is for the recovery of $319.71 with interest, which sum, it is alleged, was, on December 27, 1905, paid by plaintiff to defendant through mistake, induced by false representations made by defendant to plaintiff's officers. The answer puts in issue the material allegations of the complaint, and alleges facts tending to show that such payment was voluntarily made. A jury was expressly waived, and the cause submitted to the court, and after both parties had submitted their testimony, the court made its findings of fact and conclusions of law in plaintiff's favor, and ordered a judgment accordingly. The material portions of the findings are as follows: "That on December 27, 1905, the defendant made a certain check against said bank for the sum of $319.71, and represented to the teller, an officer of said bank, that he had said sum on deposit in said bank. That said statement so made was false and fraudulent, and made with the intent to deceive the officials of said bank, and that upon said representations so made the plaintiff, through its teller, paid to the defendant the said sum

of $319.71, and received the check of the defendant drawn against the said plaintiff for the payment of the said sum, and marked the same paid December 27, 1905. That the defendant did not have on deposit in said bank on December 27, 1905, the sum of $319.71, and that his representations to the plaintiff that he did have said sum on deposit in said bank were made with fraudulent intent to deceive the said bank, and to secure the said sum from the plaintiff. The court finds that the said plaintiff frequently demanded from the defendant the repayment of said sum, and that the said defendant refuses, and has wholly refused, the payment therefor. The court further finds that all the material allegations of the plaintiff's complaint are true. The court further finds that there is due the plaintiff, and against the defendant, the sum of $319.71, with interest thereon at the rate of 7 per cent per annum from December 27, 1905."

It is well settled that the findings of fact of the trial court in cases of this character are entitled to, and will be given, the same weight in this court as the verdict of a jury. As said by the present Chief Justice of this court in Ruettell v. Insurance Co., 16 N. D. 546, 113 N. W. 1029: "The weight to be given to the trial court's findings, when that court is clothed with the same functions as a jury in determining questions of fact, has often been before this court, and the following rule was laid down in an early case, and adopted in later decisions: 'Rather it intended, and such, we think, is the effect of the Wisconsin decisions, that, when a finding of fact made by the trial court was brought into this court for review upon proper exceptions, it should come like a legal conclusion, with all the presumptions in favor of its correctness, and with the burden resting upon the party alleging error of demonstrating the existence of such error. He must be able to show this court that such finding is against the preponderance of the testimony, and, where the finding is based on parol evidence, it will not be disturbed, unless clearly and unquestionably opposed to the preponderance of testimony.' Jasper v. Hazen, 4 N. D. 1, 58 N. W. 454, 23 L. R. A. 58; Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 N. W. 717." An examination of the testimony serves to convince us that the findings of the trial court are amply supported by the evidence. Indeed, appellant's counsel does not seriously contend to the contrary.

The whole controversy arises over the item of $319.71, which, sometime prior to October 7, 1905, was deposited in said bank to de-

fendant's credit by one Ogilvie. Plaintiff contends that defendant drew two checks against his account for this sum, which were paid by it. One on October 7th, and the other on December 27th. Defendant admits drawing both of such checks, but contends that the one on October 7th was not paid. Whether this first check was paid or not is the vital question in dispute. If it was paid, as contended by plaintiff, then it is undisputed that the check of December 27th overdrew defendant's account, the exact amount of such check. Both of such checks were introduced in evidence, and are marked paid on their face, with the dates of such payments "October 7, 1905," and "December 27, 1905," respectively. In addition to this the witness Mattison, teller of plaintiff's bank, positively testified to the payment of both checks on the dates above mentioned. Regarding the first check, he testified: "I have seen that before; it is a check signed by the defendant in my presence. The written portion of the check is mine, and was made October 7, 1905. It was charged to the defendant's account in the bank ledger. I paid him at that time on the check $319.71. It was on account of moneys a Mr. Ogilvie left for the defendant." Regarding the other check this witness testified: "It is a check of $319.71, signed by defendant on December 27, 1905, and drawn on plaintiff bank, and I paid him on that date the sum mentioned in the check. On October 7th, or about that time, Ogilvie left $319.71 for defendant, and from that time neither Mr. Ogilvie nor any other person has left any money to be paid defendant. At the time the second check was paid I had a talk with the defendant about the payment of the Ogilvie account. Defendant came in with his bank book, and began to talk in broken English and German, to the effect that I did not give him money for the check of October 7th; claimed that I would destroy the check, and I went to the ledger and turned to his account, which is our inactive account, and when the defendant claimed that I destroyed the check, and he did not get the money, I jumped to the conclusion that I had credited it back to his account instead of destroying the check. We never destroy checks. After the conversation I paid the second check. On that date the bank was busy, and I did not have time to ascertain from the books whether or not I had paid the amount before." The witness then shows by the bank ledger the status of defendant's account commencing September 8th and ending December 27th, which shows that on the latter date defendant's account was

overdrawn the exact amount of $319.71. The witness also testified that the bank books balanced on October 7th, and that if the first check had not been paid, they would not have done so. On cross-examination the witness admitted that if he had examined the books of the bank on December 27th when defendant was there, such books would have shown whether defendant's statement that he had not been paid said sum on October 7th was true or false, but witness says: "I took his word for it."

The testimony of the teller is corroborated by that of the Cashier DeNault. He testified that on December 8th defendant came to the bank and asked what his balance was, and he told him $62.80, and that defendant drew a check for such balance, which was then and there paid. His testimony is also corroborated by plaintiff's bookkeeper.

Defendant admits signing and delivering to the teller the first check, but says the teller promised to destroy the same, and that he received no money from the bank that day, and he says that shortly before December 27th, on looking over his canceled checks returned to him by the bank, he discovered this check charged to his account, and he went to the bank on December 27th with such check, and told the teller in substance that it was not paid, and should not be charged to him, whereupon the teller called for his passbook, and credited him with the item of $319.71. Defendant then stated that he did not want the credit, but wanted the cash, whereupon a check was drawn for such amount and paid by the bank. It was admitted by the defendant that the bank's books balanced October 7, 1905, and that they did not balance by $319.71 on December 27, 1905.

The foregoing is substantially the entire testimony in the case, and we think it entirely clear that the evidence preponderates in plaintiff's favor upon the vital question in dispute.

It seems to be the appellant's contention, in brief, that because plaintiff's teller, by consulting the books, could have learned the exact status of defendant's account, he had no right to rely upon defendant's statement that the check of October 7th had not been paid, and that he had a balance on December 27th of $319.71. And it is urged that for this reason the payment was a voluntary one, and cannot be recovered back. We are unable to uphold such contention. The facts as found by the trial court, and which we must accept as true, clearly present a case of a payment of such last check through mis-

take on the part of plaintiff's officer. Whether, as found, defendant intentionally and fraudulently misled plaintiff's officer we need not determine. It is enough that the plaintiff's bank in good faith and by mistake of fact, parted with money to which defendant was not entitled either legally or morally. The facts do not present a case of the payment of money to adjust a disputed claim; nor do they present a case of a voluntary payment calling for an application of the doctrine announced by the authorities cited in appellant's brief. In the light of the facts found an implied promise on defendant's part to repay such money arose immediately upon the payment by plaintiff of the last check. A proposition so elementary requires the citation of no authorities, but see 15 Am. & Eng. Ency. of Law (2nd Ed.) 1103-1105, and cases cited; also 30 Cyc. 1316 et seq., and cases cited.

Upon the question of the right to recover moneys negligently paid to another through a mistake of fact the authorities are somewhat in conflict, but the weight of authority and, as we think, the better reasoned cases support such recovery. 15 Am. & Eng. Ency. of Law, 1106-1107, and cases cited; 30 Cyc. 1320-1321, and cases cited. We quote from the latter authority: "The fact that a person, when making a payment, had the means of knowing the facts does not of itself ordinarily preclude him from recovering back the money, if he did not have actual knowledge." Fegan v. Great Northern Ry. Co., 9 N. D. 30, 81 N. W. 39, presents a case where a recovery was denied to plaintiff who had paid money to defendant through negligence in not making an investigation of facts accessible to him, but a controlling factor in the decision was the fact that plaintiff's gross neglect in this respect resulted in loss to defendant.

Finding no error in the record, the judgment is affirmed. All concur.

(124 N. W. 952.)

CASSIUS C. HAMMOND v. NORTHWESTERN CONSTRUCTION & IMPROVEMENT COMPANY, JOHN H. WISHEK, AND GEORGE W. LILLY, AND NINA WISHEK, INTERVENER.

Opinion filed January 17, 1910.

**Partition of Real Property.**

1. In making the partition, referees must divide the real property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered.

**Partition—Division of Real Property—Evidence.**

2. Evidence examined, and held sufficient to sustain the judgment entered by the trial court partitioning the real property in controversy in this action.

Appeal from District Court, McIntosh county; *Allen*, J.

Action by Cassius C. Hammond against the Northwestern Construction & Improvement Company and others, and Nina Wishek, inetervner. Judgment for defendants, and plaintiff appeals.

Affirmed.

*A. W. Clyde*, for appellant.

*Wishek & Guy and W. S. Lauder*, for respondents.

CARMODY, J. On the 20th day of September, 1904, plaintiff and the defendants were co-tenants in possession as tenants in common of certain real property situated in McIntosh county, N. D. The interest of each of said parties in the real property in question was as follows: The plaintiff, one-eighth; the defendant Wishek, one-eighth; the defendant Lilly, one-fourth; the defendant Northwestern Construction & Improvement Company, one-half. On the above-mentioned date the plaintiff brought this action to obtain a judgment and decree petitioning the said property according to the respective shares and interests of the parties hereto, and setting apart and confirming to the plaintiff in severalty, one-eighth in value thereof, etc. On the 19th day of April, 1905, the defendant Northwestern Construction & Improvement Company sold and confirmed to the intervener, Nina Wishek, all its right, title, and interest in and to the property in question that remained unsold at that date. On the 28th day of July, 1905, the defendants Wishek and Lilly served their amended answer, in which they set forth the interests of the respective parties, as the same were alleged in plaintiff's complaint, and prayed for the same relief; that is, that a judgment and decree

be entered partitioning the real property involved according to the respective shares and interests of the parties as set forth both in the complaint and in the answer. On said 28th day of July, Nina Wishek filed her answer as intervener, in which she set forth the interests of the various parties in the property in question exactly as the same were set forth in the complaint of plaintiff and the answer of defendants Wishek and Lilly, and she also prayed for the same relief as each of the parties had prayed for in their respective pleadings. On the 10th of August, 1905, the defendant Northwestern Construction & Improvement Company served on plaintiff's counsel, and filed a notice of disclaimer on their part of any interest in, or claim to, any of the property involved in the action; this corporation having, as hereinbefore stated, on the 19th day of April, 1905, sold and conveyed to the said intervener all its right, title and interest in and to the property in question. On the 10th day of August, 1905, pursuant to an order to show cause, issued on request of defendants and intervener, the plaintiff not appearing, although such order was served on his attorney, the district court entered a preliminary judgment determining the rights and interests of the respective parties in and to the property in question, as to the respective portions to which each was entitled. The land in question is the W. 1-2 of section 31, township 130, range 69, McIntosh county, N. D. About 94 acres of the land were surveyed and platted into railway station grounds, and lots, blocks, streets, and alleys for the village of Ashley. There were 28 blocks platted in all, 19 of which were subdivided into 400 lots. The remaining blocks were undivided. Ashley is a small village in said McIntosh county, containing 300 or 400 inhabitants. The townsite proper consists of 28 blocks. The main street of the village runs east and west, commencing on the west side, between blocks 8 and 21, and ending on the east side between blocks 14 and 15.

Substantially all the business of the village is confined to blocks 11, 12, 17, and 18; 11 and 12 being on the north side of Main street, and 17 and 18 on the south side. The business streets are Main street, extending east and west, and Fifth street, running north and south, where the same extends between blocks 11 and 12. The case was tried by the court without a jury, it being stipulated that Hon. Frank P. Allen, judge of said court, should act as referee in partitioning said real property between said parties in proportion

to their respective interests. At the close of the trial, by consent of all parties, the unplatted portion of said property was surveyed so as to become capable of definite description, and by said survey it was subdivided and platted into 89 out lots, comprising in all 213.1 acres. The Soo railroad runs through said property from near the southeast corner to nearly the northwest corner thereof. After the commencement of this action, and before the trial thereof, plaintiff sold on contract 26 lots. During the same period defendant, Northwestern Construction & Improvement Company, sold some lots, but these were all settled for, and the proceeds divided between the parties to this action, and do not enter into this appeal. Defendant John H. Wishek allowed some parties to take possession of some other lots, with the understanding that in case they were awarded to the defendants and intervener, said lots would be sold to the parties who took possession of them. On the 7th day of December, 1906, a decree was made partitioning the property, awarding to plaintiff lots 23 and 24 in block 4; lots 15, 16, and 19 in block 5; lots 11, 21, and 22 in block 11; lots 1, 2, 3, 4, 5, 9, 18, 19, 20, and 21 in block 12; lot 18 in block 16; lots 5 and 8 in block 17; lots 3, 4, and 5 in block 26—being 24 of the 26 lots sold by the plaintiff, as hereinbefore mentioned. The balance of said real property was partitioned and awarded to defendants and intervener in the following proportions, to wit: An undivided one-eighth interest to J. H. Wishek; an undivided one-half interest to Nina Wishek; an undivided one-fourth interest to George W. Lilly. Judgment was entered on said decree on the 11th day of May, 1907, from which judgment this appeal is taken. Appellant desires a review of the entire case in this court.

We are met at the outset by a motion to strike out statement of the case, abstract, and brief, filed and served herein, and to affirm the judgment of the district court. As we have decided to pass on the merits of this case, it will not be necessary to decide said motion. The appellant contends that the issues of fact were erroneously decided by the district court, in each of the following particulars: (1) In not allotting to the plaintiff each and every one of the lots covered by his contract; (2) in not allotting to the plaintiff his proportional shares of the undivided blocks and out lots.

The evidence is undisputed that the plaintiff had previously sold the 24 lots awarded to him for $2,250. Fifteen of the lots were in

the heart of the business portion of the city; the other 9, residence lots. The defendants and intervener, although owning seven-eighths of the property, were only awarded 9 business lots, 4 in block 11, and 5 in block 18. The balance of the lots awarded defendants and intervener were nearly all unoccupied. The 89 outlying lots and blocks, consisting of 213.1 acres and blocks 7, 8, 9, 20, 21, 22, 23, and 24 were mostly valuable for farming purposes. There were three principal witnesses who testified to the value of the property; plaintiff, defendant J. H. Wishek, and J. J. Giedt. J. J. Giedt was an employe of plaintiff. There is considerable difference as to the value of the different tracts testified to by plaintiff and defendant, Wishek, but the undisputed evidence shows that the 24 lots sold by plaintiff, sold for $2,250. Considering the fact that the property was in litigation, that the plaintiff had only one-eighth interest therein, and that the purchasers knew that the property was in litigation, and knew what plaintiff's interest was, it is fair to assume that the lots were worth at least the amount they sold for. The evidence, we think, further shows that the value of the lots awarded defendants and intervener in the platted portion of the town was about $9,000, while the value of the other property awarded to defendants and intervener was of the value of about $6,000, making the total value of the property awarded to defendants and intervener about $15,000.

The rule of law contended for by appellant is undoubtedly correct. The same rule is laid down in section 7416, Rev. Codes 1905, which section, as far as material here, is as follows:

"In making the partition referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks and may employ a surveyor with the necessary assistants to aid them." We think the learned trial court followed this rule in partitioning the property. He awarded plaintiff's grantees, 24 of the 26 lots sold by said plaintiff. It appears to us that the learned trial judge went as far as he could in his desire to protect the interests of plaintiff's grantees.

After a careful consideration of the entire case we are fully persuaded that the decision of the lower court was in all respects correct, and the judgment is accordingly affirmed. All concur.

(124 N. W. 427.)

## JOHN T. O'BRIEN v. JOHN O'BRIEN ET AL.

Opinion filed February 19. 1910.

**Escrow—Delivery of Deed.**

1. Where a deed is executed and delivered to a third person to be by him delivered to the grantee upon the grantor's death, it is a question of fact to be determined from the evidence whether the grantor intended to part with all control over the deed or not.

**Escrow—Deed—Absolute Delivery—Intent of Grantor.**

2. If the grantor clearly intends that the title should presently pass by such delivery, evidence showing subsequent change of intention by the recall of the deed is not competent.

**Escrow—Delivery of Deed—Intent of Grantor—Evidence.**

3. If the intention of the grantor in delivering the deed is doubtful or equivocal, evidence of subsequent acts of the grantor or of the person with whom the deed was deposited is competent as tending to show what the grantor's intention was at the time of the delivery of the deed to such third person.

**Escrow—Burden of Proof—Deeds.**

4. The burden is upon the grantee to clearly show a delivery of the deed for his benefit, and that such delivery was made.

**Escrow—Delivery—Evidence—Grantor's Intent.**

5. Evidence reviewed, and, *held,* not to show that the grantor's intention was to deliver the deed without reservation or power to recall.

Appeal from District Court, Pembina County; *Kneeshaw, J.*

Action by John T. O'Brien against John O'Brien and others. Judgment for defendants, and plaintiff appeals. Affirmed.

*Scott Rex,* for Appellant.

Delivery of deed to a third party to be handed to the grantee at grantor's death, conveys absolute title subject to grantor's life interest. Arnegard v. Arnegard, 7 N. D. 475, 75 N. W. 797; Haeg v. Haeg, 53 Minn. 33, 55 N. W. 1114; Wittenbrocke v. Cass, 110 Cal. 1, 42 Pac. 300; Bury v. Young, 33 Pac. 338; Wilhoit v. Salmon et al., 80 Pac. 705; Hutton v. Cromer, 85 Pac. 483; Standiford v. Standiford, 97 Mo. 231, 3 L. R. A. 299; Ruez v. Dow, 45 Pac. 867; Foreman v. Archer, 106 N. W. 372; White v. Watts, 92 N. W. 660; Crooks v. Crooks, 34 O. S. 610; Connard v. Colgan, 55 Ia. 538, 8

N. W. 351; Douglas v. West, 141 Ill. 455, 31 N. E. 403; In re Cornelius Estate, 91 Pac. 329; Schreckhise v. Wiseman, 45 S. E. 745.

The law presumes acceptance of a benficial grant; and where it is coupled with a burden, declaration and acts of beneficiary indicating his intention to claim, show acceptance. 9 Am. & Eng. Enc. Law 162; 13 Cyc. 566, 571-b; White v. Watts, (Ia.) 92 N. W. 660; Haenni v. Bleisch (Ill.) 34 N. E. 153; Gould v. Day, 94 U. S. 405, 24 L. Ed. 232; Tibbals v. Jacobs, 31 Conn. 428; Thompson v. Calhoun, 74 N. E. 775; Swisher v. Palmer, 106 Ill. App. 432; Emmons v. Harding (Ind.) 70 N. E. 142.

*Magnus Brynolfson* for Respondent.

To defeat the power of recall, the grantor must clearly and unequivocally evidence an intent and purpose to part with contract of deed for all time. Arnegaard v. Arnegaard, et al., 75 N. W. 797; Kittoe v. Willey, et al., 99 N. W. 337; Bury v. Young, 33 Pac. 338; Porter v. Woodhouse, 22 Atl. 299; Pratt v. Griffin, 56 N. E. 819; Foreman v. Archer 106 N. W., 372.

Intent is a question of fact. Arnegard v. Arnegard, Supra;; Kittoe v. Willey, et al., Supra; Bury v. Young, Supra; Foreman v. Archer, Supra; Davis v. Ellis, 19 S. E. 399; Kneeland v. Cooperthwaite, 115 N. W. 1026.

Right to revoke need not be expressly reserved. Cole v. Cole, 108 N. W. 101.

If, where intent to make grant absolute accompanied the original deposit, grantor can still revoke, pending acceptance by grantee. Arnegaard v. Arnegaard, supra; Foreman v. Archer, supra; Williams v. Daubner, 79 N. W. 748.

If deed imposes a burden upon grantee, acceptance is not presumed. Thompson v. Dearborne, 107 Ill. 87; Littler v. City, 106 Ill. 353; Darey Bank v. Webster 44 N. H. 264; Gifford v. Corrigan, (N. Y.) 11 N. E. 498; Blass v. Terry, (N. Y.) 50 N. E. 953; Kellogg v. Cook (Wash.) 52 Pac. 233; Mitchell v. Ryan, 3 Oh. St. 377.

MORGAN, C. J. The issue in this case involves the validity of the deed, under which the plaintiff claims the ownership of 80 acres of land in Pembina county. Plaintiff and the defendants are the children and heirs at law of Johanna O'Brien, now deceased, who was the owner of this land, and executed the deed under which the plaintiff claims in December, 1901. The deed was drawn up by W. J. Burke, an attorney at law, to whom the grantor delivered

it immediately after its execution and acknowledgment, with instructions that he keep the same until her death, and then deliver it to the plaintiff. Subsequently, and in October, 1904, said Burke delivered the deed to Jeremiah O'Brien, plaintiff's brother, upon representations by him to Burke that the grantor was very ill and desired the return of the deed. Prior to the return of the deed, the grantor had made a will in which she devised this land to the plaintiff, subject to money bequests to the defendants, which were made a charge upon the land. The issues made by the pleadings are as to the validity of such deed and its final delivery as a conveyance to Burke. The issues were tried to the court without a jury, who made findings of fact and conclusions of law, to the effect that there had been no delivery of the deed with intent to convey the title to the grantee therein named. Judgment was entered pursuant to such findings, and the plaintiff has appealed, and demands a review of the entire case under section 7229, Rev. Codes 1905. The deed was not produced in court until after the case had been once finally submitted for decision. The contents of the deed were therefore shown by secondary evidence. After the case had been submitted as stated, the defendant asked leave to reopen it, and such leave was granted, and further testimony was produced. At the second hearing the deed was produced by the defendants and was offered in evidence.

From the evidence we are to determine whether the title vested in the plaintiff under the deed; if so, the will thereafter executed was ineffectual for any purpose. The legal principles involved here are not in dispute. It is as to the application of these principles to the facts, and the conclusion to be deduced from the facts, that there is an irreconcilable conflict between the parties. In Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258, involving an issue similar to this case, the prevailing rule is adopted that whether there is a delivery or not is a question of fact to be found from all the circumstances surrounding the transaction. In that case it was said:. "Unless, therefore, we are able to discover from this record that the grantor absolutely parted with all control over the deed, and intended it to operate as a present conveyance, subject to his life interest, we must adjudge the instrument void for want of delivery. See 2 Jones, Real Prop. 1236. The learned district judge found in favor of an actual delivery, and as he had before

him witnesses on whose testimony his finding is based, we will not disturb it, unless it appears to be clearly erroneous." If the deed is actually or constructively delivered to a third person for the benefit of the grantee, by the grantor, without any conditions or expressed reservations, and with intent that all control over it terminates at such delivery, such delivery effectually places the deed and the title to the land subject to the grantee's control at the grantor's death. In 9 A. & E. Enc. Law (2d Ed.) p. 157, the rule is stated as follows: "A grantor may deliver a deed to a third person to hold until after the grantor's death, and then deliver it to the grantee. Such a delivery is perfectly valid, but the deed must be left with the depositary without a reservation by the grantor, expressed or implied, of the right to retake it, or otherwise control its use."

In Trask v. Trask, 90 Iowa, 318, 57 N. W. 841, 48 Am. St. Rep. 446, the court said: "It is well settled, and may be said to be an established rule, that a deed may be delivered to a third person for the grantee, and, if subsequently assented to by the grantee, it will be as good a delivery as if made directly to the grantee, provided there is no reservation of the right in the grantor to countermand it." See, also, White v. Pollock, 117 Mo. 467, 22 S. W. 1077, 38 Am St. Rep. 671; Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Frank v. Frank, 100 Va. 227, 42 S. E. 666; Haeg v. Haeg, 53 Minn. 33, 55 N. W. 1114; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Wilhoit v. Salmon, 146 Cal. 444, 80 Pac. 705; Hutton v. Cramer, 10 Ariz 110, 85 Pac. 483, 103 Pac. 497; White v. Watts, 118 Iowa, 549, 92 N. W. 660; Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867.

In the case at bar the trial court found that there was no intention to deliver the deed so as to convey title at once, and denied the relief demanded by the plaintiff in his complaint. The question is before us for retrial, and we are called upon to review all the evidence. In other words, this court is to pass upon the question of fact as to whether there was an intention, on the part of the grantor, to relinquish forever control over the deed and the title to the land, under the same rules and under the same evidence as the trial court did. We will now state what the evidence is, as shown by the record. In reference to the deed Burke testified as follows: "I drew the deed from Johanna O'Brien to J. T. O'Brien, this plaintiff, for the land described in the complaint, and I held the deed, and was to hold it

until her death, and deliver it to the plaintiff. I took the deed home with me, and put it in an envelope and sealed it up and put it in my safe. I drew the deed up under instructions from Mrs. O'Brien. The instructions were for me to hold the deed until her death, and then to deliver it to this plaintiff. I made a memorandum at the time of the terms and conditions on which this deed was in my possession. That memorandum was made the day I put the deed in my safe. The deed was drawn a few days before that. The deed was delivered to me immediately after it was drawn. The deed was acknowledged before me as a notary public. Mrs. O'Brien did not ask my advice on any matter in connection with this deed when she asked me to draw it. She told me what she wanted, and I did it. The deed lay in my safe, and I kept it until the fall of 1904. Jeremiah O'Brien came to my place in Bathgate on a Sunday, and said that his mother wanted this deed. He told me that his mother was seriously sick and was about to die, and she had requested him to get the deed. I let him have it; opened the envelope and gave him the deed. I have not seen the deed since, and I have no knowledge of its whereabouts. So far as I know, the signing of the deed was the voluntary act of Mrs. O'Brien. No consideration passed in my presence. In drawing up the deed and keeping it I acted wholly on her request. That was the first time that Mrs. O'Brien had ever sent for me. She sent for me at other times since the drawing of the deed. She told me what she wanted, and I did it. There are some features of the transaction of my drawing the deed which are not very distinct, and there are certain features of it that are distinct. The fact that Mrs. O'Brien wanted me to draw this deed, and wanted to give a deed to her son, and wanted me to keep it, and not deliver it until her death, these facts are well within my recollection. As to the other matters, where I wrote the deed, is not so distinct in my recollection. I would not be positive, for instance, whether it was in Laxdahl's office, or where it was." The memorandum on the envelope in which Burke sealed the deed is as follows:

"This deed from Johanna O'Brien to John T. O'Brien to be held by W. J. Burke until the death of the grantor." Inclosed within the envelope was the following memorandum, on a piece of paper, in Burke's handwriting: "This deed was left with W. J. Burke to be held by him until the death of Johanna O'Brien, the grantor,

at which time it is to be delivered to J. T. O'Brien, grantee. W. J. Burke, December 25, 1901." The evidence also shows what the grantor stated when the will was drawn as to her object or purpose in making a will.

From this evidence it appears that the witness Burke must have thought that the grantor had a right to recall the deed, as he delivered it without objection, or any statement that he had no right to do so. The fact that Mrs. O'Brien made a will thereafter, and expressly devised the land described in the deed, and also thereafter mortgaged the land, certainly shows that she did not think the title beyond her recall. The record does not satisfactorily show the circumstances attending the execution and delivery of the deed to Burke. The language used by the grantor is not given. The evidence as to what occurred is more by way of the conclusions of Burke. The evidence is entirely wanting as to her intent in respect to the right to recall the deed, and as to whether Burke's authority to deliver the deed was asbolute and without conditions, except as these matters may be inferred from the very general statements that the deed was to be delivered to the plaintiff upon the grantor's death. Burke's testimony may be entirely true, and still the grantor have reserved the right to recall the deed under some circumstances. It is incumbent upon the plaintiff to show that the deed was delivered without any reservations. The burden is upon him to show title to the land by virtue of the deed, and this he could not do without showing an absolute and unconditional delivery thereof. He is relying for title upon a deed found in the possession of those claiming an interest in the land, under a will executed after the delivery of the deed to Burke, in which the land in suit is devised in a different way than shown by the deed.

In the Arnegaard case the delivery was sustained under facts similar to the case at bar, but in that case there was no recall of the deed, and no attempt to do so, and nothing was done by the grantor to indicate that the delivery was not intended to be absolute. It might be that, if the deed in this case had been in Burke's possession at the grantor's death, the evidence as here given would be held to show an absolute delivery. What transpired subsequently, however, presents an entirely different question. The fact that the deed was surrendered by Burke, together with the fact that the grantor made a will disposing of the same land in a different way than by

the deed, and the fact that such will was drawn by Burke and put in his possession after its due execution, and that it was not suggested by any one that such will would be ineffectual in view of the prior deed, are persuasive of facts that the delivery of the deed could not have been intended to be without reservation of the right to recall under certain circumstances. In regard to the evidence of these subsequent acts, the relevancy and competance thereof are raised by objections. Appellant's claim is that the delivery was irrevocable under Burke's evidence, and that the title had passed from the grantor to the same extent as though the deed had been delivered to the grantee personally, with intent to give him absolute control thereof. The contention of appellant's counsel cannot be successfully disputed if the facts on which he bases such contention are true. In other words, if there was an unconditional delivery with intent to presently convey the title, subsequent acts cannot divest the title from the grantee. In the Arnegaard case that principle is stated, though, perhaps, not an issue in that case.

In Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep 186 the appellant's contention on this question is upheld, but in that case what was decided by the court was based on a finding of the trial court that the grantor intended to, and had actually relinquished all dominion over the deed and title. In the case at bar the court is considering what the intent of the grantor was under all the evidence The trial court made an express finding that the grantor did not intend to pass title to the grantee by the delivery of the deed to Burke, but that she intended the conveyance as a testamentary disposition of the land, and therefore subject to revocation or change. The evidence of Burke alone, unexplained, leaves it doubtful, and to some extent, at least a matter of inference, whether the deed was intended to convey the title from the grantor immediately, or at her death. If it appears that the grantor intended to part with all dominion over the deed and the title to the land, these subsequent acts of the grantor or of the depositary are not competent evidence. In other wards, a grantor, having effectually conveyed the title to another, cannot thereafter impair such conveyance by her subsequent acts or declarations. But if the intent to deliver absolutely is not shown, or if such intent remains in doubt, subsequent acts or conduct of the parties are admissible to show what the intent actually

was at the time that the delivery to the depositary was made. The following cases tend to sustain the principle above stated:

In Hayden v. Collins, Supra, the evidence was substantially the same as in the case at bar. After stating that the grantor must clearly and unequivocally evidence an intent and purpose to part with the possession and control of the deed for all time, the court said: "In short, the delivery and transfer must be irrevocable (citing cases). Such was not the case here.

The lawyer who drew the deed, and who says he held it to be delivered on the death of the grantor, could not remember anything Mrs. Hayden said touching this point so vital to the validity of an escrow. He evidently did not understand that it had been delivered to him beyond any power to recall, for he gave it to the grantor, with other papers in his possession, upon her request, and apparently without protest or question. Mrs. Hayden certainly understood that it was under her control, for she did not recall it, and when last seen it was in her possession." In that case, subsequent acts of the grantor and of the depositary were given effect.

In Dean v. Parker, 88 Cal. 283, 26 Pac. 91, the court said: "The matter to be determined was what was the intention of the plaintiff's father in leaving this deed with the witness, and for the purpose of arriving at this intention, evidence of any declarations made, or conversations had in relation to that subject, by the said John Dean, at that or any subsequent time, could have been competent." Later on, in reference to the same subject, it was said, in the same case: "Any declaration, made by him at the time of the alleged delivery of the deed or at any subsequent time, as to his intention is relevant to this inquiry. The evidence in this record as to what he said during his last illness in giving a reason for not making a will is relevant." This case is cited with approval in Corker v. Corker, 95 Cal. 308, 30 Pac. 541.

In Davis v. Ellis et al., 39 W. Va. 226, 19 S. E. 399, it is stated in the syllabus, in reference to the delivery of a deed: "When the grantor therein places a voluntary deed in the hands of a third person, to be delivered at an indefinite time to the grantee, and before the delivery thereof such person returns such deed to the grantor, who destroys it, the presumption of law is against the delivery of such deed, and in favor of the grantor's right to destroy it, and cannot be overcome unless the grantee shows, by a preponderance of

affirmative evidence, that the grantor, at the time he placed such deed in the hands of such third person, intended absolutely to part with the control and dominion over the same."

In Hale v. Joslin et al., 134 Mass. 310, a deed was placed in the hands of a third person by the grantor under the following statement: "I want you to take it and keep it as long as I live. Say nothing to Brother Calvin or any one else about it, and when I am gone, give it to him." The deed was kept in the possession of said third person until the death of the grantor. Prior to his death, however, the depositary, at the request of the grantor, had prepared a will, which was signed and executed by the grantor, and the grantor expressly revoked all prior wills or deeds in reference to the property involved. The grantor also subsequently stated that the word "deed" as used in the will referred to the deed which had been delivered to such third person, who was the person with whom the conversation was had, and he was expressly requested to hand the deed back to him at some time. In reference to such delivery the court said: "He (grantor) did not intend that the plaintiff should have any present interest in the deed, but intended to keep in himself the dominion and control of it. It was in the hands of Whitney as a depositary for the grantor and not as agent or trustee for the grantee. The act was intended to be in the nature of a testamentary act, which could be revoked at any time. As it was in fact revoked, it is not necessary to consider what effect it would have had if there had been no revocation." See, also, Wilson v. Carrico, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213.

In view of these authorities, and the undecisive testimony of the person with whom the deed was left in reference to the grantor's intention, we think the finding of the trial court that the deed was not delivered with intent to forthwith convey the title to the grantee is in accordance with the evidence, and the same is affirmed by this court upon a careful review of such evidence. As the deed was not intended to become immediately operative, and the same having been recalled by the grantor, it becomes unnecessary to determine whether the record shows an acceptance of the deed by the grantee.

Judgement affirmed. All concur.

(125 N. W. 307.)

## J. B. FOLSOM, ADMINISTRATOR, ET AL. v. FRANK D. NORTON.

Opinion filed January 25, 1910.

**Rehearing denied, March 9, 1910.**

**Appeal and Error—Statement of Case—Extension of Time for Settlement—Sufficiency of Affidavits.**

1. In this case the judgment was entered September 3, 1908,. On September 24, 1908, on the affidavit of Peter Prader, clerk of the district court of Eddy county, in which he stated that C. J. Maddux, (one of appellant's attorneys), had been several times after the files in said action, including the depositions, testimony, and exhibits, but that affiant was unable to give them to said Maddux for the reason that they had not been returned by the court since rendering judgment in said cause, and on the affidavit of said C. J. Maddux that the original files and depositions were not in the office of the defendant's attorneys, that the clerk of said court informed him, the said Maddux, that the said files, depositions and testimony taken were with the court, for which reason the said counsel had been unable to prepare, serve, and have settled a statement of the case, and that it would be necessary to have a settled statement on appeal, the district court made an ex parte order extending the time for settlement of the statement of the case until March 1, 1909. On February 6, 1909, a proposed statement of the case was served upon plaintiff's attorneys. On or about February 12, 1909, plaintiff's attorneys served upon defendant's attorneys, by mail, amendments to the proposed statement of the case and also served at the same time objections to the service, allowance, or settlement of any statement of the case, for the reason that the time for such service had long since expired, and that no good cause had been shown for extending the time, which objections were supported by the affidavit of J. E. Robinson, one of the plaintiff's attorneys.

On February 23, 1909, the parties respectively, were represented by counsel and respondent's counsel interposed objections to the settlement and allowance of the statement, as hereinbefore stated. The court overruled said objections and made an order settling the statement of the case. In this court a motion to strike the statement from the record was granted. We hold that the affidavits of Peter Prader and C. J. Maddux, upon which the order extending the time for settlement of the statement of the case was made do not show any sufficient reason for extending said time.

**Judgment Justified by Findings.**

2. Upon consideration of the pleadings and the findings of the trial court, *held,* that the judgment entered by the trial court was fully justified by such findings.

Appeal from District Court, Eddy county; *Burke,* J.

Action by J. B. Folsom, administrator, and others, against Frank D. Norton. Judgment for plaintiffs, and defendant appeals. Affirmed.

*Maddux & Rinker,* for appellant.

*Robinson & Lemke,* for respondents.

CARMODY, J. This action was instituted in December, 1907, and was tried in July, 1908, before the court without a jury. The findings were filed on September 3, 1908, and judgment was entered in favor of the plaintiffs on September 3, 1908. On September 5, 1908, counsel for plaintiffs served upon Maddux & Rinker, attorneys for defendant,, by mail, a true copy of the findings of fact, conclusions of law, order for judgment, and judgment in this action. On September 19, 1908, Peter Prader, clerk of the district court of Eddy county, made an affidavit in which he stated that C. J. Maddux, of the firm of Maddux & Rinker, had been several times after the files in said action, including the depositions, testimony, and exhibits, but that affiant was unable to give them to said Maddux for the reason that they had not been returned by the court since rendering judgment in said cause. On the same day C. J. Maddux, one of appellant's attorneys, made an affidavit in said action that defendant intended to appeal said action to the supreme court; that the original files and depositions were not in the office of defendant's attorneys; that the clerk of said court informed him, the said Maddux, that the said files, depositions, and testimony taken were with the court, for which reason the said counsel had been unable to prepare, serve, or have settled a statement of the case; and that it would be necessary to have a settled statement on appeal. On these affidavits, and as stated in the order, for good cause shown and in furtherance of justice, on September 24, 1908, the district court made an exparte order extending the time for settlement of the statement of the case until March 1, 1909. On or about October 1, 1908, appellant's attorneys served on plaintiff's attorneys, by mail, a copy of said order extending the time for settling a statement of the case; that immediately on receiving a copy of said order plaintiff's attorneys wrote defendant's attorneys that in their judgment the order was absolutely void. On February 6, 1909, appellant's attorneys served upon plaintiff's attorneys a proposed statement of the case. On or about February 12, 1909, plaintiff's attorneys served upon

defendant's attorneys, by mail, amendments to the proposed statement of the case, and also served at the same time objections to the service, allowance or settlement of any statement of the case, for the reason that the time for such service had long since expired, and no good cause had been shown for extending the time, and for additional reasons stated in the affidavit of J. E. Robinson, which was annexed to said proposed amendments and objections to the settlement of the statement of the case. At the time said statement was settled, February 23, 1909, the parties respectively, were represented by counsel, and respondents' counsel interposed certain objections to the settlement and allowance of the statement as hereinbefore stated, which objections were embodied in written form and submitted to the district court in that form. In connection with said written objections and as a part thereof, the affidavit of J. E. Robinson, one of the respondents' counsel, was also submitted. The court overruled said objections and made an order settling the statement of the case. When the case was reached in this court, a motion was submitted by respondents' counsel to strike the statement of the case from the records and affirm the judgment for the following reasons: "(1) That long prior to the date of the settlement of the statement of the case the period allowed by the statute for so doing had expired, and no extension of time was ever given either by consent of counsel or by order of the court. (2) That no cause for extending the time was ever brought to the knowledge of respondent's counsel by notice, affidavit or otherwise, and that no good cause and no cause whatever for extending the time was ever shown to the district court and no such cause ever existed, the evidence having all been taken and reduced to writing before the case was submitted to the trial court. (3) That the record herein does not show, or attempt to show, any good cause or any cause whatever for extending the time to settle a statement of the case, though such settlement was made after the time had expired and against the objection of counsel for the plaintiffs to the effect above stated.

The said motion will be made on this notice and on the alleged statement of the case and the transcript and the entire record, pleadings, and proceedings herein and on the said objections and the annexed affidavit of J. E. Robinson, which is a part of the alleged statement in the case."

The affidavit of J. E. Robinson is of considerable length, and contains all the grounds stated in said motion. The order extending the time for settling a statement of the case was made ex parte and deemed excepted to. We do not think that the affidavits of Peter Prader and C. J. Maddux, upon which the order extending the time for settlement of the stated case was made, show any sufficient reason for extending said time. They merely show that the papers and files in said action were in the possession of the district judge, and it is to be presumed that appellant's attorneys could have procured the papers and files at the same time that they procured the order extending the time for settlement of the statement of the case to March 1, 1909. The affidavits do not show that appellant made any effort whatever to procure the files or settle the statement of the case within the time allowed by law. While the statute is exceptionally liberal, it does not go so far as to allow time to be extended in such cases without cause and against objection. On the contrary, the statute fixes a condition precedent to such extension. The time can only be extended for good cause shown in furtherance of justice. Section 7068, Rev. Codes 1905; McDonald v. Beatty, 9 N. D. 293, 83 N. W. 224. True, the district court states in its order extending the time for the settlement of the stated case that it was made on the affidavits of Peter Prader and C. J. Maddux for good cause shown and in furtherance of justice, but it is clear to us that said order was made on the affidavits of Prader and Maddux and without any other cause having been shown. C. J. Maddux, one of appellant's counsel, made an affidavit in opposition to said motion that no written notice of the entry of judgment was ever served upon appellant's attorneys. He admits that a copy of the findings of fact, conclusions of law, order for judgment, and judgment were served on them on September 5, 1908. He made no objection to them, and the copy of the judgment showed on its face that it had been entered by the clerk of the district court. We think such service sufficient. But, in addition, J. E. Robinson made his affidavit that notice of the entry of judgment was served at the time that the findings of fact, conclusions of law, order for judgment, and judgment were served.

The motion to strike the settled statement of the case from the record is therefore granted, but the granting of this motion does not necessarily affirm the judgment. There remains for our con-

sideration the judgment roll proper, which includes the pleadings, the findings of the trial court, and the judgment. The question, therefore, which we are to determine is whether upon the issues as framed by the pleadings the court erred in entering the judgment which was entered. This action was brought to redeem from a mortgage foreclosure after the year for redemption had expired,, and to cancel and annul said foreclosure sale and sheriff's deed issued thereunder, and also to redeem from another mortgage held by defendant on the same premises and involves 160 acres of land in Eddy county, N. Dak.

The findings of fact, as made by the district court, are all in plaintiff's favor, and such findings fully sustain the allegations of the complaint. We shall not set out the findings in this opinion, as no good purpose could be served by so doing. Our conclusion is that the findings sustain the judgment.

Judgment affirmed.

MORGAN, C. J., and FISK, J., concur. SPALDING, J., concurs specially. ELLSWORTH, J., dissents.

SPALDING, J. I concur in granting the motion to strike out the statement of the case. The evidence in this case was all taken in the form of depositions, and it required only a few minutes work on the part of attorneys and court stenographer to put it into the shape of a proposed statement, thus making any great length of time entirely unnecessary to prepare it. The fact that the judge had in his possession the record does not relieve appellant's counsel of the necessity of making an effort to procure it, and it nowhere appears that they ever applied to the judge for the record, as they should have done after learning from the clerk where the record was.

I also concur in the affirmance of the judgment; but not because I think the findings show any fraud on the part of the mortgagee. I am of the opinion that the receipt of the rent by the purchaser, who was the mortgagee, which accrued during the year allowed for redemption, and which amounted to more than the debt, worked a redemption. Norton could have taken the rent before the year of redemption expired, and the fact that he did not take it until he had obtained the sheriff's deed should not effect the question. Where the rental equals or exceeds the amount necessary to redeem, the ceremony of redemption by the mortgagor and an accounting by the purchaser would be idle, and I am of the opinion that the law

does not contemplate it. In this case Norton held a second unforeclosed mortgage, and the excess of rent over the amount necessary to redeem from the sale would apply on the second mortgage. The judgment of the trial court and the decision of this court works this result, although not so stated in the opinion, and my only object in concurring specially is to make it clear that I do not assent to any findings of fraud.

ELLSWORTH, J. (Dissenting.) I am unable to concur in the opinion of my associates either upon the holding striking out the statement of the case or in affirming the judgment. I believe that upon the showing made in the district court the cause shown was amply sufficient, so far as appellant was concerned, for extending the time for preparing and settling the statement of the case. But, assuming that the cause shown for an extension of time was insufficient, I still believe that the conclusions of law of the district court are not supported by its findings of fact, and that the judgment, not being properly supported, should be reversed.

From the affidavit served upon respondent's counsel, it appears that appellant's attorneys had on September 19, 1908, received instructions to appeal from the judgment of the district court, that pursuant to such instructions they had applied to the clerk of the district court for the original files of the action and the depositions taken, which, it seems, included the entire testimony of the case, and were informed by the clerk that all of these papers were in the hands of the judge of the district court, and that for that reason he could not supply them to appellant's attorneys.

This affidavit is corroborated by that of the clerk of the district court, who states that he has been applied to by defendant's attorney "several times for the files of the above-entitled cause, including the depositions, testimony, and exhibits, but that he was unable to give them to him for the reason that they had not been returned by the court since rendering judgment in the case." These affidavits were made the basis of an application to the judge of the district court for an order extending the time in which to prepare and serve a statement of the case. This application was made without notice to respondents' counsel; but, while this practice of ex parte applications in matters of this character is not to be commended, it seems to be in vogue in some districts of the state, and

furnishes no reason for impugning the order made provided it is in other respects legal and sufficient.

The judge of the district court with affidavits before him stating that he had in his hands all original files and papers in the case, and that appellant's attorneys could not by reason of this fact have access to this record, made an order extending the time within which a statement of the case might be prepared and served to March 1, 1909. The order as originally prepared by appellant's counsel contained in typewriting the date to which the time was extended as November 1, 1908; but the judge has stricken out this date and inserted instead a date providing for an enlargement of time much greater apparently than that contemplated by appellant's attorneys. On October 1st this order was served on counsel for respondent, who at once wrote counsel for appellant acknowledging receipt of a copy of the order, stating: "We think this order is absolutely void. We certainly have never known or heard of a statute or any practice authorizing the making of such an order." Notwithstanding their belief in this particular, however, and the fact that respondent's counsel must have known of the statute permitting, upon good cause shown in the furtherance of justice, an extension of time for the purpose of performing any of the acts required by Section 7065, including preparation and service of a statement of the case, respondents' counsel took no action whatever to secure a vacation of the order or to bring to the attention of the trial court a showing that the facts alleged by appellant as a ground for such order were insufficient or untrue.

My associates hold that the order extending the time for settling a statement of the case is void for the reason that no sufficient reason for extending the time was shown, and give as their only reason for this holding that "the papers and files in said action were in the possession of the district judge, and it is to be presumed that appellant's attorneys could have procured the papers and files at the same time that they procured the order extending the time for settlement of the case to March 1, 1909." In my opinion a presumption exactly the contrary of this should guide the action of this court in reviewing the order of the judge of the district court. He was then acting clearly within his jurisdiction, and all presumptions of law and fact are in favor of the correctness of the order. It is a matter in which a district judge has a wide discretion, and the order will not be dis-

turbed except in case of an obvious abuse of discretion. Tuttle v. Pollock, 123 N. W. 399. When the judge of the district court made the order extending the time, his action in this behalf corroborated the statements of appellant's counsel and the clerk of the district court to the effect that all original files and documents in the action, including depositions and exhibits, were in the hands of the judge of the district court, or, in any event, beyond the reach of appellent's counsel, and that they presumptively would be so until about the time expressed in the order, which as before shown was considerably enlarged by the district judge at the time he signed the order. In other words, as I view it, by such action, the judge of the district court admitted that he had the entire record of the case in his possession, and was knowingly withholding it from the files of the district court for Eddy county, and that he intended to continue to so withhold it until about the close of the period to which the time for settling the statement of the case was extended.

It is clearly reasonable that appellant's counsel could not be expected to prepare a statement of the case until they had in hand the original files in the case, and that if these files were knowingly withheld by the judge of the district court, or had been lost or mislaid by him so they could not be produced, such fact furnished a sufficient reason for asking an extension of time. If this allegation was untrue, it is inconceivable that the judge of the district court with an affidavit before him making such assertion would have extended the time. If the respondent's counsel had reason to believe that the fact alleged was untrue, they had abundant opportunity between October 1, 1908, and March 1, 1909, to bring the facts that had come to their knowledge to the attention of the district court and ask that the order be vacated. Then, if it appeared that the order was made through improvidence or inadvertance of the district judge or that the state of fact alleged in the affidavits presented by appellant's attorneys did not exist, it will be presumed that it would at once have been vacated.

Taking the affidavit submitted by the appellant's counsel, therefore, together with the presumptions that attend the action of the district judge, in my opinion no reasonable question can be raised of the suffiicency of the ground for granting an extension of time. The district judge afterward settled a statement of the case over the direct objection of appellant's counsel that the order extending the

time was void as being based on an insufficient showing of cause. This gives added confirmation to the assertion of plaintiff's counsel that, until a short time before the statement of the case was actually prepared and served, the documents without which it was impossible to prepare such statement were inaccessible to them. In my opinion the practice of allowing an order which counsel believed to be void to remain in force during all times that the district court had jurisdiction of the case, and then undertaking for the first time to make direct objection thereto in this court, is not a good one, nor should it be encouraged. If respondent's counsel had not known of the order extending the time for preparing a stated case until after the appeal was taken and the record transmitted to this court, there might have been some reason for his making the motion to strike out the statement of the case. Knowing or believing as he did for a period of almost five months before the proposed statement was served that the order extending the time was void, he should have made his objection to the district court.

My associates in their opinion after holding that the statement of the case must be stricken out deem the judgment roll worthy of but scant consideration, and dispose of it with the statement that "the findings of fact as made by the district court are all in plaintiff's favor, and such findings fully sustain the allegations of the complaint. We shall not set out the findings in this opinion as no good purpose could be served by so doing." While it was unquestionably the purpose of the district court to make its finding and enter its decree in favor of the plaintiff, in my opinion such findings as may legitimately be considered findings of fact signally fail either to support the conclusions of law or to sustain the decree.

After putting aside from our consideration all evidence relied upon by the appellant as was done by a majority of the court in this case, the judgment roll should be scanned with more searching scrutiny than in a case where the evidence is present and may be considered for the purpose of impeaching the findings. Such examination discloses that the action is not one to redeem from a mortgage foreclosure or from another mortgage held by appellant on which foreclosure has not been made; but is in fact an action to set aside a foreclosure and to have the mortgage foreclosed and another upon the same land belonging to appellant offset against the value of certain grain taken from the premises by appellant after the expiration of the year of redemption.

As shown by the findings of fact, the mortgage of which foreclosure was made was given on November 10, 1897, to secure payment of a debt of $125 with interest at 12 per cent., due on November 10, 1900, this mortgage was first assigned to one S. A. Flanders, and was on March 4, 1898, again assigned to appellant Norton. Appellant's assignment was recorded on June 6, 1906, and on the same day he commenced proceedings to foreclose the mortgage by advertisement. On July 20, 1906, pursuant to notice duly published, the land was offered for sale by the sheriff of Eddy county and sold to appellant Norton for the sum claimed to be due on the mortgage of which he was the assignee, being $268 and the costs of the sale, $48.72, in all amounting to $306.75. A certificate of sale was made to appellant Norton by the sheriff of Eddy county, reciting, among other things, that he was the highest and best bidder at said sale; that the sale was made to him for the amount due on the mortgage and the costs of the sale, amounting in all to $306.75; and that the land was subject to redemption within one year on payment of the purchase price with interest as provided by law. No redemption from this foreclosure sale was made, and on August 7, 1907, the sheriff of Eddy county made to appellant Norton a deed based on the foreclosure of said mortgage, purporting to convey the land to him. About September 1, 1907, appellant Norton, claiming title under the sheriff's deed, went upon the land and took therefrom and sold grain produced and threshed from the crop of 1907 amounting in value after the necessary expenses of marketing were deducted to $386.25. It is almost needless to say that this recital of fact shows a valid foreclosure of mortgage and an unquestionable conveyance of the land to appellant. This being true, appellant had the undoubted right to take and receive not only after the year of redemption, but during that year as well from the tenant in possession of the lands the rents of the property or the value of the use and occupation, subject only to a liability to account for the same in case of redemption. When no redemption was made, this value of the use and occupation of the property during the year of redemption became appellant's absolutely. Rev. Codes 1905, 7148.

The findings of fact further recite that at the time of the foreclosure of the mortgage in question there was due thereon $125 with interest at 12 per cent. per annum for six years, eight months,

and ten days, which then amounted to $225.40, and that the sale was made for $32.58 in excess of the amount due; that the certificate of sale made by the sheriff to appellant Norton recited as a fact that at the time of sale there was due on said mortgage in principal and interest $258, when, in fact, there was due only $225.42. Then follow findings entered with an evident purpose of sustaining a conclusion that appellant in the purchase of said premises at the sale made by him as assignee of the mortgagee did not act in good faith, but unfairly and fraudulently to such an extent as to invalidate the foreclosure. These findings are that at the time of the sale the land was reasonably worth the sum of $4,000, and that this fact was known to the appellant, who had for many years resided at a distance of about 14 miles from the land; that in 1900 the title to the land was obtained by one C. C. Hewitt, of the United States Army, who died seised and possessed of the same in the autumn of the year 1905; that soon after Hewitt acquired title to said land his mind became so impaired that he lost his memory and his capacity for doing business; that none of his heirs knew anything of it, and that the plaintiff J. B. Folsom, his agent and afterward his administrator, had no recollection of it, and knew nothing of the foreclosure until the defendant entered upon the land and took the crop produced there in the year 1907; that Hewitt purchased the land through the plaintiff Folsom who from the time of the purchase in 1900 acted as his agent in renting the land, collecting the rents and paying the taxes; that Folsom for many years resided in the city of Fargo, and was and is a well-known real estate dealer, and the records of Eddy county show that in each year the taxes against said land were regularly paid by Hewitt or by Folsom; that at any time prior to the time of the foreclosure sale defendant knew that the land was being farmed and cultivated to crop by tenants in actual possession of the land and he knew or could readily have ascertained the fact that Folsom was paying the taxes on said land and receiving the rents and was representing the owners of it, and he knew that in all probability the existence of said mortgage was not known to J. B. Folsom, or to any person having interest in the land, and yet he never in any manner attempted to give notice of his claim to Folsom or to any of the other plaintiffs, who are brothers and heirs of Hewitt.

The facts so recited are evidently meant to form the entire basis of the ultimate conclusion improperly set out as a finding of fact in

the words: "That Frank D. Norton did not fairly and in good faith purchase said land at said foreclosure sale. At the time of said purchase the defendant did not have an honest intention to abstain from taking an unconscientious advantage of the owners of said land through the forms or technicalities of law. He did not purchase the land at said foreclosure sale with an absence of all information or belief of facts that would render the purchase unconscientious."

The only conclusion of law entered as such by the court is in the words: "As a conclusion of law the court finds that the foreclosure sale under which the defendant claims title to said land is void, and that the same should be canceled and annulled and that the net proceeds of the crop produced on said land in the year 1907 which the defendant received, amounting to the sum of $486.25, should be applied as money received by him to apply in satisfaction and discharge of the amount due on said first mortgage and then to the amount due on the second mortgage, and that the balance of said mortgage debt which the plaintiffs have tendered, amounting to the sum of $275, shall be paid to the defendant or paid to the clerk of the court for the use and benefit of the defendant, and that on such payment being made, the clerk shall enter judgment herein to the effect that the said mortgages and each of them be canceled and discharged, and the said foreclosure sale be canceled and declared and adjudged to be void, and that the plaintiffs have their cost of this action," etc. I believe that the most careful scrutiny will fail to disclose in these findings any valid grounds for the conclusion just recited. It appears that the mortgage foreclosed was recorded in 1897, at the time it was given, and was at all times thereafter constructively known to the plaintiffs and all persons claiming title to the land. The note which the mortgage secured fell due on November 10, 1900, but was not paid, and for a period of almost seven years thereafter the annual interest was also unpaid. Appellant, notwithstanding this entire disregard by the owner of the land and his agents of the existence of the mortgage and the fact that it was long overdue, waited until only a few months before the note would become void by the statute of limitations, and then commenced and regularly conducted a foreclosure by advertisement. At the sale he became the purchaser, and, while it appears that the price bid by him was very considerably below the actual

value of the land, he bid what he evidently supposed was the amount due upon his mortgage and the sale being regular in all respects, the mere fact of inadequacy in price will not operate as a reason for holding the mortgage invalid. He did not attempt to take the rents or value of the use and occupation of the land even during the year of redemption until after he had received a sheriff's deed of the land. And then, no redemption being made, he took them from the tenant in possession as he had an entire right to do without being liable to the charge that he was converting the grain so received as rent. There is nothing to show that he knew of Hewitt's impairment of mind or loss of memory or capacity for doing business. There was no duty upon appellant to record his assignment of mortgage or to notify Folsom that he held the mortgage. On the other hand,, Folsom, who in 1900 purchased the land and had been continuously from that time acting as Hewitt's agent for the purpose of looking after the land was inexcusably negligent of his principal's interest in failing to provide for the payment of either interest or principal upon the mortgage which he knew was due in 1900. The fact that he forgot about or had no recollection of the mortgage rather aggravates than excuses his negligence. There is certainly not the slightest evidence of bad faith on the part of appellant in the fact that he did not search the tax records or inquire of the tenant on the land or take other means to ascertain the address of Folsom and when ascertained notify him that he hald an overdue mortgage on the land, when the mortgage had been for a period of 10 ears or more spread upon the records of Eddy county, and Folsom, a real estate dealer who had purchased the land for Hewitt, must have known of its existence and the fact that it was unpaid, long past due, and liable to foreclosure at any time.

This court has held that in a case where the notice of sale stated the amount due on the loan to be $81.96 when it should have been only $67.50, according to the terms of the notes that "there is no allegation of fraud or bad faith in inserting a wrong amount and there is no allegation that anyone was misled thereby," and consequently the validity of a foreclosure otherwise legal was not affected by such misstatement. It has also held in the same case that "mere inadequacy of the price in a foreclosure sale is not ground to set aside the foreclosure in the absence of fraud, undue

advantage, or prejudice." In this case 160 acres of land or an amount the same as that covered by appellant's mortgage in the case at bar was sold for $81.96, and the court refused to disturb the foreclosure under an attack very much the same as that made in this case. Grove v. Gt. Nor. Loan Co., 17 N. D. 352, 116 N. W. 345.

Unless inadequacy of the price paid by appellant or the fact that his notice of foreclosure did not state the true amount due on his note at the time of sale are to be regarded as reasons sufficient for invalidating the foreclosure, there are none other. If he had knowledge of Hewitt's insanity and that Hewitt was without a competent representative duly authorized to look after the title to the land, or had done any affirmative act which prevented the knowledge of his foreclosure from coming to the knowledge of Hewitt's representative, the case would have been different. The facts seem to be, however, that appellant after waiting until his note was about to outlaw proceeded publicly to advertise the land for sale, and that at a sale regularly in all respects conducted according to law he bid what he believed to be the amount due on his mortgage, and in so doing became the highest bidder at the sale.

By due publication of the notice of sale plaintiffs had the notification which the law provides as full and sufficient If this sale can be brought in question, any sale under foreclosure by advertisement, where the land is bid in by the mortgagee at the amount due on the mortgage debt and the price thus paid is inadequate to the value of the land, or there is some slight mistake in stating the amount due, may be brought in question, and titles to land throughout the state be thus unsettled. I believe that, where a foreclosure is conceded to be in all respects valid, this court should not affirm a decree declaring it invalid and void for fraud, unfairness or bad faith under a sweeping generality that the findings of fact of the district court are in plaintiff's favor, and such findings fully sustain the allegations of the complaint. If district courts are to be permitted, as was done in this case, as a basis for adjudged actionable fraud, under the guise of a finding of fact, to insert a conclusion pure and simple without support in other findings, that a purchase was not made fairly and in good faith, then it will be possible in every case where the judgment role is alone

considered for the district court to effectively shut out the consideration by this court of the important question of whether or not the facts considered by it show bad faith, or warrant the decree so holding.

An examination of the evidence taken and appearing in the statement of the case shows beyond question that the findings referred to were drawn even more strongly in favor of plaintiff's contention than the evidence warrants, and that the only basis for the conclusion of unfairness and bad faith on appellant's part are the facts hereinbefore recited. However that may be, the findings fairly considered without reference to the evidence show no reason for declaring the foreclosure invalid. But, even though the foreclosure of the mortgage brought in question were invalid, the further action of the district court in including in its decree a mortgage that has not been foreclosed or redeemed from, or shown to be due and payment tendered thereon, is certainly anomalous. Upon what principle a valid mortgage upon which no action whatever has been taken by the mortgagee can in this manner and in a suit of this character be brought in question, and a debt claimed to be due from the mortgagor to the mortgagee offset against it, I am unable to discover.

125 N. W. 310.

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FRED MITCHELL v. KNUDTSON LAND COMPANY, A CORPORATION, AND O. A. KNUDTSON.

Opinion filed January 21, 1910.

**Pleading—Proof Not Required on Points Admitted in Pleadings.**

1. An allegation in a complaint for the specific performance of a contract for the sale of real estate, that "O. A. Knudtson was the duly and authorized agent of the Knudtson Land Company," admitted to be true in answer, is sufficient, without proof that such agent had authority to bind his principal by his contract to sell real estate.

**Compromise and Settlement—Pleading.**

2. Evidence of a settlement of a cause of action set forth in a complaint is not admissible under a general denial.

**Vendor and Purchaser—Contract—Offer and Acceptance.**

3. An offer in specific terms, and without conditions, for the purchase of a tract of land made by letter or telegram, unconditionally accepted, becomes a binding contract.

**Statute of Frauds—Specific Performance — Possession, Improvement and Part Payment.**

4. The fact that the requirements of the statute of frauds have not been complied with in making a contract for the sale of real estate will not defeat an action for the specific performance of such contract, where the vendee has been placed in possession of the land under the contract and has made valuable improvement and has paid part of the purchase price.

**Principal and Agent—Contract of Principal in Agent's Name—Right of Principal to Enforce.**

5. A contract of a vendee for the purchase of real estate, made through his agent in his own name, without stating the name of his principal, may be enforced by an action for specific performance by such principal in his own name.

**Evidence—Proof of Agency by Letters.**

6. Evidence consisting of letters written by an agent on behalf of his principal, received in evidence without objections, is sufficient, prima facie, to establish an authorized agency.

**Specific Performance—Scope of Remedy — Jurisdiction — Award of Damages.**

7. In an action for the specific performance of a contract to convey real estate, where the facts show a failure and refusal to specifically perform the contract, the court may retain jurisdiction of the action and award damages, and thus determine the controversy without putting plaintiff to the expense and delay of another action.

**Evidence—Vendor's Inability to Make Title—Purchaser's Knowledge.**

8. Evidence considered, and held not to show that plaintiff knew, when contract was entered into, or when suit was begun, that defendants were unable to convey by a sufficient deed.

Appeal from District Court, McLean county; *Winchester*, J.

Action by Fred Mitchell against the Knudtson Land Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

*J. T. McCulloch* and *Newton & Dullam*, for appellants.

Memorandum of sale must disclose the parties to the contract. Wood on Statute of Frauds, 693 Sec. 358; Browne on Statute of Frauds, 471; White v. Breen, 32 L. R. A. 127; Louisville v. Lorick, 2 L. R. A. 212, and note; Beckwith v. Talbott, 24 L. Ed. (U. S.) 496, Grafton v. Cummings, 25 L. Ed. 366.

Connection of several writings to make a contract, must be shown on their face. Tice v. Freeman, 15 N. W. 674; Morton v. Stone, 39 N. W. 496.

When a plaintiff knows at the commencement of his action that specific performance cannot be had, his case should be dismissed. Morgan v. Bell, 16 L. R. A. 614; Lewis v. Yale, 4 Fla. 438; Doan v. Mauzey, 33 Ill. 227; Sellers v. Greer, 172 Ill. 549, 40 L. R. A. 589; Kempshall v. Stone, 5 John Ch. 193; Kennedy v. Hazelton, 32 L. Ed. (U. S.) 576; Morse v. Etmendorf, 11 Paige 277; Milkman v. Ordway, 106 Mass. 232; Welty v. Jacobs, 40 L. R. A. 98; Baldwin v. Fletcher, 12 N. W. 873; Morgan v. Bell, 16 L. R. A. 614.

*J. E. Nelson* and *Theodore Landmann,* for respondent.

Statute of frauds cannot be used as an instrument of fraud. 8 Am. & Eng. Enc. (1st Ed.) 737.

MORGAN, C. J. This is an action for the specific performance of a contract for the purchase of real estate. The complaint alleges that the Knudtson Land Company is a corporation organized under the laws of Minnesota. In the negotiation of the contract, the Casey Land Company acted as the agent of the plaintiff, and the defendant, O. A. Knudtson, acted as the agent of the defendant corporation. The contract relied on in the complaint was entered into through telegrams and letters, and some of these letters and telegrams are set forth in the complaint to show that a contract was entered into through such correspondence. As such letters and telegrams will be considered with the merits, and their contents set forth in the opinion, they will not now be further referred to. The complaint further alleges that the plaintiff went into possession of the land under such contract, with the consent of the defendants, and that he has been ever since, and now is in possession of such land. He further alleges in the complaint his readiness and willingness to fulfill said contract by the payment of the balance of the purchase price, and that he has offered to perform all of the conditions on his part to be performed in said contract, but that the defendants have refused to comply with said contract by conveying the premises to him. The relief demanded is that the defendants be compelled to specifically perform such contract by conveying the land to this plaintiff, and if the defendants, or either of them, cannot comply with the terms of said contract by executing a good and sufficient deed to plaintiff, then that the defendants pay

to the plaintiff the sum of $1,120 damages sustained by reason of the failure of defendants to specifically perform said contract of sale. The answer is a general denial, except the express admission of allegations 1 and 2 of the complaint, which relates to the corporate capacity of the defendant company and the agency of the defendant, O. A. Knudtson for the defendant company. The district court made findings of fact and conclusions of law favorable to the plaintiff upon all of the issues. Defendants have appealed from a judgment entered pursuant to such findings and demand a review of the entire evidence under the provisions of section 7229 Rev. Codes 1905.

In the complaint it is alleged that the defendant Knudtson was the "duly authorized agent of the Knudtson Land Company," and this allegation is expressly admitted in the answer. It is now claimed by the appellants that there is no proof in the record showing that Knudtson was authorized in writing so as to empower him to bind the Knudtson Land Company by contract for the sale of this real estate. Under our statute an agent for the sale of real estate must be authorized in writing by his principal before the act or acts of the agent in making a sale of land on his behalf will be binding upon him. The objection to that allegation was not raised by demurrer. Hence it should be more liberally construed against the objection now urged. Without intimating that the allegation would be insufficient if attacked by demurrer, we are satisfied that it is sufficient when objected to for the first time in this court or at the trial. The contention of the appellants that the purpose and extent of the agency must be pleaded in cases like the present cannot be sustained. The allegation that Knudtson was the "duly and authorized agent of the Knudtson Land Company" should be construed as stating that he was a duly and regularly authorized agent of said company for all purposes in connection with the transaction set forth in the complaint. By admitting such allegation to be true, it must be admitted to be an admission of such agency with full authority in the premises. This court has recently held that an allegation in a complaint that a contract was entered into between parties will be presumed to be a legal contract, and in writing, if a written contract is necessary for the purposes of the contract. Hanson v. Svarverud, 18 N. D. 550, 120 N. W. 550. The same principle is applicable here. The

general allegation of an authorized agency will be presumed to be an agency with full powers legally conferred. If the allegations were insufficient, however, it could avail nothing to defendants, as no objection was taken to the offer of letters in evidence, written by the defendant corporation through Knudtson as agent, which was based upon the ground that the authority of Knudtson was not shown. Such letters and contracts are therefore in the record unobjected to. It also appears in the record that the corporation, by its trustees or executive committee, authorized Knudtson to accept the offer submitted on behalf of the plaintiff for this land, and that such executive committee or trustee authorized Knudtson to go to New York to procure a deed thereof for the plaintiff. This testimony was also admitted without objection that it was not the best evidence of the fact. This evidence was in the form of a conversation between Knudtson and the plaintiff, and in that conversation Knudtson stated that the trustees or executive committee of the defendant corporation had given him authority to accept the offer made on behalf of Mitchell. This was proof of the fact that the company had authorized Knudtson to accept the offer, and was sufficient for all purposes so long as no objection was made thereto as to its competency. It was proof of an official act of the corporation, through its trustees, and was entirely separate from proof of agency. We therefore find the first contention of the appellants untenable upon grounds clear and satisfactory.

It is claimed that no contract was entered into between these parties. As stated, negotiations were conducted through letters and telegrams. It therefore becomes a question of law whether the minds of the parties met as to the transaction. In other words, it is a question of law whether a contract was entered into. We find in the record an unconditional proposition in writing from the plaintiff through his agent for the purchase, upon definite terms, of the land in suit. This offer was accompanied by a check of $50 as part payment. This check was cashed by Knudtson, and the money retained from February 23, 1906, to June 25, 1906. This offer was made by letter on February 23, 1906. The terms of the offer were taken from a circular letter or list of the lands which the defendants had placed with the Casey Land Agency for sale. On February 27th, the defendant company, by a letter written by the defendant Knudtson, stated: "I am inclined to think

your proposition for the N. W. 27-145-82 will be accepted. Will let you know in a day or two." Before the plaintiff again heard from the defendants in respect to this offer, the plaintiff's agent, at the request of the plaintiff, modified the offer of February 23d to the effect that cash would be paid for the land upon the terms stated in the circular letter or list that had been placed for sale with Casey & Co. by the defendants. This modification was an unconditional one. Plaintiff requested a reply by wire or mail, but none came until March 29th, which was in answer to the following telegram to Knudtson at Minneapolis: "Must close or reject the proposition N. E. 27. Wire J. M. Casey." The answer to Casey from Knudtson was as follows: "We can put through deal for you. Waiting for papers."

On April 3d, the plaintiff, through his agent, wrote as follows: "O. A. Knudtson, Minneapolis, Minn.—Dear Sir: We received your telegram in answer to ours re N. E. 27-145-82, stating that the deal would go through without a hitch. We have therefore advised purchaser to go onto the land and begin his improvements thereon. We trust that you may be able to rush the papers through in a very short time. Yours truly, Casey Land Company."

On April 19th, the Knudtson Land Company, through O. A. Knudtson, wrote the Casey Land Company concerning this matter as follows: "I herewith return your check 110, dated Feb. 23d, 1906, as I notice same is made payable to you without endorsement. Kindly endorse same and return to me."

On April 21st, the Casey Land Company wrote O. A. Knudtson as follows: "Dear Sir: "We return herewith your check for $50.00, properly endorsed, and trust that you will get the papers for the N. E. ¼, 27-145-82 fixed up in a very short time. Our purchaser has gone onto the land and is now engaged in making his improvements in breaking the land. Hence we should be pleased to have the matter in shape before any considerable expense attaches to the land in that way. If there is any reason why he should not go ahead with such improvements, will you please notify us at once thereof. Trusting that you will push this matter with all reasonable dispatch, we are,"

In answer to this, defendant wrote as follows: "Minneapolis, Minn. 4-24-06. Casey Land Company, Underwood, N. Dak.—Gentlemen: We are in receipt of yours of the 24th inst. with check

attached, and would say that I can see no good reason why the party should not go ahead as suggested in your letter. Yours truly, Knudtson Land Company, pr. O. A. Knudtson.

On June 25th, defendants wrote as follows: "The Casey Land Company, Underwood, N. Dak.—Gentlemen: Enclosed we return check for $50.00, your favor, being amount accompanying the application for the sale of N. E. ¼, 27-145-82, your application having been turned down. Yours truly, Knudtson Land Company, per O. A. Knudtson."

The last letters was answered by the plaintiff's agent, stating that they were in no way authorized by the plaintiff, Mr. Mitchell, to accept the return of the money. They returned the check and stated in the letter that Mr. Mitchell would expect them to perform their part of the contract and to deliver said land to him pursuant thereto. We have no hesitation in saying that the offer to purchase the land was accepted as shown by the correspondence and acts of the defendants. By such acceptance, the contract became complete. The cash payment sent with the offer was retained for about four months without explanation before it was returned to the plaintiff, who promptly refused to accept it, and sent it back to defendants, who have retained it ever since. The telegram of March 29 was an unconditional acceptance. It said: "We can put through deal for you. Waiting for papers." It gave plaintiff and his agents to understand, unequivocally, that nothing remained to close the deal but the arrival of the papers.

More conclusive than this as showing that the offer was accepted is the letter of April 24th, saying: "I can see no good reason why the party should not go ahead as suggested in your letter." This referred to going into possession of the land under the contract and making improvements thereon in reliance upon receiving a conveyance of the land pursuant to the contract. These letters show conclusively, it seems to us, that the defendants and the plaintiff's agents understood that the offer was accepted without conditions. If defendants did not intend to accept the offer they were guilty of most unfair, if not fraudulent, conduct in encouraging a belief on the part of the plaintiff that it was safe for him to go into possession and make large expenditures in improvements. There is no attempt to deny that defendants gave plaintiff permission to go into possession. The

plaintiff's act, and permission to go into possession of the land, considered together, show that a definite contract was entered into between the parties for the sale of the land in question.

The trial court decreed a specific performance of the contract, and if such performance was refused, that damage be awarded to plaintiff. Defendants were given 30 days after service of a copy of the order for specific performance, during which to comply with such order, by conveying the land to the plaintiff. Upon proof of the service of such order, and the failure to comply therewith, the court awarded a judgment in plaintiff's favor, and against the defendants, for the sum of $1,120. Appellants claim that such judgment is unauthorized and " a perversion of the process of the court of equity." Many authorities are cited on this point, but they are inapplicable as not based upon facts like those in this case.

The appellants assert that plaintiff knew, from the start, that defendants were unable to convey this property. The record shows that the defendant held this land under a contract for its purchase which included other land, and the defendants' vendors refused to deed the land in suit unless the whole contract was complied with by paying the balance due on all land included in the contract. There is no showing that defendant cannot secure the conveyance of this land upon making such payment. If the defendants were unable to make such payments, that is not a showing of such inability to convey as would afford some reason for not conveying, which would warrant a court of equity in withholding its decree for specific performance. The most that can be said in this case is that it might be inconvenient for the defendants to arrange matters so that a conveyance can be given to plaintiff. The facts show that the defendants have refused to convey to plaintiff, pursuant to the contract, and this is sufficient to warrant a decree compelling a specific performance. There is no basis for the contention of the appellants that the plaintiff ever knew or now knows that the defendants were or are without ability to convey. Having refused to convey, and the plaintiff not knowing that the defendants could not convey, when the contract was entered into or when the suit was commenced, a court of equity cannot decree specific performance so as to satisfy the contract, as the defendants have only an equitable title, and such title is incumbered by liens for the pur-

chase price of such land and other land included within the contract. This, we think, is a fair inference from the evidence upon this point. In view of this evidence, the rule is well established that a court of equity should not dismiss this equitable action and remand the plaintiff to a court of law to secure his damages. The rule is well stated in Pomeroy on Contracts, (2d Ed.) 474, as follows: "All the instances in which equity thus awards damages, either in place of or in addition to some other special remedy, are particular applications of the one general principle, that complete justice should be done between litigant parties whenever jurisdiction has been acquired over them to grant any relief. This doctrine is well established, and is indeed, too familiar to require the citation of authority that whenever a court of equity has once acquired jurisdiction of a cause it will retain such cause in order to do full and complete justice between the parties with respect to the subject matter. To this end, when jurisdiction has been obtained on other grounds and for the purpose of administering an equitable remedy, damages may be assessed and adjudged in lieu of or as ancillery to the equitable relief so that the plaintiff may not be put to the trouble, expense, and delay of a second suit brought in another tribunal."

It is urged that the contract is not enforcable for the reason that it was invalid under the statute of frauds. The defect urged is that the letters and telegrams do not disclose the name of the principal for whom the Casey Land Company was acting until after the contract was repudiated. In other words, it is claimed that there was no sufficient memorandum or writing. Several cases are cited by the appellants tending to support the doctrine that the memorandum or writing necessary before a contract for the sale of real estate becomes binding must contain the name of a vendee, and that parol evidence is not admissible to supply such defect. We do not think that such cases are in point under the facts of this case. The pivotal question in this case is whether a contract for the sale of real estate was entered into. It is found that a contract was entered into between the Casey Land Agency, acting for the plaintiff, and the defendants. Upon its face, the contract is the contract of the Casey Land Agency, and it is signed by that company, but its benefits inure to the plaintiff, although his name was not therein mentioned, and he may

sue in his own name for the enforcement of it. In Pomeroy on Contracts (2d Ed.) 89, the doctrine is stated as follows: "When the agreement is executed by an agent in his own name, he appearing to be the contracting party, the requisite as to parties is complied with. The principal may maintain a suit and enforce the contract, and it is immaterial whether the principal was actually known during the transaction or whether the other party supposed that he was dealing with the agent personally, entirely on his own behalf. Under the same circumstances, it is now the rule that a suit may be maintained, and the contract enforced against the principal even though he was undisclosed and unknown to the other party at the time of entering into the agreement, provided, of course, it was actually made on his behalf." Although this is not the rule followed in some courts, we deem it sound, and many cases containing it are cited in the note to the above section. If such principle were not sustainable in this state, it could have no application in this case, as it is undisputed that the plaintiff went into possession of the land in reliance on the contract and made valuable improvements. Therefore, under the express exception to the provisions of the statute of frauds as contained in section 5407, Rev. Codes 1905, the absence of the requirements of that statute is not a defense to an action for specific performance. For these reasons, there is no force in defendant's contention as to the invalidity of the contract upon this ground.

On June 18th, the Casey Land Agency submitted another different offer for the same land to the Knudtson Land Company This is brought forward by the appellants as conclusive proof that neither plaintiff nor the Casey Land Company believed that their first offer had been accepted. Unexplained, this fact would have great force as proof, and might be deemed conclusive. However, from the evidence explanatory of the second offer, it is shown that this was an independent offer by the Casey Land Agency, and that the plaintiff is in no way connected therewith. It was not made on his behalf, and there is nothing in the letter indicating that it was made on his behalf. Mr. Casey testifies that this offer was submitted on his own individual account, and it appears that it was made after it had become apparent that the defendants were not willing to comply with the contract, although the defendants had not tendered a return of the $50 at this

time, or plaintiff's negotiations and attempts at settlement had ceased, and it was an established fact that the defendants would refuse to comply with the offer of the plaintiff, which had been accepted. Under such circumstances, this new offer has no force as evidence that the plaintiff thought that the contract had never been entered into.

It is claimed that the subject-matter of this action was by the parties settled on the 18th day of June, 1906. A memorandum of settlement was signed by the plaintiff in person and by O. A. Knudtson in person. The Knudtson Land Company is not mentioned in the memorandum, and there is no mention therein of any suit or action, and no direct mention of the subject-matter of the action. The substance of the agreement on the part of Knudtson is as follows: "That the right and title of and to the crop now growing upon the N. E. ¼, section 27, 145-82, shall be and remain in the party of the second part (Mitchell), and guarantee and protect said second party in said right. To pay in addition thereto, and does hereby pay, the sum of $100.00, and to further guarantee that the crops raised and grown upon said land shall equal to the reasonable expense of labor performed and seed sown on said land, and, if not, to pay the said second party the balance of said expense, not to exceed the sum of $50.00. Said second party does hereby release said O. A. Knudtson from any and all claims arising out of labor performed on said land, and all other claims of every nature." Under this contract a check for $100 was turned over to the plaintiff. He retained this money from that day until November 1st, when he purchased a draft for the same and sent to Knudtson, with the following letter:

"Washburn, N. Dak., Nov. 1, 1906. Mr. O. A. Knudtson, Minneapolis, Minn. Dear Sir: You are hereby notified that I have this day deposited to your credit the sum of $100.00, the same being the amount received from you on or about the 17th day of June, A. D. 1906, by virtue of a certain contract entered into by and between Fred Mitchell and O. A. Knudtson, relative to the N. E. ¼, Sec. 27 in township 145, in range 82, west of the 5th P. M. The said deposit is a tender of the said money and a return thereof by the said Fred Mitchell, being made in the First National Bank of Washburn, N. Dak. Signed and dated this first day of November, A. D. 1906. Fred Mitchell, by J. E. Nelson."

If the settlement is binding so far as the issues of this case are concerned, it is by virtue of the last part of the memorandum, reciting, "and all other claims of every nature." From other evidence it appears that the defendants had not repudiated the contract when the memorandum was entered into. The letter of the defendants to the plaintiff's agent of May 25th proves this fact conclusively. As there was no breach of the contract when the memorandum was entered into, it is not apparent how it could be included in the settlement, unless specially shown to be included therein. However, we need not place the decision on this point on that ground. It is disposed of on the ground that the memorandum is not properly in evidence. A settlement of a cause of action pleaded in the complaint cannot be proved under a general denial. The fact of such settlement presents an affirmative defense which must be specifically averred. That was not done in the answer; for the reason it is not properly before us for consideration. Plaintiff objected to its admission in evidence on the express ground that it had not been pleaded.

It is claimed by the appellants that such memorandum as properly offered in evidence for the purpose of showing the character and basis of the plaintiff's possession, and that it was offered in evidence for that purpose by the defendant as a part of the plaintiff's cross-examination. If it was offered in evidence for a particular purpose, the offer should have been restricted to that ground or purpose. A reading of the memorandum, however shows that it was silent on the question of possession. The character of the possession and the circumstances under which it was taken are clearly shown by other evidence, and this memorandum or contract in no way changes or refers to it. Furthermore the parties seem to have acted in reference to this contract in such a manner as to imply that it was waived or rescinded by mutual consent. It is true that the plaintiff retained the $100 paid at the time of the execution of this contract until the letter was written on November 1st, when it was returned. The defendants made no objection to the letter of November 1st, and did not offer to return the money to plaintiff until at the trial, nearly three months thereafter, when the plaintiff refused to accept it. It would seem that the defendant acquiesced, by such long delay, in the intention or wish of the plaintiff to rescind the contract. Whereas the evidence is not at all conclusive upon this point, we think that a fair

inference from it is that the defendants by such long delay did not rely upon that contract as having any bearing upon the issues in this case. Whether such delay and the retention of the money returned would be deemed a rescission of the contract so far as the rights to the crop are concerned, we do not determine. We are clearly of the opinion, however, that the contract has no force or bearing upon the issues as to whether this suit was settled or not.

The trial court awarded interest on the damages in the sum of $58.80. Respondent consents to modification of the judgment by striking out that sum, being interest up to the date of the entry of judgment.

The judgment is affirmed. All concur.

124 N . W. 946.

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WILLIAM P. TUTTLE v. LOUISE J. TUTTLE.

Opinion filed December 20. 1909.

**Divorce—Judgment—Acceptance of Benefits Under—Appeal and Error.**

1. In an action for divorce, a decree was entered in plaintiff's favor, but awarding defendant $1,250 counsel fees and suit money, which she accepted and retained. She thereafter appealed from the whole decree, and demanded a new trial in this court of the entire case. On motion to dismiss her appeal for the reason that she had accepted benefits under the decree.

*Held*, that inasmuch as on a trial of the whole action in this court, or by the district court, if this court should remand it to that court for a new trial, the court might find such allowance excessive, or that the appellant was not entitled to any allowance for the purpose named, she is estopped from maintaining this appeal from the decree of the district court.

**Appeal and Error—Dismissal Without Prejudice.**

2. Under rule No. 36 (91 N. W. 13), providing that the dismissal of an appeal is in effect an affirmance of the judgment appealed from, unless expressly made without prejudice to another appeal, an appeal from a whole divorce decree will be dismissed without prejudice, where appellant's right to appeal from a part of the decree only is not determined.

Action by William P. Tuttle against Louise J. Tuttle. Judgment for plaintiff, and defendant appeals. On motion to dismiss. Dismissed without prejudice.

*Cochrane & Bradley* and *Newton & Dullam*, for appellant.

*Ball, Watson, Young & Lawrence*, for respondent.

SPALDING, J. This is a motion to dismiss an appeal taken by the defendant. Plaintiff brought an action for divorce against the defendant, who appeared and answered, denying the allegations of the plaintiff's complaint, and demanding a divorce in her favor. In her prayer for relief she demanded alimony in the sum of $300 per month during the pendency of the action, sufficient means to pay counsel fees and procure witnesses and evidence to properly defend and prosecute the action, and the necessary funds to defray her expenses for transportation from Chicago to Bismarck, and that she be granted an absolute divorce, and be awarded her just and equitable part of the property accumulated by defendant and plaintiff. On the 27th day of December, 1907, in response to a motion made by defendant, supported by affidavit, demanding that the plaintiff be ordered to pay her attorneys a reasonable sum of money to defray the expenses of the action, including procuring witnesses from the city of Chicago, and other places, and for the taking of depositions, and for a further sum of alimony in the sum of $500 per month during the pendency of the action, the court entered an order directing the plaintiff to pay her the sum of $300 on the first day of each month, commencing on the first day of January, 1908, during the pendency of the action, and the further sum of $250 to Cochrane & Taylor for attorneys' fees and expenses already incurred in the action. The sums specified were duly paid. The action came to trial in December, 1908, and resulted in a decree being entered granting the plaintiff a divorce. No reply was served to defendant's cross-complaint or counter-claim, but an inspection of the records leads to the conclusion that the suit was tried on the theory that one had been served, and that thereby defendant waived a reply. Included in the findings and judgment is a provision whereby plaintiff agreed, and was required, to pay defendant the sum of $300 per month toward her support. The decree also requires plaintiff to pay the attorneys for the defendant the sum of $750 further attorney's fees and the sum of $500 to pay witness' fees and other expenses which had been incurred in the conduct of the defense. The decree was entered on the 9th day of February, 1909. Subsequently a case was settled, and an appeal taken and a new trial of the entire case demanded.

The motion to dismiss the appeal states the grounds as follows: "(1) That the said Louise J. Tuttle, defendant and appellant, is

precluded and estopped from appealing from the judgment of the said district court above referred to and more specifically referred to in the affidavit hereto attached, in that she has taken, received, and accepted benefits under the said judgment of the said district court, and has enjoyed, and is enjoying during the pendency of said purported appeal, advantages, benefits and moneys granted to her under the judgment of said district court; (2) that the defendant and appellant, the said Louise J. Tuttle, in said purported appeal has separated and divided the judgment from which said purported appeal is taken, and accepts a portion of said judgment of said district court, and attempts to appeal from the remainder." On the 8th day of February, 1909, respondent's attorneys transmitted to attorneys for appellant a copy of the findings, which it was stated had already been signed, and separate checks for the items mentioned, including one for $300 for the first month's maintenance. The attorneys for appellant returned the latter check, but retained those for $750 attorney's fees and $500 expense money. It is the retention of these checks that it is claimed constitutes an acceptance of benefits under the decree. A majority of the court is of the opinion that acceptance of these checks estops the defendant from appearing and demanding a trial de novo of the whole case. In Tyler v. Shea, 4 N. D. 377, 67 N. W. 468, 50 Am. St. Rep. 660, it is held that the plaintiff cannot accept what the judgment gives him, and then by appeal pursue a course which may overthrow the right of which he has availed himself, and it seems to make the test this, namely: That if a reversal of the judgment and a new trial may result in the decision showing that the plaintiff was not entitled to what the former judgment gave him, then the appeal should be dismissed on showing that a benefit has been accepted. In Williams v. Williams, 6 N. D. 269, 69 N. W. 47, it is said: "The test is this: Suppose the judgment should be reversed, will the appellant thus hold some substantial advantage to which she would not have been entitled had not the judgment been rendered?"

An application of these tests to the case at bar leads to the conclusion that, the defendant having retained these benefits under the decree, it would be possible for this court to hold, on a trial de novo, required by the statute, that the award of counsel fees and expense money made by the district court was excessive, or that the defendant was not entitled to any allowance for such purposes, or if this

court should determine, as it has the power to do, that this case should be remitted to the district court for new trial, that court might arrive at a different conclusion from the one pronounced in the judgment appealed from, on this question. It is contended that these items were conceded and inserted in the judgment voluntarily by the respondent. This may be true as to the fact of allowing the appellant something for attorney's fees and suit money, but an examination of the record fails to disclose that amount was conceded or fixed by the voluntary act of the respondent, and it appears to have been the act of the court. If this is correct, the amount of such allowance, at least, should be open to review on appeal from the judgment demanding a review, as appellant has demanded, of the whole case. Rule 36 (91 N. W. x i i i) of this court provides that the dismissal of an appeal is in effect an affirmance of the judgment appealed from, unless the dismissal is expressly made without prejudice to another appeal. The question of another appeal is not before us; but, in view of the provision of rule 36, and without holding that appellant either may or may not maintain an appeal and demand a review of only a part of the questions decided, but under the impression that no appeal will lie, we dismiss the appeal without prejudice. This is done to enable her counsel to protect her rights, if she has any left to protect.

MORGAN, C. J., and FISK and CARMODY, JJ., concur. ELLSWORTH, J., disqualified.

124 N. W. 429.

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CADY WEBSTER v. COLIN McLAREN.

Opinion filed November 6, 1909.

**Accord and Satisfaction—Consideration—Pleading—Evidence.**

1. An answer does not state nor does the evidence show, a defense of accord and satisfaction when it states or shows only that there was a computation of the amounts mutually due between the parties, and that it was agreed that the accounts due should mutually offset each other, although one sum was less than the other. There is no showing nor allegation that there was any consideration for the agreement, or that it was executed by satisfactions, releases, or payment pursuant to such agreement, or that there was any dispute between the parties as to the amount due.

**Trial—Judgment Notwithstanding the Verdict.**

2. A motion for judgment, notwithstanding the verdict should not be granted, unless it appears fairly that the defect in pleading or insufficiency of evidence cannot be supplied on another trial.

Appeal from District Court, Cavalier county, *Kneeshaw*, J.

Claim and delivery by Cady Webster against Colin McLaren. Judgment for defendant, and plaintiff appeals.

Reversed.

*Fred Smith*, for appellant.

Partial performance does not extinguish an obligation. Carpenter v. Chicago M. & St. Ry. Co., 7 S. D. 584, 64 N. W. 1120; Troy Mining Co. v. White, 74 N. W. 236; Anderson v. First National Bank, 4 N. D. 182, 59 N. W. 1029; Attorney Gen'l. v. Supreme Council, A. L. H., 81 N. E. 966; Eckert v. Wallace, 75 N. J. Law, 171, 67 Atl. 76; Melroy v. Kemmerer, 67 Atl. 699, 11 L. R. A. (N. S.) 1018, and note; Peachy v. Witter, 63 Pac. 468; Keller v. Strong, 73 N. W. 1071; Grinnell v. Spink, 128 Mass. 25; Upton v. Demis et al., 94 N. W. 728; Hoidale v. Wood, 93 Minn. 190, 100 N. W. 1100.

Plea must allege what was done or given in satisfaction and its acceptance. 1 Cyc. p. 343.

*Cleary & McLean*, for defendant.

MORGAN, C. J. Action in claim and delivery for property covered by a chattel mortgage. The jury found in favor of the defendant, and the plaintiff appeals from the judgment rendered on the verdict.

The errors specified in the settled statement of the case relate to the defense of accord and satisfaction, and whether such defense was properly pleaded in the answer and sustained by the evidence The sufficiency of the answer was not attacked by demurrer, but by objections to the admission of any evidence in support of its allegations. Although the action had been pending for a long time, this defense was not pleaded until after the plaintiff had rested her case at the trial. Leave to file an amended answer setting up this new defense was opposed by the plaintiff, but the court permitted it on condition that, if it appeared later that plaintiff was taken by surprise, a continuance would be granted. There was no request for a continuance, which renders any objection to this ruling unavailing, even

if it be conceded to have been error to allow the filing of the answer at that time. The practice of delaying amendments to pleadings until at the trial is not commendable, and to permit such amendments without terms may lead to injustice, which is not avoided or remedied by granting a continuance as a condition of allowing an amendment.

Plaintiff objected to the filing of the amended answer upon the further ground that it failed to set forth any defense. It remains therefore, to determine whether the answer states a defense of an accord and satisfaction. After reciting several items of indebtedness—from the plaintiff to the defendant—the aggregate amounting to less than the amount due on the two notes to plaintiff and A. P. Webster, the answer alleges "that after these matters have been computed, as aforesaid, and the result arrived at as set forth in the last preceding paragraph, it was mutually agreed between the said Webster and this defendant that the amount due on the account of said Webster to this defendant should be applied to the satisfaction of the amount due from the defendant on the two notes set forth in the complaint, and that the said A. P. Webster should thereafter be released and discharged from any liability to this defendant by reason of said account; that the said A. P. Webster agreed to accept said discharge and release of said liability aforesaid as a full and complete satisfaction and discharge of any liability of this defendant for and on account of the said two notes, aforesaid: that this defendant and the said A. P. Webster thereupon separated with the mutual understanding that the said account of the said Webster to this defendant and the indebtedness of this defendant on the two notes aforesaid had been, and were, reciprocally satisfied and extinguished." This alleges an agreement of accord, whereby plaintiff and A. P. Webster agreed to accept less than due to them, and it alleges an agreement of satisfaction, but it does not allege any fact showing an actual execution of the agreement. It fails to allege any dispute as to the mutual accounts, nor is it alleged, directly or inferentially, that there was any consideration for the agreement. It therefore fails to allege all the facts necessary to a pleading of an accord and satisfaction. The sufficiency of the evidence to sustain a defense of accord and satisfaction is challenged, and the particulars wherein the evidence is claimed to be insufficient are pointed out in a motion for a new

trial. The sufficiency of the evidence was also challenged by a motion for a directed verdict, made by the plaintiff at the close of the case.

Before considering whether there was any evidence to sustain an accord and satisfaction we will briefly state the principles governing an accord and satisfaction as defined by our statute and construed by the authorities. Section 5269, Rev. Codes 1905, reads as follows: "An accord is an agreement to accept in extinguishment of an obligation something different from or less than that which the person agreeing to accept is entitled to." Section 5270 reads: "Though the parties to an accord are bound to execute it yet it does not extinguish the obligation until it is fully executed." Section 5271 reads: "Acceptance by the creditor of the consid-sideration of an accord extinguishes the obligation, and is called satisfaction." From these provisions it seems that something must be done more than to agree to the taking of a less sum than is due, or a different thing, before an accord and satisfaction are brought about or consummated. The agreement of accord must be executed. In this case there was nothing done but to agree that the indebtedness of the plaintiff to defendant and the notes of defendant to plaintiff should be deemed to offset each other. There was nothing done further than to go over the running account from the plaintiff to defendant and make a computation as to the sum due. There was no payment of any sum under the agreement, no passing of receipts in full or satisfaction of the mortgage. On the computation of the sums mutually due, it appeared that there was a small balance due the plaintiff and A. P. Webster on the notes. There was no payment of this sum, and there was no new consideration for the agreement of accord.

It is a general and elementary principle that a mere agreement to accept less than the full amount due is not binding unless based or some new consideration and followed by an acceptance of the sum in full satisfaction. Furthermore, there was no dispute betwwen the parties as to what was due between them. Conceding that the statement of the defendant as to what occurred between them when the mutual accounts were gone over is true, although disputed by the evidence of the plaintiff's witness, it is insufficient to show an accord and satisfaction. There must be a disputed account, or an acceptance of less than what is due in full satisfaction

of the whole claim, based on some new consideration for such agreement. A mere agreement to accept less than is due, without any consideration, where there is no dispute, is not an accord and satisfaction. The following authorities sustain this general principle: 1 Cyc. p. 311; Rued v. Cooper, 119 Cal. 463, 51 Pac. 704; Creighton v. Gregory, 142 Cal. 34, 75 Pac. 569; Prairie Grove Cheese Manufacturing Company v. Luder, 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085; Grinnell v. Spink, 128 Mass. 25; Carpenter v. Chicago M. & St. P. Ry. Co., 7 S. D. 584, 64 N. W. 1120; Eckert v. Wallace, 75 N. J. Law, 171, 67 Atl. 76; Flenor v. Flenor, 99 S. W. 258, 31 Ky. Law Rep. 543. On the question of accord and satisfaction there was no question of fact to submit to the jury, and the motion for a directed verdict should have been granted. Plaintiff relies on an exception to an order made by the district court denying a motion for judgment notwithstanding the verdict. There was no error in denying that motion. There may well be different or additional testimony on another trial.

It is claimed that the defendant was estopped to show that certain property was never in his possession, for the reason that he had given a bond for the delivery of the property to him, and acknowledged by the recitals of the bond that the property had been taken from his possession and questions tending to bring forth the fact of such admission were objected to, and the objections overruled by the court, and these rulings were excepted to by the plaintiff. The abstract does not show that the property concerning which these questions were asked was taken from the defendant at the commencement of the action. The plaintiff's affidavit for the writ of replevin is not incorporated in or made a part of the abstract. Hence this question is not considered or passed upon.

The judgment is reversed, a new trial granted, and the case remanded for further proceedings. All concur.

123 N. W. 395.

## STATE OF NORTH DAKOTA v. W. H. WINCHESTER, JUDGE OF THE SIXTH JUDICIAL DISTRICT AND THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT, STATE OF NORTH DAKOTA.

Opinion filed November 5, 1909.

**Criminal Law—Change of Venue—Discretion of Court.**

1. Construing section 9931 of the Revised Codes of 1905, which provides, in substance, that the state's attorney, on behalf of the state, may apply for a removal of a criminal action, and the court, being satisfied that it will promote the ends of justice, may order such removal, *held,* that the granting or denying of an application duly made by the attorney general for a change of the place of trial of a criminal action on the ground that an impartial trial cannot be had in the county where the action is pending is a matter within the sound discretion of the court to which the application is made, and its ruling will not be disturbed except for an abuse of discretion.

**Criminal Law—Change of Venue—Jury.**

2. The fact that the defendant as sheriff subpoenaed the jury might be sufficient cause for a challenge to the panel, but is not cause for a change of venue.

**Criminal Law—Change of Venue—Discretion of Court.**

3. Upon the showing in this case this court is not prepared to say that there was an abuse of discretion in denying the motion of the Attorney General for a change of venue.

Original application by the State of North Dakota for a writ of certioriari to the district court of the Sixth Judicial District and the Honorable W. H. Winchester, judge thereof.

Writ denied.

*Andrew Miller, Atty. Gen.,* for the State.

*Newton & Dullam,* for respondent.

CARMODY, J. This is an application for an original writ of certiorari on behalf of the state, the plaintiff, in State v. Duncan J. McGillis. On the return day both parties appeared by counsel, submitted their arguments, and stipulated that the case might be disposed of on its merits on the moving papers of the Attorney General and the return of the respondent.

On June 1, 1909, the Attorney General filed an information in the district court of Burleigh county charging Duncan J. McGillis with the crime of knowingly permitting a building owned by him to be used for the purpose of unlawful dealing in intoxicating

liquors in violation of law. On the same day he pleaded not guilty to said information. On June 3d the state, by the Attorney General filed in said district court a motion for an order changing the place of trial of said action. This motion was based upon the affidavit of the Attorney General, which alleged in substance: That in his opinion the state could not have a fair and impartial trial in Burleigh county. That the people of said county were so prejudiced against the prosecution and conviction of offenders against the various statutes of this state prohibiting the illegal sale of intoxicating liquors and unlawful use of buildings for such purpose that said laws have ever since their enactment been openly and notoriously violated by numerous and divers persons in the city of Bismarck and various parts of the county within the knowledge and tacit approval of the people generally and of the peace officers, and that attempts to punish offenders against such laws have generally been met with determined resistance and refusals to convict or indict without regard to the evidence furnished by the prosecution, and that at this term of court one Bartheau on his third trial for violation of the prohibition law was acquitted. That the defendant in this case is the duly elected, qualified, and acting sheriff of this county, and as such sheriff, by himself and his deputies, subpoenaed the present jury, and as such sheriff, through himself and his deputies, has charge of such jury. That, in addition to being sheriff, he is an active politician, and one James Myers, who is now under arrest for violation of the prohibition law, was at the time of his arrest a tenant of the defendant herein in the defendant's building described in the information. That another defendant, Joseph Higgins, who was arrested at the same time charged with keeping a common nuisance was a tenant of one E. G. Patterson. That said E. G. Patterson for many years has been a prominent politician in this county, and is now chairman of the board of county commissioners. That said E. G. Patterson and the defendant McGillis up to this date and for many years past have been at all times directly or indirectly interested in places where intoxicating liquors have been sold in violation of the law, or directly engaged in the sale of intoxicating liquors in violation of the law, and for many years have been the leading influence in this county that has made possible the prevention of the enforcement of the prohibition law, as affiant is informed

and verily believes, and that the prestige of said E. G. Patterson and of the said Duncan J. McGillis, when combined, is so great that affiant believes that a jury cannot be had in the county that would give the state a fair trial in the case of the state of North Dakota against Duncan J. McGillis. That while said motion for a change of the place of trial was still pending and undetermined, and on June 4, 1909, the Attorney General made a motion and requested the respondent to call in a judge of another district court of this state to preside at the trial of said action. On June 10th the respondent denied the motion of the state for a change of the place of trial, and requested the Hon. W. C. Crawford, Judge of the Tenth Judicial District, to preside at the trial of said action in Burleigh county. Thereafter, and on June 11th, the state, through the Attorney General, setting forth the facts and proceedings above stated, procured an order from a judge of this court commanding the respondent to show cause before this court on June 15, 1909, why an appropriate writ should not issue requiring and commanding him to transmit to this court all pleadings, orders, affidavits and records herein and the records of the proceedings had in said criminal action entitled, "The State of North Dakota v. Duncan J. McGillis," to the end that this court may review the rulings thus made. On the return day a verified answer to the order to show cause was filed on behalf of the respondent, which states the reasons for his action, in substance, as follows: Admits the filing of the information against Duncan J. McGillis, his plea of not guilty, the motion for the change of the place of trial of the action of the state of North Dakota against said Duncan J. McGillis. That the Attorney General made the affidavit mentioned in his application for the order to show cause which was used in support of the motion for a change of the place of trial; the application of the state to have respondent call in another judge to preside at the trial of said action. That he called in the Honorable W. C. Crawford, judge of the Tenth Judicial district. That Duncan J. McGillis, defendant in said criminal action, filed his own affidavit, the affidavit of E. G. Patterson, G. F. Dullam, one of the attorneys for the defendant, and of some 30 or more persons resident within Burleigh county and the city of Bismarck. On behalf of said defendant, the affidavits admitted that Duncan J. McGillis, the defendant, is sheriff of Burleigh county, and that

E. G. Patterson is chairman of the board of county commissioners. That defendant, by himself and his deputies, subpoenaed the present jury, and by himself and his deputies has charge of such jury, and denied, in substance, all the other allegations in the affidavit of the Attorney General, and stated that in the opinion of each the state could have a fair and impartial trial of the action of the State against Duncan J. McGillis in Burleigh county. That in view of all the affidavits mentioned, and in consideration thereof, the said respondent then and there became and was convinced that no cause existed sufficient to move the discretion of said court or to justify the removal of the action against said Duncan J. McGillis from said Burleigh county to some other county for trial, either within or without the Sixth Judicial District, and he therefore denied the motion of the Attorney General to change the place of trial in said action. It is, and has been, the universal practice of this court on the return of an order to show cause to pass upon the merits on all applications for original writs where the parties stipulate that this may be done, and also stipulate that the facts are as set forth in the moving papers and the respondent's return. Such stipulations were made in this case.

There are two questions involved in this case: One, whether section 9931 of the Revised Codes of 1905 is mandatory. Said section reads as follows: "The state's attorney, on behalf of the state, may also apply in a similar manner for a removal of the action, and the court, being satisfied that it will promote the ends of justice, may order such removal upon the same terms and to the same extent as are provided in this article, and the proceedings on such removal shall be in all respects as above provided." The other, whether the facts presented show that the respondent abused his discretion in refusing to grant the motion for a change of the place of trial. We are convinced that section 9931, supra, is not mandatory, and that the state is not as a matter of right entitled to a change of the place of trial in a criminal action. In State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686, this court, speaking through Judge Corliss, says: "The question whether a fair and impartial trial cannot be had in the county in which the action is triable must be settled by the judge. It must be made to appear to his satisfaction by affidavit that a fair and impartial trial cannot be had in that county. Having no interest in

the question, the law very properly leaves it to him for a decision." In this case, as in any other case before an appellate court, we cannot go outside of the record and assume the possible existence of other facts than those disclosed by the record in order to sustain or reverse the decision under review. The granting or denying of an application duly made for a change of the place of trial of an action on the ground that an impartial trial cannot be had in the county where the action is pending, is a matter within the sound discretion of the court to which the application is made, and its rulings will not be disturbed except for an abuse of discretion. Ross v. Hanchett, 52 Wis. 491, 9 N. W. 624; Giese v. Schultz, 60 Wis. 449, 19 N. W. 447; State v. Hall, 16 S. D. 6, 91 N. W. 325, 65 L. R. A. 151; Territory v. Egan, 3 Dak. 119, 13 N. W. 568; People v. Webb, 1 Hill (N. Y.) 179; People v. Baker, 3 Abb. Prac. (N. Y.) 42; Commonwealth v. Balph, 111 Pa. 365, 3rd Atl. 220; Commonwealth v. Delamater, 145 Pa. 210, 22 Atl. 1098; People v. Peterson, 93 Mich. 27, 52 N. W. 1039; People v. Fuhrmann, 103 Mich. 593, 61 N. W. 865; People v. Vermilyea, 7 Cow. (N. Y.) 137.

In People v. Baker, supra, the court says: "There are many palpable reasons why trials in criminal cases should ordinarily be had in counties where the transactions which give rise to them occurred, and a change should not be made except for forcible and clearly established causes." In People v. Peterson, supra, the court says: "It cannot be said but that the question rested within the sound discretion of the trial court to judge and determine the sufficiency of this showing for a change of venue." The Attorney General made a very strong showing in behalf of the state, yet we cannot say, after a careful review of his affidavit and the return of the respondent, that the district court abused its discretion in denying the motion of the state to change the place of trial.

The fact that the defendant, as sheriff, by himself and his deputies subpoenaed the jury, might be sufficient cause for a challenge to the panel, but is not cause for a change of venue. It follows, therefore, that the application for the writ must be denied, and the temporary restraining order dissolved, and it is so ordered.

MORGAN, C. J. and FISK, J., concur. SPALDING and ELLSWORTH, J. J., dissent.

SPALDING, J. (dissenting.) On a somewhat superficial examination of the record and the questions involved in this application, I was disposed to concur in the majority opinion, but, after giving it more careful attention, I am unable to do so. The record before us contains in full the motion papers, including the affidavit supporting the application of the Attorney General for a change of the place of trial used in the district court, and it is conceded in the majority opinion that that official made a strong case. It is at least customary to include in or annex to the return a copy of the record made in the lower court. This was not done in this instance. It is unnecessary to consider whether the omission in itself is fatal to the respondent's case, because it was stipulated on the hearing in this court that we might consider and decide the application for the writ upon the papers before us. The original record, including the affidavits submitted to the district court by the respondent cannot be considered because, as indicated, they are not contained in the record. The Attorney General having made out a case, we are limited in determining whether the judge of the district court legally exercised his discretion in denying the application, to a consideration of the competent and material statements in the return. The Attorney General charged that he had good reason to believe and did believe, that the state could not have a fair and impartial trial of said action in Burleigh county. Among the reasons given for this statement were that the people of the county were so prejudiced against the prosecution and conviction of persons for offenses against the various statutes prohibiting illegal traffic in and sale of intoxicating liquors and the unlawful use of buildings for such purposes, and permitting buildings and premises to be used therefor, that it was common knowledge and the commonly expressed opinion of the people of the county that the state could not, in Burleigh county, obtain a fair trial for the crime charged, or in any case where the crime charged was the violation of the prohibition law . That the laws of the state on that subject and the maintenance of premises for such unlawful use and of knowingly permitting such use by owners of buildings had ever since the enactment of such laws been openly and notoriously violated by numerous persons in the city of Bismarck and other parts of the county with the knowledge and tacit approval of the people generally and of the peace officers, and that the attempt to

punish offenders against such laws had generally met with determined resistance and refusal to convict or indict without regard to the evidence furnished by the prosecution; that at the term of court then in session, in the case of State v. Bartheau, the defendant was acquitted on his third trial for violation of the prohibition law, notwithstanding the fact that the Attorney General believed that the evidence introduced was more than sufficient to warrant a conviction, and that such acquittal could not have been by any reason of any reasonable doubt of the guilt of said defendant in the minds of the jurors, but was solely on account of the prejudice against the enforcement of the law, and reference was made in support of that contention to the reporter's record of the evidence introduced on such trial, and that at the first trial in said case at a former term of the district court for Burleigh county, Hon. W. J. Kneeshaw then presiding, reprimanded the jury for its disagreement, (and that in such case the evidence introduced was substantially the same as in the trial at which said defendant was acquitted; that the defendant McGillis was the duly elected, qualified, and acting sheriff of said county, and that he himself, and through his deputies, subpoenaed the members of the jury, was in charge of the jury, the courthouse, jury rooms, jail, and courthouse premises, whereby he has easy and ready access to the jury and witnesses in attendance on such court; that said defendant, besides being sheriff, was an active politician of the county, and that at the time of his arrest one James Meyers was his tenant in the building described in the information and that Meyers was also under arrest; that in the case of State v. Higgins, charged with keeping and maintaining a common nuisance as defined by the prohibition law, the defendant Higgins was arrested at the same time that the herein named parties were arrested, and was a tenant of one Patterson in the building described in the information in the last mentioned case, and that Patterson had for many years been a prominent politician in the county, and was then chairman of the county commissioners thereof, and that the prestige of said Patterson and of the respondent, when combined, was so great that in his belief a jury could not be had in the county that would give the state a fair trial in the case of State v. McGillis; that both said Patterson and said McGillis up to that date had for many years last past been

at all times directly or indirectly interested in places where intoxicating liquors had been sold in violation of law, or directly engaged in the sale of intoxicating liquors in violation of law, and were the leading influences in Burleigh county that had made possible the prevention of the enforcement of the prohibition law, and that in his belief the interest of said Patterson and of the defendant McGillis in preventing conviction would be a common interest for the protection of their respective properties and interests, and that their united efforts would be exerted to prevent the state from obtaining a fair trial; that the prejudice existing in the county against the enforcement of the prohibition law was general, and that among other reasons for his belief was his knowledge of the sentiment of the public obtained through a residence of four years, part of such time having been spent as prosecuting official whose duty it was to prosecute violators of such law, and to inform himself as to general conditions and public sentiment. These allegations are met in the return, as far as they are met, by quotations from the affidavits of the defendant McGillis, of Patterson, and of Dullam, one of defendant's attorneys, and, as far as the recitations of the order of the trial court denying the change of venue indicate the affidavits of the three persons named constitute the only evidence submtited by the defendant. It will be observed that, although there is no allegation that Patterson had been informed against for permitting his building to be used for illegal purposes under the prohibition law, yet it is positively stated that a tenant of his in such building had been arrested on the charge of violating that law. So it is apparent that Patterson stands in nearly the same relation to the prosecution as does defendant McGillis. The return states that McGillis in his affidavit alleges that the charge that he at all times has been, or is, directly or indirectly, interested in places where intoxicating liquors have been sold in violation of law, or directly engaged in the illegal sale of such liquors, and had for many years been the leading influence in the county that had made possible the prevention of the enforcement of the law, is false, and without foundation, and denies that he has any particular prestige, political or otherwise, but alleges that he was defeated for public office two years ago in the city of Bismarck; that the prestige of said Patterson was not as stated in said affidavit of the Attorney General, but that

the said Patterson had twice been defeated for office since the spring of 1907; and that statements that Patterson and the affiant were using, or would use their influence to prevent the enforcement of the prohibition law, are also untrue. This affidavit is largely denials that affiants have, at all times, been guilty of the acts alleged. The affidavit of Dullam is stated in the return of respondent to be to the effect that during the term of court then sitting four cases had been submitted to juries in which defendants were charged with unlawfully selling intoxicating liquors, in three of which verdicts of guilty were found, and only one defendant was acquitted; that other defendants have pleaded guilty to not registering their United States Government licenses; that he had heard many jurors examined as to their qualifications who testified almost without exception that they were in favor of enforcing the provisions of the prohibition law; that he did not believe that Patterson had the prestige ascribed to him by the Attorney General; and that he believed that the state could and would have a fair and impartial trial. He fails to disclose how many of the three persons convicted were convicted in their absence. The remaining portion of his affidavit presents a quibble on the distinction as to public sentiment between the crime of selling intoxicants and the crime of permitting a building to be used for such purpose illegally. The affidavit of Patterson is in all material respects a duplicate of that made by McGillis, and alleged that the charge that he at all times for many years has been directly or indirectly engaged in the sale of intoxicating liquors, etc., is untrue. The return also states that the affidavits of some 30 or more persons, residents of Burleigh county, were used on the application, but it makes no reference to their contents. The remainder of the return is devoted mostly to showing that the court exercised its legal discretion in denying the change, and in setting forth its construction of the law regarding a change of the place of trial in criminal actions. In my opinion these affidavits do not meet the allegations supporting the application fully, and that the statements contained in such affidavits coming as they do from the defendant and another in a similar position are entitled to very little weight. Many of the statements are mere evasions of the Attorney General's allegations. The fact that McGillis has been defeated for office in the city of Bismarck is

immaterial when used to show that an impartial jury can be obtained. The city of Bismarck is but a small portion of the county of Burleigh, and, if such statement is entitled to any consideration, it can only apply to jurors drawn from the city of Bismarck. Patterson does not state what offices he has been defeated for, nor in what part of the county, but it does clearly appear that he was chairman of the board of county commissioners and McGillis sheriff of the county at the time they were claiming to be without political or other prestige. The statements of Dullam's affidavit are immaterial, and those of the 30 citizens cannot be considered because we do not know, and have no means of knowing, what they contained.

The order denying the application of the Attorney General recites that it was entered upon the affidavits of Andrew Miller on behalf of the state, and those of McGillis, Patterson and Dullam on behalf of the defendant, and makes no reference to the court having considered any other evidence or facts. The return is most carefully and ingeniously drawn, and is in the nature of a special plea. The quotations from the affidavits submitted by the defense in a very large degree evade the issue. As I have previously indicated, they are largely devoted to allegations that the parties named have not at all times for many years been engaged in violations of the law, or that their influence is not the leading influence in the town, or county, or that it has been exaggerated by the Attorney General. If the judge of the district court was at liberty to consider his own knowledge of conditions, the order does not state that he did so, or disclose what his knowledge was other than as derived from the affidavits mentioned. I am strongly impressed that, when the Attorney General in his application makes out a case for the change of the place of trial of a criminal action, it is mandatory upon the court to grant it. The English authorities cited in the case of Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762, 112 Am. St. Rep. 662, are not accessible, but the opinion in that case was written after a most searching and careful examination of all authorities bearing on the subject, and, if I read it aright, the court there found that by the common law of England on the application of the Crown or the Attorney General a change of the place of trial was granted as of course. It is also found that the common law was in force in such

proceedings in this state except in so far as the procedure was regulated by statute. The statute does provide for an application by the State's Attorney, but it does not pretend to regulate the procedure on the application of the Attorney General. Section 10320, Rev. Codes 1905, reads: "The procedure, practice and pleadings in the district courts in this state in criminal actions or in matters of a criminal nature in matters not expressly provided for in this code shall be in accordance with the procedure, practice and pleadings under the common law." The omission of the Legislature to make provision regarding the change in the place of trial on application of the Attorney General doubtless occurred for the same reason that so few authorities are found relating to a change on his application. It is stated in the Barry case at page 146, where it is said: "It is true that most of the reported cases on this subject are where the application was by the defendant. The reason for this is found in the fact that the Crown's right was an admitted one, whereas that of the defendant rested upon an exercise of the court's discretion, and the latter was therefore most frequently the subject of judicial inquiry. The Crown's right was seldom, if ever, challenged, and no case has been cited or found by us where it was denied." In this country the statutes of many of the states fully regulate the procedure. Likewise many of the statutes limit the right to a change of the place of trial from the county where the offense is charged to have been committed to the defendant, unless on the application of the state he waives his right to a trial in the county. For this reason a large proportion of the authorities cited in the majority opinion are not relevant. The Kent case is an authority only when the defendant makes the application. There is a distinction where no specific regulation is imposed by the statute between applications on the part of the defendant and those made on behalf of the state. If the granting of the change on the application of the state rests solely within the discretion of the trial court, in many counties where criminal statutes are in disfavor and are ignored by the people and the officials, the discretion of the trial judge in passing upon such applications is in practical effect non-reviewable, as follows from the majority opinion, and the state might as well abandon all attempts to protect the lives, the liberty, or the property of its subjects in such counties and submit at once, and as

gracefully as possible, to the domination of the criminal and lawless elements in some localities. I cannot agree that the rights of a single individual are any more sacred than are those of the people. The object of all statutes providing for a change of the place of trial is to secure justice and to guard against injustice, and it was never contemplated that the laws should be perverted to deny justice or protection to the sovereign people of the state by reason of local prejudice preventing the election of unbiased and fair officials whose duties it is to administer and execute the criminal laws. No court ought to place any such construction on our system of criminal procedure, unless the legislative branch of the government has made it clear by express language that it should do so, and even then its power might be questioned.

A statement in a paragraph of the return not heretofore referred to and not mentioned in the majority opinion requires notice. I quote: "That respondents are fully convinced and believe from their observations and knowledge of the situation existing in Burleigh county, N. D., wherein said action of the State of North Dakota v. Duncan McGillis is now pending, that both parties thereto may and will have a fair and impartial trial before the average jury that would be procured in such county." It is apparent that this statement is intended to bolster up and strengthen the conclusion of the district judge and the order denying the application for a change of the place of trial. It indicates that in reaching his decision he did not confine himself to a consideration of the evidence submitted by the parties, but that he also proceeded upon the theory that he might legally consider his own knowledge of the situation existing in Burleigh county. I do not attempt to discuss the correctness of this position, because it is unnecessary to do so, but I am satisfied that if he has a legal right to take into consideration the results of his own observations and his own knowledge, and render a decision either wholly or in part based upon his observations and knowledge of conditions without disclosing, either in the order denying the application or in his return, the extent and character of such knowledge and observations, his order is as much nonreviewable as though the statute or Constitution had made it so in express language. This court can never in such case determine to what extent the decision of the trial court was predicated upon its undisclosed knowledge de-

rived from sources independent of the evidence submitted by the parties. In most cases the trial court is bound to judge of the application as well as of the adequacy of the defense by a consideration of the evidence presented. See Ruff et al. v. Phillips et al., 50 Ga. 130; Scroggins v. State, 55 Ga. 380. And to admit that that court may take matters outside of the record, information obtained from whatsoever source, into consideration in arriving at its decision, or to hold in this case that there was not an abuse of discretion, when the fact that the court did not take such matters into account, as disclosed by his return, is not to hold that a change of the place of trial rests upon the sound legal discretion of the lower court, but is, in effect, to hold that in every instance where that court says it took into consideration evidence outside of the record, and fails to disclose the substance thereof, its decision is final, and that this court in such instances ceases to be a court of last resort, but that the district court, by its own act, constitutes itself the final arbiter of the rights of the public. This court can, in the presence of such a statement in a return, never say that the trial court abused its discretion. Had the order denying the application or even the return included a statement of the facts claimed to be within the knowledge or observation of the trial court relevant to the matters at issue, a different question would be presented. It would then be possible for this court to pass upon the exercise of the discretion of the trial court, but if that court can, as in effect follows from the majority opinion, determine such an application upon the knowledge possessed by the judge, and not imparted to him officially or in the shape of evidence the nature of which is not disclosed in the record made, it may be seriously questioned whether, in its supposed power to review the discretion of that court, this court may not, and should not, call into exercise the result of its own observations, and take judicial notice of facts transpiring in Burleigh county relating to the trial of those charged with violating criminal laws, the rarity of convictions even on conclusive evidence, and of facts and matters occurring at and relating to such trials in that court which are, and have been for many years, notoriously public, and of the present and past attitude of the public toward the subject.

In conclusion, I am satisfied that, if the writ carrying the change should only be granted on an abuse of discretion being shown, the

return is inadequate, and fails to meet the showing made by the Attorney General on behalf of the state, and that, in any event, on the application of the Attorney General and a case being made, the change should be granted as of course.

ELLSWORTH, J. (dissenting). The application presented by this case is that this court issue "a supervisory writ, requiring the district court of Burleigh county and Honorable W. H. Winchester, as the judge thereof, to certify to this court and the records, files and proceedings in a certain criminal action entitled the State of North Dakota v. Duncan J. McGillis, to the end that said records, files and proceedings may be reviewed by the Supreme Court, and justice may be done in the premises." In response to an order to show cause issued from this court, the respondents filed a return in which, after a lengthy showing directed entirely to the end that the Attorney General is not entitled to the writ applied for, they "protest that they shall not be required to transmit to this court, or be commanded to do so, all the pleadings, orders, affidavits, and records in said action of the State of North Dakota v. Duncan J. McGillis and all the records of proceedings had in the said criminal action, or any of them, and ask that said application therefor be disallowed and dismissed."

In my view, the only point presented to this court for decision is that of whether or not upon the application and showing made by the Attorney General the writ of certiorari should issue. The Attorney General does not make specific application for this writ; but it is apparent from his moving papers that the writ of certiorari is the only supervisory writ under which he can receive any relief whatever. This being the case, I think the application should be read as though it were expressly made for a writ of certiorari from this court to the district court of the Sixth judicial district. I believe that jurisdiction of this court to determine any of the points passed upon in the majority opinion is dependent entirely upon the writ and cannot be acquired by any other means. The moving papers, both of the Attorney General and of the respondents, are directed entirely to the point of whether or not the writ shall issue. The Attorney General applies for the issuance of a supervisory writ, and the respondents protest against it, and direct their entire showing to the point that they should not be required to do the things that will be required of them in case the writ issue.

The majority opinion seems to proceed on the theory that an oral stipulation of counsel made on the hearing to the effect that the proceedings may be disposed of on its merits on the showing made, dispenses with the necessity for the writ. This stipulation can have the effect of waiving the writ provided only that it appears the full purpose of the writ is accomplished by the return. It is apparent at a glance that such is not the case. Fragmentary excerpts from the record that was before the district court, together with the conclusions of persons interested in the outcome of this proceeding as to what the record contains and the legal construction to be placed on the statutes involved, cannot be said to bring before this court the evidential facts on which the district court acted. Yet the return contains only this as appears from the opinion of Judge SPALDING. I regard it as a matter of the highest importance that this court in deciding any of the very important questions presented upon this proceeding should have before it the entire record acted upon by the judge of the district court. Further than this, I believe that without such record this court is without jurisdiction to make any order in any manner affecting the ruling of the judge of the district court, whether he has regularly pursued the authority of such court or not. I can think of no reason deserving of the slightest weight why questions affecting the sovereignty of the state should be disposed of upon an incomplete, mutilated or imperfect record when this court has full power by the issuance of a prerogative writ to bring the entire record before it.

So far as the question may be properly considered, as to whether or not a judge of the district court is vested with a discretion authorizing him to deny a change of venue in a criminal case when application is made therefor by the Attorney General, as is shown to have been made in this case, I fully concur in the conclusions reached by Judge SPALDING. If such discretion is conceded to exist, however, upon the question of whether or not the district court abused its discretion in denying the change of the place of trial in the case of State v. McGillis, I am of the opinion that this court is precluded from taking any action whatever by reason of the fact that it has not before it the showing made to the district court. The application of the Attorney General upon its face discloses a state of facts which unquestionably authorizes this court

to issue a writ that will enable it fully to review these interesting and important questions, and in my opinion the writ of certiorari should issue.

122 N. W. 1111.

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TRI-STATE TELEPHONE & TELEGRAPH COMPANY, A CORPORATION, v. M. A. COSGRIFF, WILLIAM WHITMORE, SARAH BUSSEE, JAMES MCSHERRY AND FRANK COUFL, DEFENDANTS AND RESPONDENTS.

Opinion filed December 14, 1909.

**Streets and Highways—Eminent Domain—Damages—Evidence.**

1. In an action brought in the exercise of the right of eminent domain for the purpose of condemning to the use of a telephone company a strip of land wholly within the limits of a public highway for use as a telephone and telegraph line, it is improper to admit evidence to the effect that an owner of land abutting upon the highway has been accustomed for a period of years to use for agricultural purposes a portion of the highway between the traveled strip on the medium line of the same and his property line. The highway is dedicated to purposes of travel, and, in his use of it for agricultural purposes, the land owner was a trespasser without any right that can be recognized in law or considered of pecuniary value; and such testimony being entirely irrelevant and immaterial serves no purpose other than to improperly enhance in the minds of the jury the value of the strip taken and should have been excluded.

**Eminent Domain—Damages.**

2. The measure of damage for taking property in exercise of the right of eminent domain under the law of this state is the value of the landowner's interest in the land actually taken and the depreciation in value, if any, sustained at the time of the trial by land not taken upon the same tract, by reason of the appropriation of a part to the uses of the party condemning.

Evidence in which the attention of the witness is directed to the future value of the interest condemned, or of the value of the right sought to be acquired by the party condemning, rather than the rights and interest of the owner in the property taken is improperly received.

**Eminent Domain—Damages.**

3 A grove of trees growing upon, or adjoining, land sought to be condemned under the right of eminent domain is part of the real estate, and should be valued as such. Any damage to the trees growing upon

the strip taken by the appropriation of the land to the uses of the party condemning may be considered a diminution in value of the interest of the party owning the land. An instruction that a jury in such a case may consider as a proper element of damage, "such damage to the said groves and trees as will naturally and properly necessarily result in the course of time to said grove and trees by the construction, maintenance, and operation" of a telephone and telegraph line, is erroneous, in that it directs the attention of the jury to a future contingency, and not to the damage sustained by the property taken at the time of trial.

**Eminent Domain—Nominal Damages.**

4. The damage sustained by the owner of lands abutting upon a public highway by the taking of a strip immediately adjoining his property line for the purpose of constructing thereon a telephone and telegraph line, while it may be small in amount, is not as a matter of law merely nominal; but is substantial in the sense that the landowner is entitled to recover a sum sufficient to compensate him for all damage to the property actually sustained by him under the conditions.

Appeal from District Court, Grand Forks County, *Goss*, J.

Action by the Tri-State Telephone & Telegraph Company against M. A. Cosgriff and others, for the purpose of condemning certain real property to the uses of the plaintiff for a telephone and telegraph line in exercise of the right of eminent domain. A judgment was entered in favor of each of the defendants, and plaintiff appeals..

Judgment reversed and a new trial ordered.

*Bangs, Cooley & Hamilton,* for the appellant.

Courts allow only for property actually taken. Everett v. Union Pac. Ry. Co., 59 Ia. 234, 13 N. W. 109; Burt v. Wigglesworth, 117 Mass. 302; Co. v. Ring, 58 Mo. 491; Co. v. Elliott, 5 Nev. 358; Cummings v. Williamsport, 84 Pa. St. 472; Santa Anna v. Harlin, 99 Cal. 538, 34 Pac. 224; San Diego Land & Town Co. v. Neale et al., 78 Cal. 63, 20 Pac. 372; Brown v. Calumet River Co., 125 Ill. 600, 18 N. E. 283; Brunswick v. Union Depot Street Ry., etc., Co., 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; In re B. H. T. & W. Ry. Co., 22 Hun. 176; 5 Ency. of Evidence, 197.

Where property is taken that is subject to a public easement, damages are only nominal. Lewis, Eminent Domain, 500; See also Joyce on Electric Law, (1st Ed.) 321; Stetson v. Bangor, 60 Me. 313; Bartlett v. Bangor, 67 Me. 460; Walker v. Manchester, 58 N. H. 438; Clark v. Elizabeth, 37 N. J. L. 120; Baldwin v. Buffalo,

35 N. Y. 375; Baldwin v. Buffalo, 35 N. Y. 375; Matter of City of Brooklyn, 73 N. Y. 179; Sherer v. City of Jasper, 93 Ala 530; 9 So. 584; Danforth v. City of Bangor, 83 Me. 423, 27 Atl. 268; In re Adams, 141 N. Y. 297, 36 N. E. 318; Village of Oleon v. Steyner, 135 N. Y. 341, 32 N. E. 9; In re Department of Pub. Works, 53 Hun. 556; In re Wells St., 4 N. Y. S. 301.

The measure of damages where a telephone company takes a right of way is the value of the land actually taken for placing poles and the extent to which the value of the use of the portion between the poles and under the wires is diminished. St. Louis & C. R. Co. v. Postal Tel. Co. of Ill., 173 Ill. 508, 51 N. E. 382; Co. v. Katkamp, 103 Ill. 420; Co. v. Co., 120 Ala. 21, 24 So. 408; Mobile & Ohio Ry. Co. v. Postal Telegraph Cable Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403; Mobile & Ohio Ry. Co. v. Postal Telegraph Cable Co., 76 Miss. 631, 26 So. 370, 45 L. R. A. 223; Co. v. Co., 104 Fed. 623; 2 Lewis Eminent Domain, 490; Joyce on damages, 2204; 15 Cyc. 701, 711 and 724; Postal Tel. Cable Co. of Utah v. Oregon S. L. R., 65 Pac. 735.

Where the property can be used only for a particular purpose, damage to the remainder is measured by the extent to which it is rendered less valuable for the use to which it is devoted. 2 Lewis Eminent Domain, 485, p.1076; Co. v. Katkamp, 103 Ill. 430; St. L. I. C. R. et al. v. Postal Tel Co., 173 Ill. 508; 51 N. E. 382; Mobile & Ohio Ry. Co. v. Postal Telegraph Cable Co., 76 Miss. 631, 26 So. 370, 45 L. R. A. 223; First Parish v. Co., 7 Gray 106; Co. v. Chicago, 166 U. S. 226; In re 9th Ave. 45 N. Y. 729; In re Albany Str., 11 Wend. 149.

Electric poles for street cars cause no damage. Taggart v. Newport Street Railway Co. (R. I.) 19 Atl. 326; Rafferty v. Central Traction Co. (Penn.), 23 Atl. 884; Williams v. Electric Street Ry. Co. (Ark.), 41 Fed. 556.

*Skulason & Burtness,* for respondent.

Abutting owner owns to center of highway and may use such strip. Jones on Telegraph and Telephone Companies (1907) Secs. 109, 119, 120, 121; Lewis on Eminent Domain, Sec. 131 and cases cited; 1 Enc. of Law, 236, 242; Postal, etc., Co. v. Eaton (Ill.) 39 L. R. A. 722; Elliott, Roads and Streets, p. 519.

Respondents are entitled to substantial damages, Jones on Telegraph and Telephone Cos., Sec. 109, 119, 120, 121; Lewis on Eminent Domain, Sec. 131 and 478 and cases cited; City of Buffalo v. Pratt, 30 N. E. 233; Kreuger v. Wisconsin Tel. Co., 81 N. W. 1041.

ELLSWORTH, J. The proceeding in which this appeal is taken is a civil action brought under the provisions of chapter 36 of the Code of Civil Procedure (sections 7574-7603, Rev. Codes 1905) for the exercise of the right of eminent domain upon certain real property belonging to the defendants. The use for which the condemnation of the property is sought is a right of way upon which to construct, maintain, and operate a telephone and telegraph line. The real property brought in question by the proceeding is situated in Grand Forks county, and, in the case of each defendant, abuts upon a public highway 4 rods or 66 feet in width. The right of way sought to be condemned is included within a strip 8 feet in width wholly within the limits of the highway immediately adjoining the property line of the defendants. The line of poles as planned by the plaintiff will be set midway in this 8-foot strip, 4 feet from the property line of the defendants and 132 feet apart, or about 40 to the mile. Prior to the time the action was brought the board of supervisors of the civil township having control of the highway duly granted to plaintiff the right to occupy the highway for the use mentioned. This action is brought for the purpose of condemning the interests of the defendants in the strip of land to be used as a right of way. Each of the defendants has made answer, and alleges that a damage will accrue to him and to his abutting land by the taking and use of an 8-foot strip in the location described for a telephone and telegraph line. The question of the amount of compensation to be paid each of the defendants for his interest in the land condemned to such use, was submitted to one jury with a stipulation that a separate verdict might be rendered and a separate judgment rendered in each case. In the case of the defendant Cosgriff, the jury found that the value of his right and interest in the land embraced in the highway and taken by plaintiff was the sum of $15; that the damage to his abutting property was the sum of $50, and the detriment or damage to certain trees growing upon a portion of the tract abutting the highway was the sum of $20. Judgment was entered upon this verdict, and

the plaintiff appeals therefrom, specifying numerous errors occurring upon the trial in the rulings and instructions of the court. A stipulation of counsel provides that the case on appeal may be abbreviated to include only the evidence offered in reference to the claim for damages of defendant, Cosgriff, and that the judgments of all the defendants be bound and affected by the decision of this court in that case. Plaintiff groups his many specifications of error in an assignment of eight classes. Of these, in the view we take of the case, it will be necessary for us to consider only three or four.

The defendant Cosgriff testified as a witness on his own behalf, and stated that the highway abutting his land along which the right of way sought to be condemned extends is put to public use by pedestrians and carriages only for a width of about 10 feet, or 5 feet on each side of the medium line, which leaves a strip between the traveled portion and his property line of about 28 feet not traveled upon. He was then asked this question: "Q. Have you in the past been in the habit of using that 27 or 28 foot strip for agricultural purposes?" The question was objected to by plaintiff as immaterial, irrelevant and incompetent in its bearing upon the issue of the value of the land to defendant. The attorney for defendant thereupon stated: "I propose to show what has been the regular uniform custom in the past as to the use of that strip as having some bearing upon the value at the present time and its probable value in the future." The objection of plaintiff was thereupon renewed upon the same grounds and was overruled by the court; and the defendant answered the question in the affirmative.

The use of a highway for the planting, growing, and gathering of a crop has rather the character of a permanent appropriation than of the temporary and reasonable use permitted to an abutting landowner. So, whether or not, as contended by plaintiff, defendant has incurred liability under a penal statute by his intrusion upon and interference with the highway, it is readily apparent that he exercised such privileges upon those portions of the highway not used for travel, not as a matter of right, but wholly through indulgence of the road supervisors. Elliott, Roads & Street (2nd Ed.) p. 694. The highway is dedicated to purposes of travel, and defendant, in his use of it for agricultural purposes, is, at best, a trespasser without any right that can be recognized in law or con-

sidered of any pecuniary value. The testimony admitted by the court's ruling might have served improperly to enhance in the minds of the jury the value of the strip taken. The true question was: What was the value of the interest still retained by defendant in the strip of land taken by plaintiff, giving due weight to the consideration that it was already subject to use as a public highway? As defendant could not rightfully grow crops upon the highway, the consideration by the jury of the fact that he had been permitted to do so for a period of years was entirely immaterial and irrelevant in determining the value of his interest, and could only serve to mislead the jury. The admission of this testimony was error.

The defendant was then asked: "Q. Now, Mr. Cosgriff, understanding that the company desired to condemn this eight-foot strip next to the south line of the highway for the uses and purposes of a telephone line, with all the poles, cross-arms, guy wires, guy poles that are usually used in connection with the construction and maintenance of such a line, have you any opinion as to the value of that right or easement so taken?" Objection was made to this question on the ground that the material point was the value of the property condemned, and not of the easement or right taken by the plaintiff, which objection was overruled by the court, and the defendant answered: "A. Well, it is worth at least $150." Shortly afterward one Buttree, a witness for defendant, was asked: "Q. It is in evidence here, Mr. Buttree, that the telephone company, the plaintiff in this case, desires to condemn for right of way purposes on that line for its poles, its cross-arms, its wires, guy poles and guy wires, and the use in a strip of land eight feet in width and, so far as this land is concerned, half a mile in length. Have you any opinion as to the value of the rights sought to be acquired by the plaintiff for the purposes that I have mentioned?" This question was objected to as irrelevant, immaterial, and not the proper measure of damages, and after the objection was overruled by the court the witness answered, "Yes." Counsel then stated: "The question is, Mr. Buttree, the value of the right taken from the defendant—that is, of his interest there under the circumstances—in the strip which the telephone company is seeking to condemn for its right of way uses?" This statement was not responded to by the witness, who inquired if any title would be

given. To this, counsel answered: "No, no absolute ownership; but the right of way there—the right to occupy the place there permanently in the ground, and to use the strip for such purposes as they need to string their wires," etc. The witness then answered: "Well, would put it at two hundred dollars."

The measure of damage for a taking of property in exercise of the right of eminent domain is the value of defendant's interest in the land at the time of trial and the damage at that date sustained by its appropriation to the uses of the party condemning. Rev. Codes, 1905, 7596. The evidence bearing on this point must therefore be directed to the present, and not to the future value of the interest condemned; to its value for uses to which it was or could be applied or for which it had some natural adaptation or special fitness, not to its value to plaintiff at the time of or after the taking or for the purposes to which plaintiff expected to put it. The questions referred to were properly objectionable, in that the point to which the attention of the witness was directed in each case seems to be either the value of "rights sought to be acquired by the plaintiff" or of the easement after the appropriation or its value under a future, and not the present, condition. Lewis on Eminent Domain (2d. Ed.) 478-479; Burt v. Wriggleworth, 117 Mass. 302; Union Depot Street Ry., etc. Co. v. Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224.

The defendant Cosgriff testified that for a distance of about 30 rods the right of way sought to be condemned upon his land extends through a grove of trees growing upon or near to the border of the highway. These trees are cottonwood and box elder, about 20 years old, in healthy condition, and average from 50 to 60 feet in height. The outside row of trees is set within the highway at a distance of about 7 feet from the property line, and the number of trees within the grove that are within reach of the poles, wires, and cross-arms which plaintiff proposes to place on the right of way sought to be condemned number between 40 and 50. In order to place the telephone line, it will be necessary to cut off the tops of two different trees and a few of the branches of others. Some of the trees which defendant claims are affected by the wires and cross-arms are entirely outside of the limits of the highway.

Defendant was allowed to testify, over objection by plaintiff, that the damage to the trees on his land by reason of the construction, maintenance, and operation of a telephone line was about $150. The court, on this point, gave an instruction to the jury, to which the plaintiff excepted, as follows: "In determining this question where the telephone and telegraph line runs through groves of trees belonging to some of the defendants, you may take into consideration the conditions relative to said trees and telephone and telegraph lines as the evidence shows to exist, and may consider as proper element of damage such damage to the said groves and trees as will naturally and properly necessarily result in the course of time to said grove and trees by the construction, maintenance, and operation of said telephone and telegraph line within said 8-foot strip, and you may take into consideration in ascertaining such damage to the same extent as though the same had been established independently as facts in the trial of this case, the laws of nature, the measure of time, and also what is commonly known in the various industries and all such matters of common knowledge and science as may be known to all men of ordinary understanding and intelligence." Plaintiff contends that this instruction is erroneous in that it fails to confine the question of damage to the trees within the strip taken by plaintiff, and directs the jury that it may by conjecture and speculation assess damage accruing wholly in the future, and base a verdict against plaintiff, partially, at least, upon a condition that did not exist at the time of trial. As heretofore stated, an estimate of damage is limited to conditions of the property condemned existing at the time of the trial. The trees being a permanent fixture upon the real estate are a part thereof, and damage to them may be considered a diminution in value of defendant's interest in the land. Peoria, etc., Traction Co. v. Vance, 234 Ill. 36, 84 N. E. 607. Damage to trees outside of the strip taken, however, if considered at all, could be estimated only in connection with the detriment caused to the entire tract not taken. In an action of this character nothing can be allowed on account of trespasses committed by the condemnor or his agent outside of the property actually taken. 2 Lewis on Eminent Domain (2d Ed.) 482a. Obviously it would be improper in estimating the damage to the strip of land taken to consider detrimental conditions that may arise upon it in the future in connection with the use pro-

posed by plaintiff. The extent to which the value of the interest of defendant in the strip of land on which the trees stand is diminished by reason of injuries necessarily and actually inflicted upon the trees may be considered by the jury and included in the estimate of damage. The court's instruction to the jury that they "might consider, as a proper element of damage, such damage to the certain groves and trees as would materially and properly necessarily result in the course of time" by the construction, maintenance, and operation of such telephone line directed the attention to a future contingency, and was therefore erroneous. The estimate should have been confined to the detriment or diminution in value sustained by the property taken, which in this case included the land with the trees growing upon it at the time of the trial.

At the close of the testimony the plaintiff requested, and the court refused to give, an instruction to the jury as follows: "That the defendant has no absolute right of user in the right of way, the right of user was vested in the state under the congressional grant for the right of a highway, and the state, acting through the board of supervisors, has granted permission to the plaintiff for the construction of the line." The plaintiff also requested, and the court refused to give an instruction in these words: "Under the undisputed evidence, the value of the defendants' interest in the land sought to be condemned by the plaintiff for use by it in the construction of its telephone line in the highway in front of and along the defendants' land is merely nominal, and I instruct you under this element of damage to find for the defendant in the sum of one dollar.' The defendant requested several other instructions involving substantially the same principles, and, upon the refusal of the court to give any of them, took proper exceptions and now presents these refusals as error of law.

In instructing the jury as to the measure of damage the court then charged that such damage or detriment is made up of elements to be considered under two heads, viz: The reasonable present cash market value of the land actually occupied by plaintiff for the use and purpose proposed, exceeding in no instance the present market value of the entire 8-foot strip, taking into consideration that such strip is within the limits of a public highway and subject to a public use for highway purposes; that in no instance

could a greater sum be allowed as damage than would be allowed if the highway right of user was not upon the land so sought to be condemned. That the second element of damage is that which will be suffered by the parts not taken of the tract of land owned by the defendant by reason of the taking and appropriation of the strip in question for telephone and telegraph purpose, and that "in determining the value to the balance of the several tracts not included in the 8-foot strip, you should determine from the evidence how much said land will be depreciated in value by reason of the taking for the particular use of the 8-foot strip or the portion thereof necessary to be taken. What is the difference, if any, between the cash market value of the entire tract of land excepting the 8-foot strip before the erection of the said telephone and telegraph lines thereon and its present cash market value after said line has been erected. Such difference will be the damage occasioned to the defendant arising under the second element of damage."

The contention of plaintiff, suggested by the specification referred to that the placing of a telephone and telegraph line upon the land already dedicated to highway purposes is not an additional servitude entitling the owner of abutting property to compensation, is disposed of adversely to its view by former decisions of this court. And the court, as at present constituted, is not disposed to disturb principles announced in well-considered opinions which may now be regarded as settled law. Donovan v. Allert, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720; Cosgriff v. Telephone Co., 15 N. D. 210, 107 N. W. 525, 5 L. R. A. (N. S.) 1142. Neither are we disposed to hold that the right of the owner of property to compensation under such conditions is merely nominal. The damage to the owner, in view of the existing servitude and the further use to which the telephone company may wish to subject it, may be small even to insignificance; but it is nevertheless substantial in the sense that he is entitled to recover a sum sufficient to duly compensate him for all the damage actually sustained under the conditions. The instructions requested by plaintiff were, therefore, properly refused, and the instructions given by the court upon the measure of damages seem to have fully and fairly stated a rule which our judgment approves and which has the sanction of much of the later authority. City of Grafton v. St. Paul, etc., Ry. Co., 16 N. D. 313, 113 N. W. 598,

and cases cited; Krier v. Milwaukee Northern Railway Co.,120 N. W. 847; Town of Eutaw v. Botnick, 150 Ala. 429, 43 South 739.

The assignments of error not passed upon by this opinion either present questions substantially the same as those disposed of or which are not likely to arise upon a second trial of the action. For the errors mentioned the judgment is reversed and a new trial ordered. The same order will be made in reference to the judgment in favor of each of the defendants.

All concur except FISK, J., disqualified. Hon. CHAS. F. TEMPLETON, Judge of the First Judicial District, sat in the place of Judge FISK upon the hearing, but did not participate in the decision.

CARMODY, J. (concurring). I concur in the result arrived at in the opinion of Judge Ellsworth, but do not agree to all that is said in that opinion. The measure of damages of the defendant for the 8-foot strip in the highway actually taken by the plaintiff is set forth in that opinion as follows:

"The reasonable present cash market value of the land actually occupied by plaintiff for the use and purpose proposed, exceeding in no instance the present market value of the entire 8-foot strip, taking into consideration that such strip is within the limits of a public highway and subject to a public use for highway purposes; that in no instance could a greater sum be allowed as damage than would be allowed if the highway right of user was not upon the land so sought to be condemned." This measure of damages, inferentially, at least, might lead the jury to believe that the defendant was entitled to the full market value of the land so taken, when, as a matter of fact, it was already in use for highway purposes, and the defendant had at best only a reversioner's interest. In most cases the damage to his interest would be merely speculative and not more than nominal. It seems to me that a more correct measure of damages would be the reasonable present cash market value of the defendant's interest in the land actually occupied by plaintiff for the use and purpose proposed, taking into consideration that such strip is within the limits of a public highway and subject to a public use for highway purposes.

I am authorized to say that SPALDING, J., concurs in the views herein expressed.

124 N. W. 75.

## STATE OF NORTH DAKOTA v. GEORGE BALL.

Opinion filed December 3. 1909.

**Intoxicating Liquors—Nuisance— Sufficiency of Information.**

1. Where the prosecution for keeping and maintaining a common nuisance is only against the person, an information charging the keeping of the place where the forbidden acts are committed is sufficient, and a conviction thereunder will be sustained.

**Criminal Law—Intoxicating Liquors—Instructions.**

2. Where, in a prosecution under the prohibition law, the evidence tended to show the sale and keeping for sale of beer, it was proper for the court to instruct the jury that beer was a malt liquor and intoxicating.

**Criminal Law—Intoxicating Liquors—Instructions.**

3. Other instructions complained of examined, and held correct, and not prejudicial to defendant.

**Costs—Retaxation.**

4. Under the showing made by appellant, it was error to deny his motion for a retaxation of costs, but such error does not affect the judgment of conviction.

Appeal from Ward County Court; *Davis*, J.

George Ball was convicted of keeping and maintaining a common nuisance, in violation of the prohibition law (Pen. Code, c. 65, Rev. Codes 1905), and he appeals.

Modified, and as modified, affirmed.

*Joseph Denoyer*, for appellant.

*Andrew Miller*, Atty. Gen.; *Alfred Zuger*, Asst. Atty. Gen.; *G. L. Young*, Asst. Atty. Gen., and *Dudley L. Nash*, for the State.

CARMODY, J. The defendant was convicted in the county court of Ward county of the offense of keeping and maintaining a common nuisance, in violation of the provisions of chapter 65 of the Penal Code (Rev. Codes 1905), and appeals from the judgment of conviction.

Upon being arraigned, he interposed a demurrer to the information upon the following grounds: "(1) That the information does not conform to the requirements of the Revised Codes of the state of North Dakota, in that the same does not state the name of any public offense thereunder. (2) That the information does not state

sufficient facts to constitute a public offense," which demurrer was overruled. This ruling is assigned as error. The description of the place in the information is as follows: "A saloon in a building in the village of Ryder, in said county and state." It is claimed by appellant that this description is too indefinite to sustain the conviction in view of the provisions of Sec. 9383, Rev. Codes 1905, which section, as far as material here, is as follows: "It shall not be necessary to state the kind or quantity of liquor sold or kept for sale, and it shall not be necessary to describe the place where sold or kept for sale, except in prosecutions for keeping and maintaining a common nuisance, and in proceedings for enjoining the same, or when a lien is sought to be established against the place where such liquors are illegally sold or kept for sale." It will be noticed that this section simply requires the place to be described. The particular description is not in terms demanded. The state did not seek an order of abatement in this case, nor was any attempt made to establish a lien against the premises in which the nuisance was maintained. The rule is now established that, where the prosecution is only against the person, an information charging the keeping of the place where the forbidden acts are committed is sufficient, and a conviction thereunder will be sustained. State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Thoemke, 11 N. D. 386, 92 N. W. 480.

Appellant assigns as error the admission of evidence over his objection relative to the location of the building or shack where the offense was alleged to have been committed, and to the refusal of the court to strike out such evidence. What we have said in regard to the overruling of the demurrer is a sufficient answer to this assignment of error. The court instructed the jury that as a matter of law beer is a malt liquor, and is intoxicating. This instruction is assigned as error. That it correctly states the law has so often been decided by this court that a citation of authorities is almost unnecessary. See, however, State v. Currie, 8 N. D. 546, 80 N. W. 475; State v. Seelig, 16 N. D. 177, 112 N. W. 140. The court further instructed the jury as follows: "And if you believe from the evidence beyond a reasonable doubt that the defendant kept and maintained the place mentioned in the information at the time therein stated, or at any time within two years prior to the filing of this information, which was on October 28, 1907, and dis-

pensed beer or kept it as a place where persons were permitted to resort for the purpose of drinking beer as a beverage or kept beer for sale, barter, or delivery, then you should find him guilty as charged in the information." Appellant objects to the use of the words "dispensed beer," claiming that the jury might have understood, and no doubt did, that simply dispensing beer was enough, no matter whether it was kept for sale or not. This objection is extremely technical and without merit. "Dispense" means to deal out in portions, to distribute, to give. If he kept the place charged in the information where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage or where intoxicating liquors were kept for sale, barter or delivery, in violation of said chapter 65, it made no difference whether he dispensed beer or not; he was guilty. Section 9373, Rev. Codes 1905. It follows from what we have hereinbefore stated that appellant's motion in arrest of judgment was properly overruled.

The court sentenced the appellant to imprisonment in the county jail of Ward county for 90 days and to pay a fine of $200 and costs of prosecution taxed at $300, amounting in all to $500, and, in default of paying said fine and costs, that he be imprisoned in the said county jail of Ward county for the further period of 30 days. Appellant upon the affidavit of his attorney made a motion for a retaxation of the costs, which motion was denied and exception taken. Upon the showing made by appellant, this motion should have been granted. The trial court is directed to allow a retaxation of the costs and any sum deducted upon such retaxation be credited upon the costs taxed in the judgment, but this in no way to interfere with the judgment of conviction.

As modified, the judgment is affirmed. All concur.

123 N. W. 826.

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## WATERLOO GASOLINE ENGINE COMPANY v. W. K. O'NEILL.

Opinion filed January 24, 1910.

**County Court—Certification to District Court—Sufficiency of Affidavit.**

Section 8294, Rev. Codes 1905, which requires county courts of increased jurisdiction to certify cases to the district court when "it shall appear to the court by affidavit, or if the court shall so order, upon other testimony, that a fair and impartial trial cannot be had in such court by reason of the bias or prejudice of the judge or otherwise," construed, and held not to require a certification of a case to the

district court upon an affidavit setting forth no facts, but merely the conclusion that the moving party has reason to and does believe, that the county judge is so prejudiced against him that he cannot obtain a fair and impartial trial.

Appeal from Stutson County Court; *Conklin*, J.

Action by the Waterloo Gasoline Engine Company against W. K. O'Neill. Judgment for plaintiff, and defendant appeals. Affirmed.

*F. Baldwin*, for appellant.

*Oscar J. Seiler* and *A. W. Aylmer*, for respondent.

FISK, J. This is an appeal from a judgment of the county court of Stutsman county, and the sole question raised by the assignment of errors involves the construction of section 8294, Rev. Codes, 1905. This section is as follows: "In any civil or criminal cause of which this court has jurisdiction, whenever at any time before said cause is called for trial it shall appear to the court by affidavit, or if the court shall so order upon other testimony that a fair and impartial trial cannot be had in such court by reason of the bias or prejudice of the judge or otherwise, the court shall direct said cause and all papers and documents connected therewith to be certified to the district court of the county wherein said county court is held; and such papers shall be delivered to the clerk of the district court at least one day before the first day of the next term thereof and shall be placed upon the trial calendar and stand for trial the same as cases originally commenced in the district court." The record discloses that before the cause was called for trial defendant moved the court "for a change of venue therein," presumably intending to ask the court to certify the cause to the district court, pursuant to provisions of the above action. In support of his motion, and as a sole basis thereof, defendant presented to the court the following affidavit, omitting formal parts: "W. K. O'Neill, being duly sworn, says that he is the defendant in the above entitled action; that Marion Conklin, judge of the county court before whom said action is pending, he has good reason to, and does, believe is so prejudiced against him that he cannot obtain a fair and impartial trial before him, the said Marion Conklin, judge of the county court." The motion was denied, the ground of such denial being that the affidavit was insufficient, and

it does not appear therefrom that the defendant cannot have a fair and impartial trial in such court. Thereafter, the cause having been regularly called for trial, defendant made default, whereupon a jury was waived, proof submitted, and judgment rendered in plaintiff's favor, from which this appeal is prosecuted.

It is appellant's contention that the presentation and filing of the affidavit as aforesaid ipso facto ousted the county court of jurisdiction, and that it thereby became incumbent on the court to certify such cause to the district court. In other words, he contends that the statute above quoted is analogous to sections 8375, 9929, Rev. Codes, the first of which provides for a change of venue from a justice court and the latter from a district court. Upon a comparison of these statutes with the one in question, it is entirely clear that they are wholly dissimilar. Section 8294, as its plain language denotes, does not require the county court to certify the case to the district court except when it is made to appear to the court that a fair and impartial trial cannot be had in such court by reason of the bias or prejudice of the judge. The other statutes cited merely require the filing of an affidavit stating in the language of the statute that he believes or has reason to believe that he cannot obtain a fair and impartial trial, etc. It will be readily seen that under the statute here involved facts not mere conclusions or beliefs, must be set forth in the affidavit from which it is made to appear that such fair and impartial trial cannot be had. The court should, at least, be able to determine from the facts thus shown that the application is made in good faith, and not merely for the purpose of delay.

Under the other statutes, no discretion whatever is vested in the court or judge. The filing of the statutory affidavit ipso facto ousts such courts of jurisdicion, and requires a transfer of the case or a change of the judge. Our views above expressed are fully supported by the authorities. 4 Ency. Pl. & Pr. 434; 12 Cyc. 245; Territory v. Egan, 3 Dak. 119, 13 N. W. 568; State v. Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432; State v. Rodway, 1 S. D. 475, 47 N. W. 1061; People v. Williams, 24 Cal. 31.

Judgment affirmed. All concur, except ELLSWORTH, J., not participating.

124 N. W. 951.

## W. A. SIMMONS v. J. McCONVILLE.

Opinion filed February 19, 1910.

**Trover and Conversion—Title to Maintain—Cropping Contract—Evidence.**

1. Plaintiff brought an action for damages for the conversion of one-half of the flax raised by him on land belonging to the defendant under a written contract, and for the conversion of three-fourths of the oats and speltz raised by him on land belonging to the defendant under an oral contract. The written contract provided that the title and possession of the grain should be in the land owner until a division thereof, and until all the covenants and agreements to be performed by the plaintiff had been fulfilled. Held that, until the grain raised under the written contract was divided, neither the legal title to nor the right of possession of any part of said grain was in the plaintiff and he could not maintain an action for conversion.

**Trover and Conversion—Disputed Contract—Question for Jury.**

2. As to whether an action in conversion would lie for the oats and speltz, is dependent upon the terms of the contract under which they were raised. This was a disputed question of fact, which should have been submitted to the jury.

Appeal from District Court, Dickey county; *Allen*, J.

Action by W. A. Simmons against James McConville. Judgment for plaintiff and defendant appeals.

Reversed in part, and remanded for new trial on one issue.

*W. S. Lauder* and *Austin & Axtell*, for appellant.

*Youker & Berry*, for respondent..

CARMODY, J. On the 16th day of April, 1906, the defendant was the owner of the following described real property situated in Dickey county, N. D., towit: The N. E. 1-4 of section 3, township 129, range 65. He was also the owner of the N. E. ¼ of section 4 in the same township and range.

On the date above mentioned the defendant, under a contract lease, leased all of the quarter in section 3 to the plaintiff for the farming season of 1906. Said lease was in writing, and signed by both parties, and, as far as material, is as follows: "Witnesseth: That the said party of the first part hereby covenants and agrees to and with the said party of the second part for the consideration hereinafter named, to well and faithfully till and farm, during the season of farming in the year 1906, commencing April 16, 1906, and ending

December 1, 1906, in a good, husbandman-like manner, and according to the usual course of husbandry. (Here follows description.) And the said party of the first part hereby further covenants and agrees to sow and plant the said land, party of the first part to haul and clean all seed used on said land free of charge. The party of the first part also agrees to furnish at his own cost and expense all proper and convenient tools, teams, utensils, farm implements and machinery (except as hereinafter otherwise provided) to carry on and cultivate said farm during said season, and to furnish and provide all proper assistance and hired help in and about the cultivation and management of said farm, and to farm and cultivate the said lands to the best advantage and according to his best skill and judgment, and to maintain and keep up the fences so as to protect said crops from injury or waste, * * * and to crop and cultivate said lands, and harvest and secure the crops grown thereon in a farmer-like style and in the best possible manner during the season, * * * and generally do and perform all proper and ordinary work, labor, care and skill requisite, usual or necessary to work and crop said premises in a proper manner and style and to the best interests of the party of the second part; and further agrees not to move any straw or manure from said farm, but to haul out and spread on said premises all the manure made thereon, and not to sell or remove, or suffer to be sold or removed, any of the produce of said farm or premises, or the stock, increase, income or the products herein mentioned of any kind, character or description, until the division thereof, without the written consent of the party of the second part; and until all the covenants and agreements to be performed by the party of the first part shall have been fulfilled and such division made, the title and possession of all grain, crops, produce, income, and products raised, grown or produced on said premises shall be and remain in the party of the second part, and said party of the second part has the right to take and hold enough of the crops, income, and products that would on the division of the same belong to said party of the first part, to repay any and all advances made to him by the party of the second part, * * * and also to pay all the indebtedness due said party of the second part by said party of the first part, if any there be. * * * It is also agreed that, in case said party of the first part neglects or fails to perform any of the conditions and terms of this contract on

his part to be done and performed, then said party of the second part is hereby authorized and empowered to enter upon said premises and take full and absolute possession of the same, and he may do and perform all things agreed to be done by the party of the first part remaining undone, and to retain or sell sufficient of the crops raised on said premises that would otherwise belong to said first party if he had performed the conditions hereof, to pay and satisfy all cost and expenses of every kind incurred in performing said contract, * * * and the residue remaining, if any, of said crops, shall belong to the said party of the first part, after all conditions are fulfilled. * * * And it is further agreed that as soon as such threshing is finished the said party of the first part shall at once and at his own cost and expense deliver the one-half part of said grain to said second party in his granary on the land or as the second party may elect at ..... railroad station, and take receipts therefor in the name of said second party, and deliver the same to him on demand. That said first party shall sow 75 acres to wheat and plow and sow 85 acres to flax, all seed to be furnished by the second party, who also agrees to pay one-half of the cost of threshing and allow the first party one-half of all crops grown on the land for his compensation. Upon the prompt and faithful performance of all the foregoing agreements and conditions by said first party, the said party of the second part agrees to give and deliver to said first party, upon said premises, the balance of the grain raised thereon as aforesaid, to-wit: The one-half part thereof as and for said first party's share and compensation hereunder. In case of sufficient storage room on said farm for said first party's share of said grain, it is hereby agreed that he may haul and deliver the same to one of the elevators at ....., but in such case at least ..... bushels of said wheat shall be for and in the name of the said second party, to whom, and in whose name, the elevator company receiving such wheat shall deliver the proper receipts therefor, said.....bushels shall be retained by said second party as security for the plowing and other work to be done hereunder by said first party."

After the written contract was entered into defendant, under an oral agreement, leased to plaintiff for the farming season of 1906, 20 acres of the quarter in section 4. Under the terms of the agreement, with reference to the 20-acre tract, all parties are agreed that

plaintiff should furnish the seed, do all the work, and bear all the costs incident to farming the land, and that plaintiff should have three-fourths of the crop and defendant one-fourth. It was claimed by the defendant, and he so testified, that it was orally agreed between the parties that all the provisions of the written contract should apply to the 20-acre tract in section 4, except that plaintiff should furnish the seed, pay all the threshing bill, and should be entitled to three-fourths of the crop, and the defendant should have one-fourth of the crop. The plaintiff, however, denied that there was any understanding or agreement that any of the provisions of the written lease should apply to the 20-acre tract. The plaintiff farmed all of this land during the season of 1906. There was 940 bushels of flax raised on the quarter in section 3. The wheat raised is not involved in this action. On the 20-acre tract in section 4 there was raised 823 bushels of oats and speltz. The defendant cut a portion of the flax, furnished certain board, provisions, and horse feed for plaintiff, in connection with the farming of this land. The plaintiff also used some tools or farm implements belonging to the defendant. Defendant also procured the threshing to be done, and paid the threshing bill. There has never been any settlement between the plaintiff and the defendant with reference to any of these items, and plaintiff has never paid to the defendant the same or any part thereof. After the grain in question had been threshed it was placed in granaries on the premises of the defendant, and the flax, oats, and speltz have been in the sole and exclusive possession of the defendant ever since. There has never been any division of the crop as between plaintiff and defendant, except the defendant placed about one-half of the flax and about one-half of the oats and speltz in separate bins, in the granaries on his premises, as hereinbefore stated. This he claims he did, so that, when a settlement was made between him and plaintiff, it would be convenient to divide said grain between them. The defendant has not delivered to plaintiff any part of this crop as for his share thereof or otherwise. The plaintiff claims that he was ready at all times to perform his contract, and get the threshing done, and that it was unnecessary for the defendant to perform any part of said contract. This is denied by the defendant. The defendant paid the threshing bill, amounting to $248.91, of which $145.03 should have been paid by the plaintiff. This, the plaintiff claims, he was ready and willing

to pay, but had not paid it. After making a demand on the defendant for one-half of the flax and three-fourths of the oats and speltz, plaintiff brought this action against the defendant in conversion upon two causes of action: (1) For the value of the said one-half of the flax; and (2) for the value of three-fourths of the oats and speltz. At the close of all the testimony defendant moved the court to direct the jury to find a verdict for him on the ground that the uncontradicted testimony showed that at all times the defendant was the owner of and rightfully in the possession of the personal property involved in this action, and that the plaintiff was at no time the owner of, nor entitled to the possession of, any of the property involved in this action, which motion was overruled and an exception taken by defendant. The defendant then moved the court to direct the jury to find a verdict for him as to all the flax involved in the action, on the ground that the uncontradicted testimony showed that defendant was at all times, and has been, the owner of all said flax, and has at all times been in the lawful possession and entitled to the possession thereof, and that the uncontradicted testimony showed that plaintiff had never been the owner of any part or portion of said flax, and had never been entitled to the possession of the same nor any part thereof, which motion was overruled, and an exception taken by defendant.

The case was submitted to the jury, which found a verdict in favor of the plaintiff for the sum of $751.45. A motion for a new trial was duly made and overruled, and judgment entered on the verdict. From the order overruling the motion for a new trial, and from the judgment defendant appeals to this court.

Among the numerous errors assigned, we shall notice but two, and these relate to the ruling of the court in refusing to direct a verdict in favor of the defendant and in refusing to direct a verdict in favor of the defendant as to the flax. As to the flax, the plaintiff agreed that the title to any portion of the flax should not vest in him until it was divided and until all the covenants and agreements to be performed by him had been performed. Indeed, the plaintiff does not seriously contend that he was entitled to the possession of the flax until the division thereof, and until he had performed his part of the written contract, herein mentioned, nor to the possession of the oats and speltz, if defendant's version of the contract, under which they were raised, was correct. Plaintiff, how-

ever, contends that the defendant's version of the contract under which the oats and speltz were raised was not correct, and contends that the defendant himself made a division of both the flax and the oats and speltz. The evidence as to the division was given by the defendant, who, on cross-examination, testified as follows: "I testified that I still had this flax out there in my granary all in one bin. I have divided a portion of it. I divided it from the machine."

Q. But I thought you said it was all in one bin?

A. A part in a bin and another in another. His was in one bin and mine in another. I have not subdivided out of his bin so as to take out any portion for the costs of the threshing and the cost of the use of my machinery and time that I swore to. It is in my granary on my land on section 4, N. E. ¼. That is where my house is. This flax was raised over on the northeast of section 3. I took this flax and hauled it over on section 4 because I wanted to hold possession of it. It wasn't in my contract to haul it to Forbes. This flax was to be put in my granary until a division. Under my contract, my flax wasn't to be put in a granary on section 3; no buildings on section 3. I signed this contract. The reason I didn't haul this grain some place else was that I wanted to hold possession until these things were settled, and so I hauled it to my own place. * * * I never offered to tender or deliver to him any share or part of those oats or speltz. I told him he could have the oats when this thing was settled and the bills paid. I have testified that the oats and speltz were divided, his share in one place and mine in another, and they are in the same place today. I have not fed anything out of them. I have never made any division or any subdivision of the share of Mr. Simmons' oats and speltz for the purpose of defraying the threshing bill or work and labor. They are in a bin now there together." On redirect examination he testified as follows: "Q. You said something about a division of this property, now just what do you mean by that, Mr. McConville? A. I mean that there was a division made of this grain. I put part in a granary and his part in another, and it has remained there since. I put the flax in two bins, put about half in one and half in the other. Q. How about the oats and speltz? A. All right there together. His part in one bin and mine in another. The oats and speltz are in two bins about equally divided. I have never delivered any part of it to Mr. Simmons, and have always had it. It was divided in that

way so that, when we finally made a settlement, the grain would be in a position to deliver when it would be coming to him, his share of it."

This evidence we think does not show any division. The plaintiff was not present, never consented to it, and knew nothing about it. The defendant placed the grain in his own granaries, but in separate bins, as he said, so that it would be more convenient to deliver to the plaintiff his share when a settlement was had between them. As far as the flax is concerned, it is well settled by former decisions of this court that neither the legal title to the property nor the right of possession was in the plaintiff at the time this action was commenced. The plaintiff undoubtedly had an equitable interest and could enforce his rights by a suit in equity, but he could not maintain replevin, or sue for conversion. The unjust refusal of the defendant to deliver to the plaintiff any part of the flax would not make him the owner of the legal title, but would only give him a cause of acion in equity to enforce his rights under the agreement. Angell v. Egger, 6 N. D. 391, 71 N. W. 547, and cases cited in the opinion in that case; Bidgood v. Monarch Elevator Co., 9 N. D. 627, 84 N. W. 561, 81 Am. St. Rep. 604; Hawk v. Konouzki, 10 N. D. 37, 84 N. W. 563; Van Gordon v. Goldamer et al., 16 N. D. 323, 113 N. W. 609; Aronson v. Oppegard, 16 N. D. 595, 114 N W. 377; Wadsworth v. Owens, 17 N. D. 173, 115 N. W. 667; Consolidated N. & I. Co v. Hawley, 7 S. D. 229, 63 N. W. 904; Esdon v. Colburn, 28 Vt. 631, 67 Am. Dec. 730; Wentworth v. Miller, 53 Cal. 10; Moulton v. Robinson, 27 N. H. 550.

As to whether the oats and speltz were governed by the terms of the written contract was a question for the jury, and, if the jury should find under the evidence that the defendant was correct in his contention that they were, then he was entitled to the possession of the oats and speltz, and this action as to them could not be maintained. The question as to whether the oats and speltz were raised under the terms of the written lease should have been submitted to the jury under proper instructions. It follows that the court should have granted the motion of the defendant to find a verdict for him as to the flax.

The judgment and order appealed from are reversed, and the court directed to dismiss plaintiff's cause of action as to the flax, and to grant a new trial as to the oats and speltz. All concur.

125 N. W. 304.

## W. L. MARCHAND v. F. X. A. PERRIN.

Opinion filed February 3, 1910.

**Appeal and Error—Refusal to Strike Out Counterclaim—Error Without Prejudice.**

1. In an action by a contractor to foreclose a mechanic's lien for a balance claimed to be due under an express contract, the answer puts in issue the allegation of the complaint to the effect that plaintiff had substantially performed the contract, and also pleads four alleged counterclaims. At the trial plaintiff's counsel moved to strike out certain of such counterclaims and certain portions of others. The trial court granted such motion in part and denied the remainder.

*Held*, for reasons stated in the opinion, that such rulings were nonprejudicial.

**Foreclosure of Mechanics' Lien—Sufficiency of Evidence.**

2. The finding of the trial court that the building erected by plaintiff for defendant under the contract, was not built and completed in a good, substantial, and workmanlike manner, but was built and erected in a careless, negligent, unskillful, and unworkmanlike manner of inferior material, held amply supported by the testimony.

**Contracts—Failure of Substantial Performance—Waiver.**

3. Plaintiff, having failed to prove a substantial performance of the contract on his part, cannot recover anything under the contract where defendant is not shown to have waived such performance.

**Substantial Performance of Contract Not Waived.**

4. Evidence examined and held insufficient to show such waiver.

**Contracts—Failure of Substantial Performance—Waiver.**

5. The mere fact of making certain payments and taking possession of and occupying the building does not of itself amount to such waiver or estop defendant from urging nonperformance of the contract on plaintiff's part.

Appeal from District Court, Bottineau county; *Templeton*, J.

Action by W. L. Marchand against F. X. A. Perrin. Judgment for defendant, and plaintiff appeals.

Affirmed.

*A. Besancon*, for appellant.

Where one executes work according to contract, and the request of the other contracting party, it is sufficient. 30 Am. & Eng. Ency. Law 1236.

Substantial performance sufficient. 301 Am. & Eng. Ency. 1221; Hahn v. Bonacum, 107 N. W. 1001; Leeds v. Little, 42 Minn. 414, 44 N. W. 309, 80 N. Y. 312; 81 N. Y. 211; Crouch et al. v. Gutmann, 31 N. E. 271; 30 Am. St. Rep. 608.

Where extra work is necessary by owner's mistake, contractors can have both compensation and lien. 30 Am. & Eng. Enc. Law 1283; 51 Ill. 422; 93 Mass. 152.

*Weeks, Murphy & Moum,* for respondent.

Part payment of purchase price, and use and occupancy of building do not waive completion of contract. 6 Cyc. 54, note 52; 6 Cyc. 67 to 69 and note 28; Anderson v. Todd, 8 N. D. 158, 77 N. W. 599; Baders v. Davis, 88 Ala. 367, 6 So. 834; Morrison v. Cummings, 26 Vt. 486; Eaton v. Gladwell, 66 N. W. 598.

Full and substantial performance of contract essential to recovery or benefit of lien. 9 Cyc. 759; U. S. v. Robeson, 9 Pet. 319; 9 L. Ed. 142; Hitchcock v. Davis, 49 N. W. 912; Anderson v. Todd, supra.

FISK, J. This is an action primarily for the foreclosure of a mechanic's lien, and appellant desires a review of the entire case in this court.

The complaint is in the usual form, alleging, among other things, that on April 13, 1906, the parties entered into a written contract, by the terms of which plaintiff agreed to construct for defendant at Willow City, a certain concrete building for the consideration of $4,550. It is also alleged that, pursuant thereto, plaintiff constructed such building, and in the construction thereof he furnished at defendant's special instance and request, certain extras on account of changes and alterations in the original plans and specifications, which extras were reasonably worth $669.37, and which sum defendant promised to pay. After deducting credits for payments made, plaintiff claims a balance due him under such contract $3,302.68, for which a lien is claimed and a foreclosure thereof prayed for. The complaint also alleges that, as part payment under the contract, defendant agreed to convey to plaintiff certain real property therein described at an agreed valuation of $2,050, and a specific performance of this portion of the contract is also prayed for. The gist of the defense, as stated in the answer, is that plaintiff failed to construct such building in a good and workmanlike

manner, and has not completed the same in several specific particulars. In brief, the defense alleged is a failure on plaintiff's part to substantially perform the contract, the answer alleging, in detail, many material imperfections in the structure and deviations by plaintiff from the contract. In addition to the defensive matter, the answer contains four alleged counterclaims, but which we need not notice except as we are required so to do in passing upon certain rulings of the trial court on motions of plaintiff to strike out such counterclaims or portions thereof. In view of the fact that the trial court merely tried the equitable issues raised by the pleadings, expressly reserving, with the implied consent of counsel, the legal issues for future trial, and as a consequence we are called upon by this appeal merely to review and determine such equitable issues, we need not consider such rulings only to the extent that they affect the equitable issue aforesaid. Such alleged counterclaims contain much evidentiary matters, both of a defensive and affirmative nature, which no doubt are improperly pleaded, but we discover no prejudicial error in the rulings complained of. Appellant could not have been prejudiced by a refusal to strike out the allegations of a defensive character, which he asks to have stricken out, as such allegations, so far as competent, material and relevant to the issues tried, could all have been proved under other portions of the answer.

Turning our attention to the merits, we are confronted with a great mass of testimony covering 728 pages of the printed abstract. A detailed review of such testimony in this opinion is manifestly both impracticable and useless, and we shall not attempt it. We shall merely in a general way refer to such testimony, giving our conclusions as to ultimate and controlling facts which we deem established, and apply thereto well-settled rules of law. The contract required plaintiff to construct such building in a good, substantial and workmanlike manner of certain designated dimensions and materials. The learned trial court found, and we think such findings in accordance with the clear preponderance of the testimony, that the building "was not built and completed in a good, substantial and workmanlike manner, but that said building was erected in a careless, negligent, unskillful, and unworkmanlike manner of inferior material." That such finding has ample support in and is fully justified by the testimony we are fully agreed.

Plaintiff himself testified as follows: "Q. Did you notice any cracks on the west side of the building? A. On both sides. Q. Did you see cracks on the west where you could see daylight? A. Yes, sir. Q. Was it long, extending from the top to the bottom? A. Yes, sir. Q. You found a great many cracks? A. Yes, sir. Q. Did you take a stick to see whether you could dig holes in it? A. Yes, sir. Q. Could you? A. Yes, sir; I could with any kind of a wall. Q. Did you take a lead pencil and dig holes? A. I tried my finger. Q. Could you dig a hole with your finger? A. Yes, sir. Q. It was crumbly? A. Yes, sir. Q. You could take a piece in your finger and crumble to dust? A. Yes, sir. Q. Was it that way in different parts of the wall? A. About the same. Q. Did you find cracks on the west, south, east, and north sides? A. Yes; all along. Q. How wide were these cracks? A. Some very small, and some about half an inch. * * * Q. Do you know whether or not that building is standing plumb at the present time, those walls? A. It is not exactly plumb. Q. Which wall did you find worse in regard to being plumb—the east or the west side? A. The east side. Q. Is the west side out of plumb also? A. No; it is pretty plumb. Q. Estimate about how much out of plumb the east wall is? A. About an inch and a half. Q. Which way does the wall lean? A. It was bulged. Q. Is the crack running along the wall along where the bulge is? A. Yes, sir. Q. Runs from the front clear to the back? A. No, sir; not from the front. Q. Almost the full length of the building? A. About half the length. Q. And besides that a crack runs from the top to the bottom, up and down? A. Yes, sir. * * * Q. Is the surface of the wall also crooked? A. It is straight enough. Q. It is not a straight surface or level? A. It bulges, too, it is not smooth. The wall is not straight. Q. Did you notice where the wall itself was bulged? A. Yes, sir. Q. How is the west wall, it is bulged? A. It is bulged, and the east wall is bulged." It is true plaintiff stated that he considered the structure a good building the way it stands.

The witness Sholl, a general contractor and builder of 12 or 13 years' experience, testified that he examined the building in June, 1907, and again just before the trial, and gave it as his opinion that the material was poor. Witness by using the end of his rule dug into the wall and took out certain chunks of the cement which were

introduced in evidence. Said he had no difficulty in making a hole with the end of the rule to take out these pieces, and said it was an easy matter to dig a hole through the wall with such rule. He says the wall was poor and the material therein would easily crumble: that "by taking it between your fingers you could pulverize it." In speaking of the bulges in the walls, the witness stated: "About 64 feet from the rear I started to put my plumb up and 4 feet from the top of the foundation I found a bulge and also a crack. It bulged out 4 inches, about 1 inch on a foot, and, going up 13 feet, I found a bulge going in again 6 inches. Q. That was all on the east side of the building? A. Yes, sir." He says the wall was cracked in one place about 70 feet or so, and such crack went entirely through the wall. He also testified to other numerous cracks and imperfections in the walls of the building.

The witness Higgins, a contractor and builder and familiar with cement and concrete materials, testified that he examined the building, and found the walls very much out of plumb and badly cracked. He says the material was very poor, and with a soft stick he was enabled to bore into the wall at three or four different places, and that such wall was soft, and he drilled a hole through the concrete without any trouble. Says that it took him possibly 30 seconds to bore through the wall with a pine stick. He says he made such tests all over the building, and they indicated very poor material, very poor concrete, and he thinks too much sand and gravel was used and not enough cement, and that the cement used was of an inferior grade and the gravel of a poor quality.

The witness Bowen also testified to the numerous cracks in the walls and to the brittle nature of the material. He says he could run his lead pencil in some of the cracks, and that "you could pulverize pieces of the concrete in your fingers." He corroborates fully the witness Higgins as to the defective character of the walls.

The architect, Shannon, a witness for plaintiff, testified that the concrete is not a good grade. When asked if he would call it a very poor grade, he answered: "I have seen poorer. I wouldn't call it very poor, but I would call it a poor grade." He was asked: "Would you call Exhibits 2 and 3 (concrete) sufficient for a two-story buiding? A. Not if it is all that kind; I would not. Q. And if some was worse than that, and in some places it was a little better, would you consider it safe for a building two stories high, such

as the Perrin building? A. I would not." At another place this witness testified as follows: "Q. Would you consider a concrete wall in which you could bore a hole with a common pine stick a good quality of concrete? A. I wouldn't call that good concrete. Q. That wouldn't be fit for any building? A. No, sir. Q. It would be practically worthless and a dangerous wall? A. Yes; if it was all like that. Q. Yes, or any of the material, part of it, even half, like that? A. Yes, sir. Q. And if any of it was like that it wouldn't be a proper wall built of concrete? A. No, sir."

The witness Ross, an architect and builder of many years' experience examined the building in October, 1906, at the request of the authorities of Willow City, and he testified that the walls were badly cracked, buckled and out of plumb. He examined the foundation and found no checks or cracks that would effect the superstructure, and he considered such foundation sufficient. Later he examined the building carefully, and found the walls in still worse condition than on his first examination, and he gave it as his opinion that the walls of the building are liable to collapse, and that the structure is dangerous. He again examined it on the day that he gave his testimony, and found its condition worse. He was asked: "Q. Is it a safe building now, Mr. Ross?" to which he answered: "No; by no means. Q. As it stands there will it ever be a safe building? A. No, sir." And he says that the building is not only worthless, but a detriment to the lot on which it stands.

There is much more testimony in the case in corroboration of the foregoing, but it would serve no useful purpose to refer to it. Suffice it to say that from an examination of all the testimony we have no hesitancy in approving the findings of the trial court as to the defective material and workmanship in such building. Plaintiff attempted to show that the condition of the walls was caused by a faulty construction of the foundation which was furnished by defendant, but in this he is not supported by the preponderance of the proof. Plaintiff, having failed to establish a substantial performance of the contract on his part, cannot recover in this action, which is based on such contract, unless it appears by a preponderance of the evidence that defendant in some manner waived such substantial performance. Anderson v. Todd, 8 N. D. 158, 77 N. W. 599; 9 Cyc. 759; 6 Cyc. 54, and cases cited. We find nothing in the evidence to warrant a finding that defendant waived the provisions of

the contract to the effect that such building was to be constructed of good material and in a substantial and workmanlike manner. The fact that defendant went into possession of the building prior to its completion, and has occupied the same, cannot be considered as a waiver of latent defects therein. Anderson v. Todd, supra; 6 Cyc. 54, 67-70. Appellant cites and relies upon 30 Am. & Eng. Ency. of Law, 1232-1233, and cases cited, also Katz v. Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826, and Gier v. Daiber, 148 Mich. 190, 111 N. W. 773, in support of his contention that defendant by making certain payments under the contract and by taking possession and occupying the building thereby waived any defects and estopped himself from urging any defense to plaintiff's recovery. The authorities cited do not support such contention, but merely announce the general rule upon the subject as recognized and applied by this court in Anderson v. Todd, supra.

The trial court refused defendant's first proposed conclusion of law, "That defendant is not indebted to the plaintiff in any sum whatever," but found his second proposed conclusion, "That the plaintiff is not entitled to a lien against the property described herein," and appellant urges that such rulings are inconsistent. To this we cannot assent. The learned trial court in refusing the first proposed conclusion no doubt merely intended to refrain from deciding issues not before it. If the plaintiff had requested the court to find as a conclusion of law that defendant is not indebted to the plaintiff upon the contract in question in any sum whatever, such request no doubt would have been granted. It is apparent that the trial court merely intended to, and did, hold that there was nothing due plaintiff under the contract, leaving open for future consideration the question of the defendant's liability in an action on the quantum meruit, should such an action be brought.

In conclusion, suffice it to say that we are entirely satisfied with the findings and conclusions of the trial court (and the same as adopted by this court). It follows that the judgment appealed from must be, and the same is hereby, affirmed. All concur.

124 N. W. 1112.

# W. W. REED v. P. O. HEGLIE, JOHN HOLTHUSON, THEODORE LARSON,! C. G. SELEVEIT, K. N. MYHRE, J. W. MCPHAIL, S. T. COLE, D. A. CROSS, AND S. W. BALE, AS TRI-COUNTY DRAIN COMMISSIONERS OF RICHLAND, SARGENT AND RANSOM COUNTIES.

Opinion filed February 8, 1910.

**Drains—Mandamus—Drain Commissioners—Action on Contract.**

1. The board of "drain commissioners" of any county in this state is a department of said county, with power to draw warrants upon a special fund in the county treasury. An action will not lie against it on its contract. The remedy in the courts is by mandamus.

**Same—Contracts of Two or More Counties—Mandamus.**

2. This rule applies to the board of drain commissioners of two or more counties, when acting together for the laying out and constructing of a drain through two or more counties.

**Drains—Action Against Drain Commissioners—Pleading.**

3. The complaint must show the representative character in which the defendant is sued.

**Drains—Drain Commissioners—Allowance for Claims.**

4. The proper disposition of a bill presented to a board of drain commissioners is to audit it and, if allowed, issue a warrant on the proper drain fund in payment of such bill.

**Drains—Drain Commissioners—Action for Service.**

5. The demurrer in this case was properly sustained.

Appeal from District Court, Ransom county; *Allen*, J.

Action by W. W. Reed against P. O. Heglie and others, Tri-County Drain Commissioners of Richland, Sargent, and Ransom Counties. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

*W. W. Reed, (S. D. Adams of counsel)*, for appellant.

*Ink & Wallace, A. M. Kvello,* and *E. W. Bowen,* for respondents.

CARMODY, J. This is an action brought by plaintiff against the defendants as Tri-County Drain Commissioners of Richland, Sargent and Ransom counties, to recover for services claimed to have been rendered said board. The complaint, as far as material here, is as follows: "(1) That the defendant board is indebted to the

plaintiff in the sum of $14, as an unpaid balance due for work, labor and services rendered by plaintiff to defendant and at its request, as an engineer on that portion of Long Drain No. 1 which lies in Sargent county, North Dakota; (2) that the said amount became due and payable on the 12th day of June, 1907; that the bill for the same was presented on said 12 th day of June, 1907; that the same was not paid nor has it since been paid"—to which complaint the defendant interposed the following demurrer: "Come now the defendants in the above-entitled action and demur to the complaint of the plaintiff upon the grounds and for the following reasons, to-wit: (1) That there is a defect of parties defendant. (2) That the complaint does not state facts sufficient to constitute a cause of action. (3) That the court has no jurisdiction of the persons of the defendants"—which demurrer was sustained by the district court. From the order sustaining the demurrer, the plaintiff appeals to this court. The principal point discussed by the attorneys is as to whether the drain commissioners can be sued in an action of this kind.

The board of county commissioners of any organized county in this state is authorized to appoint, on the petition of any person interested, three freeholders of the county as a board of drain commissioners of such county. Any person appointed as a member of the board of drain commissioners shall, within ten days after his appointment, qualify by filing an oath of office and a bond in the office of county auditor. Upon petition, the board of drain commissioners is authorized to lay out and construct a drain and cause a survey of the line thereof to be made by a competent surveyor. The drains laid out are named and numbered. The lands benefited by the construtión of each drain are assessed for the cost thereof, including all expenses connected therewith. The drain taxes so assessed shall be collected by the county treasurer, and all moneys so collected shall be credited to the drain fund to which they belong, and the county treasurer shall be the treasurer of such drain funds. Payment of all expenses and costs of locating and constructing any drain shall be made by the board of drain commissioners, issuing warrants in such amounts and to such persons as by such board may be found due. The boards of drain commissioners of two or more counties in this state are authorized to construct or extend a drain through or into two or more counties in this state and to

construct and maintain the same, on petition presented to the several boards of drain commissioners in each of such counties for the establishing of such drain in their several counties. The several boards of drain commissioners may apportion the cost of establishing and constructing such entire drain ratably and equitably upon the lands in each county in proportion to the benefits to accrue to such lands, and file reports of such apportionment with the auditors of the several counties affected, which reports shall show the portion of cost of such entire drain to be paid by tax upon the lands of each such counties, and such reports shall be signed by the boards of drain commissioners of all counties affected. Upon the filing of such reports, the several boards of drain commissioners shall assess against the lands in each of such counties, ratably and equitably as provided by law, an amount sufficient to pay the proportion of cost of such drain in each of such counties so fixed by all said commissioners.

The demurrer was properly sustained. There is no provision of law anywhere that either expressly or by implication recognizes the defendants sued in this case as a body capable of being sued in such an action as the one at bar. Board of Directors of the Chicago Public Library v. Arnold, 60 Ill. App. 328; Raisch v. Board of Education of the City and County of San Francisco, 81 Cal. 542, 22 Pac. 890; Swift v. the Mayor, Aldermen, and Commonalty of the City of New York and the Police Department of said city, 83 N. Y. 528; Drake v. Board of Trustees of the Normal School at Oskaloosa, 11 Iowa 54. In the case of Board of Directors of the Chicago Public Library v. Arnold, supra, which was an action upon a contract for work done, the court said: "Now the board has no property or funds; it is only a department of the city—by construction a quasi corporation—having, among its powers, the power to draw vouchers upon a special fund in the city treasury. As it never can have anything with which to pay a judgment, assumpsit will not lie against it. The only remedy of the surviving appellee is by mandamus." In the case at bar the board of drain commissioners can never have anything with which to pay a judgment. It can only issue warrants on a special fund in the county treasury, derived by means of a special assessment against the lands benefited by the construction of each particular drain, under the provision of this chapter. The remedy by appellant in the courts is by mandamus.

See Osborn v. Selectmen of Lenox, 2 Allen (Mass) 207; 19 Am. & Eng. Ency. of Law (2nd Ed.) 795, and cases there cited.

There are other reasons why the demurrer in this action was properly sustained. It appears from the title of the action that the defendants the Tri-County Drain Commissioners, are sued in their representative capacity. There is no averment in the complaint showing the character in which they are sued, or even showing that the members of the different boards are or were the duly appointed, acting, and qualified drain commissioners of the three counties, or of any of them. The representative character of a party sued must be stated in the body of the complaint. Bliss on Code Pleading (2nd Ed.) 148. Where a party is sued in a representative capacity, the complaint should by distinct allegation show the character in which the defendant is sued. 4 Ency. of Pl. & Pr. 595.

It is alleged in the complaint that the amount therein claimed is due for work, labor and services rendered as an engineer on that portion of Long Drain No. 1 which lies in Sargent county. There is no allegation in the complaint that there was any such drain laid out or constructed. Neither does the complaint show that the defendants refused to audit or allow the amount of the bill claimed by plaintiff. The complaint alleges that the bill was presented on the 12th day of June, 1907, and that the same was not paid. The only proper disposition of the bill by the defendants, if it was properly before them, was to audit it, and, if allowed, to issue a warrant in payment of the same, payable from the proper drain fund, if there was any such fund.

The order appealed from is affirmed.. All concur.

124 N. W. 1127.

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THE STATE OF NORTH DAKOTA EX REL. M. F. MINEHAN v. PAUL F. MEYERS AS COUNTY AUDITOR OF MCLEAN COUNTY.

IN THE STATE OF NORTH DAKOTA.

Opinion filed January 18, 1910.

**Counties—Division—Organization of New Counties.**

1. Proceedings for the division of a county and for the organization of new counties are strictly statutory, and no intendment can be indulged in their favor.

**Counties—Organization and Division—Statutory Construction.**

2. Such statutes should receive a liberal construction, to the end that the legislative intent may be given effect; but, such intent being reasonably apparent, it is incumbent upon those who seek to interfere with the existing county organizations by the creation of new counties to at least substantially conform to the requirements of the statute.

**Counties—Division and Organization—Mandamus—Appeal and Error.**

3. By these proceedings it is sought to compel, by mandamus, the defendant to maks his certificate to the Secretary of State, as prescribed by Chapter 62, Laws 1907. relative to the division and organization of counties. An alternative writ was issued as prayed for, to the sufficiency of which defendant objects upon the ground that it fails to allege facts authorizing any relief.

*Held,* such objection is without merit. Such alternative writ, upon its face, shows a full compliance by the petitioners for the organization of the proposed new county of Stevenson, and others, of all the statutory prerequisites. In the petition for the organization of such proposed new county its western boundary was designated as the east and north bank of the Missouri river, whereas it manifestly appears that it was the intention of all concerned that the western boundary of such proposed new county should be co-extensive with the present western boundary of McLean county, which is the center of the main channel of the Missouri river.

*Held,* that such manifest intention will be given effect by construing the language of the petition as designating the western boundary of such proposed new county to be the center of the main channel of such river.

The other objections urged to the sufficiency of such alternative writ cannot be considered in the absence of certain extraneous facts which have not been incorporated in the record by the settlement of a statement of case.

**Appeal and Error—Appealable Order.**

4. The trial court, on relator's motion, struck out most of defendant's answer new matter of a relevant and material character, and by the same order, and on like motion of relator the issuance of a peremptory writ was directed. *Held*

(1) That such order "involved the merits and necessarily affected the judgment" within the meaning of section 7081, Rev. Codes 1905. Hence it is a part of the judgment roll proper, and its correctness may be reviewed by this court on appeal from the judgment.

(2) Such order was prejudicial error.

**Appeal and Error—Practice—Striking out Portions of Answer—Consideration of Stipulation of Facts in Absence of Statement of Case.**

5. The record discloses that a certain stipulation of facts was used in connection with relator's said motion. *Held,* that such stipulated

facts may be considered by this court in reviewing the correctness of such order, although not incorporated in a statement of the case.

**Voters and Elections—Notice of Election—Mandamus.**

6. In the light of the facts thus stipulated, it is held that the statute requiring the publication for four successive weeks of a notice of election on such county division proposition was not substantially complied with. This being true, it was prejudicial error to deprive defendant of an opportunity to establish the facts pleaded in his answer, and tending to show that actual prejudice in fact resulted on account of a lack of due notice of election.

The notice given merely consisted of the insertion in the notice of the general election at the foot of the list of candidates the words: "Three petitions for county division."

By the order in question defendant was deprived of the right to show the invalidity of the special election on such proposition by showing that there was not a full, fair and intelligent expression of the electors upon such proposition.

**No Issue Left for Trial.**

7. After these defenses were stricken out of his answer, it was not incumbent on defendant to offer proof thereof. There was no issue left for trial, except the naked issue of a want of due notice of election, and by the order complained of defendant was wrongfully deprived of even the opportunity of showing such fact.

Appeal from District Court, McLean county; *Winchester*, J.

Mandamus by the State, on the relation of M. F. Minehan against Paul F. Meyers, as County Auditor of McLean county. Judgment for relator and defendant appeals.

Reversed and remanded.

*J. E. Nelson* and *Engerud, Holt & Frame*, for appellant.

Where averments are "indefinite," remedy is motion to make definite and certain.

Rev. Codes 1905, Sec. 6870; Yerkes v. Crum, 2 N. D. 72, 49 N. W. 422; Johnson v. Great No. Ry. Co., 12 N. D. 420, 97 N. W. 546; Tilton v. Beecher, 59 N. Y. 176; Lee v. Minneapolis & St. L. Ry. Co., 25 N. W. 399; Bliss on Code Pleadings, Sec. 425.

Being demurrable does not make allegations frivolous. Strong v. Sproul, 53 N. Y. 497; Youngs v. Kent et al., 46 N. Y. 672; Cottrill v. Cramer et al., 40 Wis. 555; Bliss on Code Pleadings, Sec. 421.

Naming a river as a boundary means the middle of the channel, unless circumstances exclude this presumption. Smith v. City of Rochester, 92 N.Y . 463; Gouverneur et al. v. National Ice Co., 134 N. Y. 355, 31 N. E. 865; Lorman v. Benson, 8 Mich. 18; Storer v. Neeman, 6 Mass. 435; Walker v. Shepardson, 4 Wis. 486; State v. Gilmanton, 9 N. H. 461.

Naming the bank of a river, excludes the channel. Denver v. Pearce, 13 Colo. 383, 22 Pac. 774; Rockwell v. Baldwin, 53 Ill. 19; Murphy v. Copeland, 51 Iowa, 515; Bradford v. Creney, 45 Me. 9; Hatch v. Dwight, 17 Mass. 289; Watson v. Peters, 26 Mich, 516; Bellows v. Jewell, 60 N. H. 420; Hall v. Power Co., 103 N. Y. 129, 8 N. E. 509; Martin v. Nance, 3 Head (Tenn.) 650; Camden v. Creel, 4 W. Va. 365; Smith v. Ford, 48 Wis. 115, 4 N. W. 462; Freeman v. Bellegarde, 41 Pac. 289; Borkenhagen v. Vianden, 82 Wis. 206, 52 N. W. 260; Axline v. Shaw, 17 So. 411; Fleming v. Keeney, 27 Ky. 155.

Notice of election must disclose nature and extent of proposed change in county. 15 Cyc. p. 325 and cases cited; Bean v. Barton Co., 33 Mo. App. 635; McMahon v. Board, 46 Cal. 214; George v. Twp., 16 Kans. 72; Beal v. Ray, 17 Ind. 554; Harding v. R. R. Co., 65 Ill. 90; Mayor v. Hemerick, 16 S. E. 72; Bowen v. Mayor, 4 S. E. 159; Crook v. Davies Co., 36 Ind. 320; Commonwealth v. Barrett, 17 S. W. 336; Williams v. Town, 88 Ill. 11; People v. Hamilton, Co., 3 Neb. 244; State v. Mayor, 44 N. J. L. 137; Swenson v. McLaren, 21 S. W. 300; Bloomfield v. Bank, 121 U. S. 121, 30 L. Ed. 923; 10 Am. & Eng. Enc. of Law (2nd Ed.) p. 626 et seq.; Detroit, etc., Ry. Co. v. Beares, 39 Ind. 598.

*Herbert F. O'Hare* and *Newton & Dullam*, for respondent.

Only papers defined by statute as a part of the judgment roll, can be considered on appeal. Garr, Scott & Co. v. Spalding, 2 N. D. 414, p. 419, 51 N. W. 867; Cord v. Southwell, 15 Wis. 211; Nash & Harris, 57 Cal. 242; Schenectady etc., v. Thatcher, 6 How. Pr. 227; Cook v. Dickerson, 1. Duer. 686; Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50; Elliott App. Pro. Sec. 190, et seq.; Douglas v. Dakin, 46 Cal. 49; Cleland v. Walbridge, 20 Pac. 730, and cases cited; Carter v. Paige, 20 Pac. 729; Spinetti v. Brignardello, 53 Cal. 281; Sharp v. Daugney, 33 Cal. 505; Harper v. Minor, 27 Cal. 107; Sichler v . Look, 93 Cal. 607, 29 Pac. 220; Ingerman v.

Moore, 90 Cal. 410, 27 Pac. 306; Evansville, etc., R. Co. v. Maddux, 134 Ind. 571; State v. Fabrick, 16 N. D. 94, 112 N. W. 74; State v. Scholfield, 13 N. D. 664, 102 N. W. 878; Morris v. Angle, 42 Cal. 236; Sweet v. Meyers, 53 N. W. 187, and cases cited; The Bank, etc., v. The Bank, etc., 16 Ohio Rep. 170; Acheson v. Sutliff, 18 Ohio Rep. 122 p. 125; Elliott, Sec. 813, et seq. and notes; San Francisco S. Union v. Myers, 76 Cal. 624, 13 Pac. 403; Spreckels v. Ord, 72 Cal. 86, 13 Pac. 158; Stewart v. Miller, 1 Mont. 301; Marden v. Wheelock, 1 Mont. 49; Eureka Coal Co. v. Powers, 10 Ill. App. 61.

Immaterial and impertinent matter may be expunged on motion. 26 Cyc. p. 464; Page v. Merwin, 54 Conn. 426, 8 Atl. 675; Cheney v. State, 165 Ind. 121, 74 N. E. 892; Logiodice v. Gannon, 60 Conn. 81, 21 Atl. 100; Cope v. State, 126 Ind. 51, 25 N. E. 866; Brainard v. Straub, 61 Conn. 570, 24 Atl. 1040; Erickson v. Judge, 138 Mich. 103, 101 N. W. 63; Ray v. Wilson, 14 L. R. A. 773.

As to construction of boundary on rivers and banks of rivers see Heald v. Yumisko, 7 N. D. 422, 75 N. W. 806; Lamphrey v. Metcalf, 53 N. W. 1139; Olson v. Huntamer, 61 N. W. 479; Baker County v. Benson County (Ore), 66 Pac. 815; Rieglesville, etc., Co. v. Bloom, 48 N. J. L. 369; Ex parte Jennings, 6 Cowen 518, p 526 to 527 and note, p. 543; People v. New, 214 Ill. 287, 73 N. E. 362.

Both notice of election and its publication were sufficient. State ex rel., etc., v. Goetze, 22 Wis. 348; Stone v. City of Chicago, 69 N. E. 970, 207 Ill. 492; Coe et al. v. Buell et al., 27 Minn. 197, 6 N. W. 621; State v. Doherty, 16 Wash. 382, 47 Pac. 958; Demaree v. Johnson, 50 N. E. 376; State ex rel. v. Skirving, 19 Neb. 497, 27 N. W. 723; Chicago, etc., R. Co. v. Pickney, 74 Ill. 277; Dillon on Municipal Corporations, 197, note 3 and cases cited; Dushon v. Smith, 10 Iowa 212; Com. v. Reynolds, 8 Pa. Co. Ct. Rep. 568; State ex rel. v. Lansing (Neb.) 64 N. W. 1104; Wheat v. Smith, 50 Ark. 277; Com. v. Smith, 132 Mass. 289; Town of Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579; Foster v. Scarff, 15 Ohio St. 532, Opinion page 537; Smith v. Carroll, (R. I.) 24 Atl. 106; Smith v. Commissioners, 45 Fed. 725; Seymour v. Tacoma, 6 Wash. 427, 33 Pac. 1059; State v. Winnet, 110 N. W. 1113; People v. New, supra; State ex rel. Bruce v. Davidson, 32 Wis. 114; McCrary on Elections, (3d Ed.) pp. 94, 95, 96, 97, 98; Cooley's Const. Lim. (3d Ed.) 603.

The majority of the voters assembled is sufficient. Lawrence v.

Ingersoll, 6 L. R. A. 308; Launtz v. People, 113 Ill. 137; First Parish, etc. v. Sterns, 21 Pick. 148; Booker v. Young, 12 Gratt. 303; State v. Green, 37 Ohio St. 227; State v. Chapman, 44 Conn. 600; Field v. Field, 9 Wend. 394; Verbeck v. Scott; Marion County v. Winkley, 29 Kan. 36; Gillespie v. Palmer, 20 Wis. 544; Rushville Gas Co. v. City of Rushville, 6 L. R. A. 315.

FISK, J. This is an appeal from an order of judgment of the district court awarding to relator a peremptory writ of mandamus, commanding defendant to make his certificate to the Secretary of State, as prescribed by chapter 62, Laws 1907, relative to the division and organization of counties. Such proceedings were initiated by the issuance and service of an alternative writ reciting, in substance, the following facts: That on November 21, 1907, plaintiff and other electors of McLean county, presented to the board of county commissioners of such county a petition for the formation of the new county of Stevenson out of certain territory in the western portion of McLean county therein specifically described; that such petition was signed by the requisite number of legal voters, and in other respects conformed with the statute; that on March 10, 1908, such board of county commissioners approved the petition, finding that the proposed new county of Stevenson could be constitutionally formed and making an order for the submission of the question of the formation thereof to a vote of the people of McLean county at the next general election. It is also alleged in such alternative writ that the county auditor caused notice to be published, at least once each week for four successive weeks next preceding such general election in the three official papers of the county, that the question of the formation of such new county would be submitted to the voters at such general election. Then follow allegations to the effect that after such election the ballots upon such new county proposition were duly counted, canvassed, and returned, the result showing that 1,006 votes were cast "For New County," and 741, "Against New County." The refusal of the county auditor, Ole B. Wing, to make his certificate to the secretary of state reciting such facts is next alleged, and also the fact that relator brings this proceeding in his own behalf and in behalf of the electors of the proposed new county.

According to the printed abstract, although the fact is disputed by respondent's counsel, defendant demurred, and moved to quash

the alternative writ, upon the ground of the alleged insufficiency of the facts therein stated to entitle relator to any relief, which demurrer and motion were overruled. Thereupon defendant answered, in substance as follows: It is therein admitted that a petition for the formation of the proposed new county was presented to the board of county commissioners, and that such proposition was by such board submitted to the electors of McLean county at the November, 1908, general election, but it is alleged, in effect, that such proposed change of county boundaries violates the constitutional provision requiring natural boundaries to be observed, in that it leaves all the part of the Missouri river lying between the middle of the main channel thereof and its east bank within the county of McLean. It is also therein alleged that two other propositions for county division were also submitted at such election. By paragraph 3 of such answer it is expressly denied that any notice of the election upon such special question of county division was published as alleged in the alternative writ, or in any other manner whatsoever, and it alleges that 3600 votes were cast at such general election, and upon the various propositions for county division 2,750 votes were cast, and that the proposition in question received but 1,006 affirmative votes; 811 votes having been cast in the negative. Then follow various allegations tending to show laches and grounds for estoppel on the part of the relator and those on behalf of whom he sues, which allegations we deem it unnecessary to set forth. Such answer next contains the following : "Defendant further answering, alleges that the entire vote on the question of county division was never returned to or canvassed by the county board of canvassers of McLean county; that although in each of the precincts of Butte, Douglas, Roseglen, Whittaker, Shell Creek and Turtle Lake votes were cast on the said question of county division. No returns from the said precincts of said vote were made to the board of county canvassers, and that the aggregate number of electors who voted in said precincts at the said election was 354. That it appears from the face of the election returns from each of the following precincts, that the number of the electors who voted on county division voted on the same ballot in favor of all three of the proposed changes appearing on the ballot Exhibit A, and that the precinct officers counted the same as a vote in favor of each proposition. Said precincts, and the votes so improperly counted in each as it

appears on the face of the returns, were as follows: Lincoln, 3 votes; Curtis, 2 votes; Malcolm, 1 vote; Garrison, 24 votes; St. Mary, 7 votes; LaMont, 1 vote; Goodrich, 11 votes; Mercer, 3 votes.

That all the foregoing facts were known to the relator, and to all others similarly situated and interested in said question of county division, but that they took no steps whatever to have said errors and omissions corrected, or to have a corrected count or canvas of all the votes on said question made. Defendant further alleges the fact to be that the actual number of electors who voted on the same ballot in favor of all three of the proposed changes was in excess of 200, and that ballots marked in the same way were counted as votes in favor of each of the three proposed changes in all the remaining precincts of the county of McLean." Nearly all of the allegations of such answer were, on relator's motion, stricken therefrom,and judgment ordered awarding the peremptory writ as prayed for.

The record contains the following stipulation of facts, which the abstract states was made and used in connection with the relator's motion to strike out :

"STIPULATED SET OF FACTS.

That the official newspapers designated by the board of county commissioners of McLean county in which to publish the official proceedings of said board in 1908 were: The Washburn Leader, published at Washburn, N. D.; The Turtle Lake Wave, published at Turtle Lake, N. D., and The Searchlight, published at Martin, N. D., all in McLean county. That the notice of election was published in the Washburn Leader and in the Turtle Lake Wave on the 9th, 16th, 23d and 30th days of said month of October, 1908, in the form as appears in the copy of Washburn Leader hereto annexed. That the same notice was published in The Searchlight only three times, to-wit: On October 15th, 22d, and 29th. That a notice in the form as shown by the copy of Washburn Leader hereto annexed, under the heading 'Certificates of Nomination,' was published in the regular weekly editions of each of said three official newspapers two times, one in each of the two weeks next preceding the election. That each of the foregoing mentioned notices were published in The Searchlight on a separate sheet, folded in and mailed with the regular edition of said paper, as shown by the

copy of said newspaper hereto appended. That the remainder of McLean county, after segregating Stevenson and Sheridan counties, as described in the first and second questions respectively, appearing in the ballot, Exhibit A of defendant, contains 22 complete congressional townships, and in addition thereto fractional congressional townships containing an aggregate area of 135 complete government sections, equal approximately to four complete congressional townships. That the Garrison Commercial Club, of which M. F. Minehan, the relator in this case is a member, through its secretary, Herbert F. O'Hare, did about 10 days before the general election circulate by mail throughout the whole length and breadth of the county of McLean the following circulars, attached hereto, and made a part of this stipulated set of facts, marked 'Exhibit A' and 'Exhibit B'; that is, that the said Herbert F. O'Hare mailed a copy of each Exhibit A and B by United States mail to each and every voter within the whole county of McLean, as shown by the poll list of the primary election held in said county on June 24, 1908. Dated this 3d day of April, 1908."

The notice of election referred to in such stipulation was as follows :

"NOTICE OF ELECTION.

"Notice is hereby given that on Tuesday, the 3d day of November next, in the year of our Lord 1908, at the established polling places in the several voting precincts in the county of McLean and the state of North Dakota, as hereinafter described, an election will be had for the election of state, legislative, county and district officers, to-wit."

Then follows an enumeration of the several offices to be filled at the election. And following such list of officers are the words "Three Petitions for County Division." These words are the only reference in such notice of election to the fact that such county division propositions were to be submitted.

The notice referred to in said stipulation under the heading, "Certificates of Nomination" is dated October 14, 1908, and is in the usual form, setting forth a list of the constitutional amendments to be voted on, the names of nominees for the various offices, after which the three county division propositions were set forth at length. The circular referred to as having been mailed to the va-

rious electors as disclosed by the primary election poll lists contains arguments in favor of the organization of both Stevenson and Sheridan counties, and explains the form of ballot and manner of voting, and, among other things, contains the following:

"It is necessary that a majority of all voters casting their ballots at such election shall be in favor of county division if the county is to be divided at the coming electon, and for this reason it is not only advisable, but necessary, that every voter who is in favor of the organization of the proposed county of Stevenson, or the proposed organization of the county of Sheridan, line 78-79, should vote for each of these on the ballot, and not for one alone."

The foregoing, we think, a sufficiently full statement of the record to enable us to properly dispose of the appeal.

There are three alleged errors assigned in appellant's brief as follows: (1) The court erred in overruling defendant's demurrer and motion to quash; (2) the court erred in striking out each of the several parts of the answer designated in paragraphs 1 to 16, both inclusive, of relator's motion to strike out; and (3) the court erred in awarding the peremptory writ of mandamus. Under these assignments numerous questions are presented and argued in the briefs of counsel relative both to points of practice and the merits, but we shall notice only those questions which we deem controlling.

In disposing of the various quesions presented it must be borne in mind that the proceedings for the division of a county and the organization of new counties are strictly statutory, and no intendment can be indulged in their favor. It is no doubt true that the statute must receive a liberal construction to the end that the legislative intent may be given effect, but where such intent is reasonably apparent, it is incumbent upon those who seek to interfere with existing county organizations by the creation of new counties to at least substantially conform to the requirements of the statute.

Regarding appellants first assignment of error there is a dispute between counsel as to whether a demurrer was interposed to the alternative writ, or merely a motion to quash, and in appellant's reply brief his counsel concedes that it may be treated merely as a motion to quash, and hence the order overruling the same, being no part of the judgment roll, cannot be reviewed. They contend, however, and correctly so, that the assignments of error raise the same objections to the sufficiency of the alternative writ which were

attempted to be raised by the motion to quash. Does such alternative writ, upon its face, show relator entitled to the relief prayed for? We think this question must be answered in the affirmative. Our answer might be otherwise if we were permitted to treat the stipulation of facts as modifying the allegations in such writ. But respondent's counsel contend, and we think correctly so, that such stipulated facts, not having been brought into the record by a statement of case, is not properly before us for such purpose. Therefore, in testing the sufficiency of the alternative writ, we must look only to the writ itself. From an examination of the writ it appears that all the statutory prerequisites were observed in submitting to the voters the proposition for the organization of Stevenson county, including the notice required of the submission of such proposition to the electors of McLean county.

It is true that in describing the territory proposed to be segregated from McLean county the petitioners designated the east and north "bank" of the Missouri river as its wesern boundary, and if such designation is to be given a strict and literal interpretation, the proceedings might be held to conflict with section 167 of our Constitution, which provides that: "In the organization of new counties and in changing the lines of organized counties * * * the natural boundaries shall be observed as nearly as may be." The western boundary of McLean county is the center of the main channel of the Missouri river, and it is the contention of appellant's counsel that, under the proposition as submitted and voted upon, the portion of the Missouri river between its main channel and its east and north bank would still continue a part of McLean county. We cannot assent to such contention. It was manifestly the intention of the petitioners, and of all who voted upon the proposition for the organization of Stevenson county, that its western boundary should extend to the extreme western boundary of McLean county, and it was unquestionably an oversight on the part of the petitioners, in describing the western boundary of such proposed new county, to use the language which was used in the petition. In the light of the facts and circumstances, and the manifest intent of all concerned, we think the only reasonable interpretation to be given the language employed is, that the western boundary of the proposed new county should extend to the western limit or boundary of McLean county, namely, to the center of the main channel of the

Missouri river. Our conclusion, therefore, is that the alternative writ upon its face is sufficient to afford relator the relief prayed for. This brings us to appellant's second assignment.

And here we are again confronted with a question of practice. Respondent's counsel vigorously urge that, in view of the fact that no statement of the case was settled, no question is properly before this court, except such as may arise upon the judgment roll proper. Hence they argue that the ruling of the trial court in striking out portions of the answer cannot be reviewed, not being a part of the judgment roll. Among other things, they say: "The motion to strike out certain designated portions of the answer is no part of the judgment roll. Such motion is entirely interlocutory and collateral, and does not involve the merits, nor necessarily affect the judgment, and may not be reviewed upon an appeal upon the judgment roll." In support of such contention they cite and rely upon Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50; Bolton v. Donovan, 9 N. D. 575, 84 N. W. 357; Schomberg v. Long, 15 N. D. 506, 108 N. W. 332; State v. Fabrick, 16 N. D. 94, 112 N. W. 74; Elliott's App. Pro. 190 et seq.; also numerous authorities from California.

In Mooney v. Donovan, it was held merely that an order denying a motion to quash an alternative writ of mandamus forms no part of the judgment roll, and consequently is not reviewable on appeal from the judgment without such order is made part of the record by statement of case. The court said: "Before the order becomes a part of the judgment roll, it must not only involve the merits, but it must necessarily affect the judgment, either by terminating the action so that no judgment can be rendered, or by making it certain that by reason of the order the judgment will necessarily be different from what it would be were the order not made." The above language was used in construing what is now section 7081, Rev. Codes 1905, relating to the contents of the judgment roll. This statute which includes in the judgment roll, "All orders and papers in any way involving the merits and necessarily affecting the judgment was borrowed from the Wisconsin statute, and differs radically from the California Statute under which the California decisions cited by respondent's counsel were rendered. The case of Bolton v. Donovan merely involved the question of the appealability of an order, and is not in point here.

In Schomberg v. Long, it was held that on an appeal from the judgment an order taxing costs can be reviewed only upon a statement of case embracing the record upon which the court acted in making such order. The order in that case clearly was not an order "involving the merits and necessarily affecting the judgment." Hence such case it not an authority upon the question here involved.

We deem it reasonably clear that the order here involved, which granted relator's motion to strike out certain portions of the answer, "involved the merits and necessarily affected the judgment," and therefore is a part of the judgment roll, and reviewable on this appeal. Such is the express holding of this court in Township of Noble v. Aasen, 8 N. D. 77, 76 N. W. 990. In that case the court, on plaintiff's motion, struck out a counter-claim and on appeal from the judgment such ruling was the sole error assigned. It was urged that the order could not be reviewed, but the court held othewise, saying: "It was an intermediate order, which involved the merits, and necessarily affected the judgment; and,as such, it is reviewable on appeal from the final judgment, under section 5627 (section 7226, Rev. Codes 1905)." We are unable to agree, therefore, with respondent's counsel that upon this record the question presented is "clearly only a moot question, or at best entirely academic."

This brings us to a consideration of the correctness of the court's ruling in striking from the answer certain portions thereof complained of. By section 6870, Rev. Codes 1905, it is provided: "If irrelevant or redundant matter is inserted in a pleading it may be stricken out on motion of any person aggrieved thereby." The attitude of the trial court in striking out the alleged defences necessarily was that, although true, they did not constitute any defense. Assuming the truth of the allegations thus stricken from the answer, did they, or any of them, constitute a legal defense? If so, then manifestly the ruling complained of was prejudicial error. The order striking out such defenses and directing the issuance of the peremptory writ in effect terminated the case. The record, while containing findings of fact and conclusions of law, clearly discloses, we think, that no issues of fact were tried, at least no issues thus tendered by the new matter in the answer are covered by the findings. After the ruling complained of it was not only unnecessary, but it would have been manifestly useless, for defend-

ant to have offered proof relative to the matters thus stricken from the answer. Township of Noble v. Aasen, supra, 8 N. D. 77, 76 N. W. 990.

Among the documents certified to this court is the stipulation regarding certain facts hereinbefore mentioned, and such stipulation is printed in the abstract, together with the following statement: "The foregoing stipulation was made and used in connection with the relator's motion to strike out." This statement is nowhere challenged by respondent's counsel, and they have not asked to strike from the record such stipulation or any other document. We think, therefore, that such stipulation is properly before us for the purpose of considering the order complained of under the decision of this court in Oliver v. Wilson, 8 N. D. 590, 80 N. W. 757, 73 Am. St. Rep. 784. In the light of the facts thus stipulated it is entirely clear that the provisions of the statute regarding the publication of notice of the submission of the proposition for the organization of Stevenson county were not substantially complied with. The statute (sections 2329, 637, Rev. Codes 1905) requires such notice to be published in each of the official newspapers of the county "at least once in each week for four successive weeks next preceding such election." Concededly the notice, such as was published, as hereinbefore stated, was published for three consecutive weeks only, in one of the official papers of the county, and we think it too clear for discussion that the notice as published in each of the papers was wholly insufficient. It in no manner apprised the voters or furnished them any information relative to the several county division propositions. We think it equally plain that the legislative intent was to furnish such information to the end that the electors might, prior to election day, have an opportunity to intelligently discuss with one another the advisability and feasibility of voting for or against the same.

It is not seriously argued by relators counsel that such published notice was a compliance with the statute; but they contend that, inasmuch as the respective propositions were published at length in such official newspaper under the heading "Certificates of Nomination" for two weeks next preceding the election, this sufficed. The logical effect of such argument is that a two week's publication is a substantial compliance with the statute requiring four weeks' publication. We feel compelled to differ with respondent's counsel

in this regard. They also contend that any prejudicial consequence resulting from a failure to publish the notice as required by law was obviated by the fact as stipulated that the Garrison Commercial Club, through its secretary, mailed to each voter within the county, as shown by the poll lists of the primary election held in June preceding, a copy of Exhibits A and B, which contain a printed statement of each county division proposition, together with arguments in favor of county division. Such contention is manifestly erroneous. There is nothing to show that all or any considerable proportion of the legal voters participated in the primary election, and, furthermore, many persons may have become electors subsequent to such primary election, and prior to the general election. It follows from this conclusion that those portions of the answer tending to show that actual prejudice in fact resulted on account of a lack of due notice of the election were relevant and material. Any facts tending to show that there was not a full, fair and intelligent expression of the electors upon the proposition in question was, we think, relevant and material. That defendant could urge any defense showing the invalidity of the election we deem well settled. This he sought to do in his answer, first, by denying that notice of the election on such special question was given; and, second, by alleging the various matters tending to show that such election could not, in the absence of due notice, be sustained. The order complained of deprived him of the opportunity to do either.

After these defenses were stricken out, it was not incumbent on defendant to offer proof thereof, and as before stated, it would have availed him nothing by so doing. There was no issue left for trial except the issue as to notice of such election, and defendant was under no obligation to offer proof under this issue, even if permitted, in view of the attitude of the court with reference to his other defences which merely supplemented his defense of a want of due notice. But the record discloses that no opportunity was afforded defendant to make such proof. The relator's motion was dual in character. It asked, first, for an order striking from the answer the defenses aforesaid; and, second, for the issuance of the peremptory writ. The motion was granted in both particulars by one order, and thus the writ was directed to issue simultaneously with the granting of the relief first asked. This conclusion necessitates a reversal of the judgment and order appealed from; and,

in view of the aparent fact that the other questions presented will in all probability not again arise in the case, we shall not notice them at this time.

The judgment and order are reversed, and the cause remanded to the district court for further proceedings according to law.

124 N. W. 701.

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THE STATE OF NORTH DAKOTA, EX REL. ANDREW MILLER, ATTORNEY GENERAL, v. THE DISTRICT COURT OF BURLEIGH COUNTY, SIXTH JUDICIAL DISTRICT OF THE STATE OF NORTH DAKOTA, AND THE HON. W. H. WINCHESTER, JUDGE THEREOF.

Opinion filed January 12, 1910.

(124 N. W. 417.)

**Grand Jury—Enforcement of Prohibitory Law—Appearance of Attorney General.**

1. Section 9372, Revised Codes 1905, relating to the prohibition law, provides, among other things, as follows: "Whenever the state's attorney shall be unable, or shall neglect or refuse to enforce the provisions of this chapter in his county, or for any reason whatever the provisions of this chapter shall not be enforced in any county, it shall be the duty of the attorney general to enforce the same in such county, and for that purpose he may appoint as many assistants as he shall see fit, and he and his assistants shall be authorized to sign, verify or file all such complaints, informations, petitions and papers as the state's attorney is authorized to sign, verify or file, and to do and to perform any act that the state's attorney might lawfully do or perform * * *."

*Held,* that the attorney general and his assistants have the right to appear before the grand jury and examine witnesses and lay before it any matters relating to the violation of the prohibition law.

**Grand Jury—Appearance of Attorney General.**

2. Section 2494, Revised Codes of 1905, provides, among other things, as follows: "The attorney general or his assistants are authorized to institute and prosecute any cases in which the state is a party, whenever in their judgment it would be to the best interests of the state so to do."

*Held,* that the attorney general has the right to appear before the grand jury at any time when in his judgment he deems it for the best interests of the state so to do, and that each of his assistants has the same right.

**Grand Jury—Appearance of Attorney General.**

3. The right of the attorney general and his assistants to go before the grand jury is not affected by section 9829, Revised Codes of 1905, allowing only the state's attorney to appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them, and to interrogate witnesses before them whenever he thinks it necessary, and permitting no other person to be present during the sessions of the grand jury except the members and a witness actually under examination.

Application by the state, on the relation of Andrew Miller, Attorney General, for writ of certiorari to the District Court of Burleigh county, and W. H. Winchester, Judge.

Writ awarded.

*Andrew Miller,* for plaintiff.

*R. N. Stevens* and *Newton & Dullam* (*F. H. Register* and *T. R. Mockler,* of counsel), for defendant.

CARMODY, J. This is an application by the attorney general for a writ of certiorari to the district court of Burleigh county, Sixth Judicial District, and the Hon. W. H. Winchester, judge thereof. It is agreed by counsel that the facts before us are the same facts which would be disclosed by the return to the writ. Our decision, therefore, will not only settle the preliminary question, whether the writ should issue, but also the ultimate question whether the order of the district judge sought to be reviewed by this proceeding, is valid or void.

On the 18th day of November, 1909, the attorney general, having before him a certain report of the public examiner relative to the condition and management of the offices of the county auditor and county commissioners of Burleigh county, North Dakota, which report had been transmitted to said attorney general by the governor; the attorney general transmitted a copy of said report to the respondent, the Hon. W. H. Winchester, together with a letter of transmittal from said attorney general, calling the attention of said respondent to certain irregularities and purported violations of law, claimed to constitute misconduct, malfeasance and misdemeanor in office on the part of said officials; also calling the attention of the said respondent to alleged violations of the prohibition law in said Burleigh county, and requesting the said respondent to call a grand jury for said Burleigh county to attend at the next session of the district court in and for said

county to the end that said grand jury might inquire into the subject matter of said report and all other offenses cognizable or triable in said county; that thereafter, on the 24th day of November, 1909, the judge of said court, in accordance with said request, made and issued his order for the calling of such grand jury, and caused the same to be filed with the clerk of said district court; that thereafter, in accordance with said order, the proper officers of such county caused to be summoned from the body thereof, in the manner authorized by law, twenty-three electors, having the qualifications of grand jurors, to meet in the county court house of Burleigh county at 10 o'clock, a. m., on the 30th day of November, 1909, being a day of the regular November term of said court; that on the same day respondent duly impanelled a grand jury of twenty-three men and charged the same in respect to their duties as such grand jurors; that as part of such charge in relation as to who might appear before the grand jury in the capacity of public prosecutor and adviser to said grand jury, the court said: "That the grand jury may at all reasonable times ask the advice of the court and of the state's attorney. The state's attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them, whenever he thinks it necessary, but that no other person is permitted to be present during their sessions except the members and a witness actually under examination;" that thereupon at said time in open court before the grand jury had retired, the attorney general stated to the court that he had several important matters that he desired to present to this grand jury as attorney general, and requested the court to amend its instructions by instructing the grand jury that the attorney general and his assistants might also appear before the grand jury and present such matters as the state's attorney might do; that thereupon the court made and caused to be entered in the record, the following order: "I will hold, General, that you have no right to go before the grand jury," to which ruling and order the attorney general excepted. No claim was made by the attorney general that the state's attorney of said Burleigh county refused or neglected to perform any of the duties of his office prescribed by law. We are asked by this writ to review the action of the respondent in denying the attorney general and his assistants the right to appear before such grand jury and present such matters as the state's attorney might.

Section 82 of our constitution provides for the election of an attorney general.

Section 83 provides that the power and duties of the attorney general shall be as prescribed by law.

Section 173 of the constitution provides for the election in each county of a state's attorney.

Section 9829, Revised Codes 1905, is as follows: "The grand jury may at all reasonable times ask the advice of the court or of the state's attorney. The state's attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them, and may interrogate witnesses before them whenever he thinks it necessary; but no other person is permitted to be present during their sessions except the members and a witness actually under examination, and no person whomsoever must be permitted to be present during the expression of their opinions or the giving of their votes upon any matter before them."

Section 9372, Revised Codes 1905, relating to the duty of the attorney general, in enforcing the prohibition law, as far as material here, is as follows: "Whenever the state's attorney shall be unable, or shall neglect or refuse to enforce the provisions of this chapter in his county, or for any reason whatever the provisions of this chapter shall not be enforced in any county, it shall be the duty of the attorney general to enforce the same in such county, and for that purpose he may appoint as many assistants as he shall see fit, and he and his assistants shall be authorized to sign, verify or file all such complaints, informations, petitions and papers as the state's attorney is authorized to sign, verify or file, and to do and to perform any act that the state's attorney might lawfully do or perform; * * *"

Section 9788, Revised Codes 1905, is as follows: "All crimes or public offenses triable in the district courts must be prosecuted by information or indictment, except as provided in the next section."

Section 9794, Revised Codes 1905, as far as material here, is as follows: "All informations filed under the provisions of this article, shall be by the state's attorney of the county or judicial subdivision, or by the person appointed to prosecute * * *."

Section 123, Revised Codes 1905, as far as material here, is as follows: "The duties of the attorney general shall be:

1. To appear for and represent the state before the supreme court in all cases in which the state is interested as a party.

4. To consult with and advise the several state's attorneys in matters relating to the duties of their office; and when in his judgment the interests of the state require it, he shall attend the trial of any party accused of crime and assist in the prosecution."

Section 2494, Revised Codes 1905, as far as material here, is as follows: "The state's attorney is the public prosecutor, and must:

1. Attend the district court and conduct on behalf of the state all prosecutions for public offenses.

2. Institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that such offenses have been committed, and for that purpose, when not engaged in criminal proceedings in the district court, must attend upon the magistrates in cases of arrest, when required by them, except in cases of assault and battery, and petit larceny, and attend before, and give advice to the grand jury whenever cases are presented to them for their consideration.

3. Draw all indictments and informations, defend all suits brought against the state or his county, prosecute all bonds forfeited in the courts of record and all actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or his county.

4. Deliver receipts for money or property received in his official capacity, and file duplicate receipts therefor with the county auditor.

5. On the first Mondays of January, April, July and October in each year, file with the county auditor an account, verified by his oath, of all moneys received by him in his official capacity during the preceding three months and at the same time pay it over to the county treasurer.

6. Give, when required, and without fee, his opinion in writing to the county, district, township and school district officers, on matters relating to the duties of their respective offices.

7. Keep a register of all official business, in which must be entered a note of each action, whether civil or criminal, prosecuted officially, and of the proceedings therein.

8. Make a written report to the attorney general, on the first day of each month, of all proceedings instituted or pending in his county in any court, other than justice courts, wherein the state is a party or is interested; which reports shall give the title of the case, the date when commenced, the purpose of the action, the proceedings had and taken therein, and the final disposition of such cases.

9. It is the intention of this article to make the attorney general, his assistants, and the state's attorney the only public prosecutors in all cases, civil and criminal, wherein the state, or county, is a party to the action, and that they only shall be authorized and empowered to perform the duties herein set forth, except as hereinafter provided. The attorney general or his assistants are authorized to institute and prosecute any cases in which the state is a party whenever in their judgment it would be to the best interests of the state so to do, and in case the state's attorney of any county refuses or neglects to perform any of the duties prescribed in subdivisions 2 and 3 of this section, after it has been properly brought to his attention, or when he has information that a public offense has been committed, or that a civil suit in which the state is a party, should be instituted and the fact of such refusal or neglect to perform such duty, and that the action is one that should be prosecuted, has been brought before the judge of the district court in the judicial district having jurisdiction of such action, by affidavit or otherwise, and said judge is satisfied that such action should be prosecuted, and that said state's attorney has failed or neglected to perform his duty, then in that case, he shall request the attorney general or an assistant attorney general to take charge of such prosecution * * *."

Chapter 195 of the Laws of 1907 make it the duty of the attorney general and the state's attorney to prosecute all violations of the pure food law.

Chapter 196 of the Laws of 1907 makes it the duty of the attorney general and the state's attorney to prosecute all violations of the pure drug law.

Chapter 197 of the Laws of 1907 makes it the duty of the attorney general and the state's attorney to prosecute all violations of the act concerning concentrated commercial feeding stuff

Chapter 211 of the Laws of 1907 makes it the duty of the attorney general and the state's attorney to prosecute all violations of

the law relating to the construction of Y's by railroad companies.

Chapter 259 of the Laws of 1907 makes it the duty of the state's attorney of the proper county and the attorney general, to prosecute all violations of the act defining pools and trusts.

Chapter 128 of the Laws of 1909 makes it the duty of the attorney general and the state's attorney to appear in the prosecution of criminal actions arising under the game and fish law.

Chapter 189 of the Laws of 1909 makes it the duty of the attorney general and the state's attorney of the proper county to prosecute all violations of the pure liquor law.

Chapter 209 of the Laws of 1909 makes it the duty of the attorney general and the state's attorney to prosecute all violations of the pure seed law.

Under section 9372, Revised Codes of 1905, supra, the attorney general and his assistants have authority to do and perform any act that the state's attorney might lawfully do or perform and for that purpose they are authorized to go before the grand jury.

State v. Winchester, 18 N. D. 534, 122 N. W. 1111; State v. Becker, 3 S. D. 29, 5 N. W. 1018; State v. Crilly, 69 Kan. 802, 77 Pac. 701.

State v. Becker was a prosecution for maintaining a common nuisance, on an information signed and verified by an assistant attorney general. Defendant demurred on the ground, among others, that the assistant attorney general had no power to sign or verify the information or bring or prosecute the action. Under a statute nearly similar to ours, in holding that the assistant attorney general had authority to sign, file and verify the information, the court uses the following significant language: "The attorney general is in the same department as the state's attorney, but having a larger jurisdiction, and is in a sense a superior and supervising officer."

In State v. Winchester, supra, the attorney general filed an information in the district court of Burleigh county against Duncan J. McGillis for an alleged violation of the prohibition law. The attorney general made an application to the said district court for a change of venue, which application was denied and the attorney general applied to this court for a writ of certiorari to review the action of the district court in denying the application of the attorney general for a change of venue.

Section 9931, Revised Codes 1905, is a part of the article relating to changes of venue in criminal actions, and is the only section of the code granting the state the right to a change of

venue. Said section reads as follows: "The state's attorney, on behalf of the state, may also apply in a similar manner for a removal of the action, and the court, being satisfied that it will promote the ends of justice, may order such removal upon the same terms and to the same extent as are provided in this article, and the proceedings on such removal shall be in all respects as above provided."

No question was raised as to the authority of the attorney general to file the information or apply for the change of venue in State v. McGillis. No valid objection could be raised as it was a proceeding for the enforcement of the prohibition law in Burleigh county, in which county for some reason the attorney general was of the opinion that the prohibtion law was not enforced.

Under the same section that authorized the attorney general to file the information against McGillis, he is authorized to appear and lay before the grand jury violations of the prohibition law in Burleigh county.

Section 9372, supra, is identical with section 7426 of the general statutes of 1901 of the state of Kansas. In upholding the authority of the assistant attorney general of the state of Kansas to sign an indictment against a violator of the prohibition law, in State v. Crilly, supra, the supreme court of Kansas says: "But the county attorney can cause witnesses to be subpoenaed before a grand jury, therein interrogate them himself, and give the jury any other information he may have. Therefore he can institute a prosecution in this manner as well as by the other methods provided by statute. These same powers are given to the attorney general and his assistants so far as concerns offenses against the prohibitory law. And the signing of an indictment charging the unlawful sale of intoxicating liquor is a step in the enforcement of that law. To clothe the assistant attorney general with authority to perform this duty in any case where there might be occasion for his services in that connection, was apparently one of the very purposes for which the statute was enacted."

In the case at bar the attorney general called the attention of the respondent, the Hon. W. H. Winchester, to alleged violations of the prohibitory law in Burleigh county and had, in our opinion, authority to appear before and bring to the attention of the said grand jury violations of the prohibition law in said Burleigh county.

It is made the duty of the attorney general, when for any reason whatever the prohibition law is not enforced in any county in the state, to enforce said law. Who is to judge when any reason exists for his enforcing the prohibition law in any county? Clearly the attorney general. The statute makes no provision for any other person. We might rest our decision and grant the writ on the ground that the attorney general and his assistants had authority to go before the said grand jury for the purpose of enforcing the prohibition law in said Burleigh county, but as the right of the attorney general to appear before a grand jury is a very important question, and one likely to arise in the future, we are disposed to pass upon the authority of the attorney general to appear before the grand jury in any county whenever or whereever there is a grand jury in session in this state.

Section 123, supra, is Chapter 24 of the session laws of 1901. It was approved March 11, 1901, with an emergency clause which is as follows: "Whereas, there is now no law requiring the attorney general to keep a record of actions in which the state is a party or interested, prosecuted by the state's attorneys of the several counties, therefore an emergency exists and this act shall be in force from and after its passage and approval."

There is no provision in this chapter requiring the state's attorneys of the several counties to make any report to the attorney general.

Section 2494, supra, is chapter 178 of the session laws of 1901, approved March 11, 1901, with no emergency clause. Subdivision 8 of this section requires the state's attorney to make a written report to the attorney general on the first day of each month, "of all proceedings instituted or pending in his county in any court, other than justice courts, wherein the state is a party or is interested."

These two sections, having been approved the same day, must be construed together, and we are of the opinion that a reasonable construction of them warrants the result arrived at in this case.

What did the legislature mean by requiring the state's attorney to make a written report on the first of each month of all proceedings instituted or pending in his county in any court, other than justice's courts, wherein the state is a party or is interested? We think it was to enable the attorney general to keep in touch with the business of the office of the state's attorney in the dif-

ferent counties. And in any county where the state's attorney was not properly performing his duties, either in the enforcement of the prohibition or other laws or in other matters, the attorney general or his assistant could institute and conduct prosecutions in such county or assist the state's attorney in the prosecution of such cases as the attorney general deemed best.

By said section 123 it is made the duty of the attorney general, when in his judgment the interests of the state require it, to attend the trial of any party accused of crime and assist in the prosecution.

By said section 2494 it is made the duty of the attorney general and his assistants to institute and prosecute any case in which the state is a party whenever in their judgment it would be to the best interests of the state so to do.

What is the meaning of the word "prosecution?" The word "prosecution" is defined in Vol. 23, Am &. Eng. Enc. Law, 2d Ed. 268-269, as follows: "To prosecute is to proceed against judicially. A prosecution is the act of conducting or waging a proceeding in court; the means adopted to bring a supposed offender to justice and punishment by due course of law. It is also defined as the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information."

As provided by section 2491, supra, the judge of the district court of any judicial district has authority, in certain contingencies to request the attorney general or his assistants to take charge of any prosecution. In such a case it will be conceded that the attorney general or his assistants would be authorized to lay such matters before the grand jury. We are of the opinion that the attorney general is the proper party to decide when he shall attend the trial of any party accused of crime, and assist in the prosecution and that the attorney general or his assistants are the proper parties to decide when it is to the best interests of the state to institute and prosecute any case.

People of the state of N. Y. v. Ballard et al., 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737; State v. Bowles, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176; People v. Stratton, 25 Cal. 242; State ex rel. Nolan v. The District Court, 22 Mont. 25, 55 Pac. 916; State v. Robinson, 101 Minn. 227, 112 N. W. 269, 20 L. R. A. (N. S.) 1127.

People of the State of New York vs. Ballard, supra, was an action by the attorney general to remove the trustees of a business corporation and compel them to account for its property. The court of appeals of the State of New York, speaking through Judge Vann, says: "We think that the question as to what the public interests require is committed to the absolute discretion of the attorney-general, and that it cannot be made the subject of inquiry by the courts. If he abuses the great power intrusted to him, a remedy may be found in his removal from office, or in the election of a successor worthy of the high position."

People vs. Stratton, supra, was an action instituted by the attorney general of the State of California on behalf of the people to cancel a patent issued by the state. The defendant moved to dismiss on the ground that the attorney general had no authority or power to institute or prosecute the proceeding in this action in the name or on behalf of the people of the state of California. Among the duties which the attorney general was required by the laws of the state of California to perform was to attend each term of the supreme court and there prosecute or defend all causes in which the state might be a party. Nowhere was it made the duty of the attorney general to institute any action in a court of original jurisdiction on behalf of the state or otherwise, but it was his duty, whenever in his opinion required by the public service or when directed by the governor ,to repair to any district in the state and assist the district attorney in the discharge of his duties. The court says: "The act, as already observed, does not make it the duty of the attorney general to institute any action on behalf of the state in any court of original jurisdiction, and from this silence, it is argued on behalf of the respondent, he can have no such power without the aid of legislative enactment. But can this be so when the nature and objects of the office are considered? The attorney general is the law officer of the state. * * * * The question as to the right of the attorney general of this state ex officio to file an information in the nature of a bill in chancery, to annul a patent for lands granted by the state to an individual, is one perhaps of difficult solution, but by analogy to the powers exercised by officers of like character in England, and in most, if not all the states of the American Union, we think he may do so in a case where the matter involved in the state immediately concerns the rights and interests of the state.

People vs. Oakland Water-Front Co., 118 Cal. 234, 50 Pac. 305, was an action instituted by the attorney general to determine adverse claims to real property and for other incidental relief. It was contended by the defendants that the attorney general had no authority to institute the action. The supreme court, following the decision in People vs. Stratton, overruled their contention.

State vs. Bowles, supra, was a prosecution for soliciting a bribe. The governor requested the attorney general to attend and prosecute the same. The defendant made a motion to quash the indictment on the ground, among others, that the indictment is not signed by the county attorney as required by law, nor by any person who is authorized by law to sign indictments in said county. The court, in denying the motion to quash on these grounds, says: "When directed by the governor or either branch of the legislature to appear and prosecute criminal proceedings, in any county, he becomes the prosecuting attorney of that county in those proceedings, and has all the rights that any prosecuting officer there may have including those of appearing before the grand jury, signing indictments, and pursuing cases to final determination."

State ex rel Nolan vs. The District Court, supra, was an application by the attorney general for a writ to review the action of the district court in denying him the right to appear before the grand jury. The statutes of Montana, referring to the duties of the attorney general, are as follows: "Among other requirements therein mentioned, he is to exercise a supervisory power over county attorneys in all matters pertaining to the duties of their offices, and from time to time to require of them reports as to the condition of public business intrusted to their charge." The statute further provides as one of the attorney general's duties that he shall, "when required by the public service, or directed by the governor, assist the county attorney of any county in the discharge of his duties."

The attorney general was, in this case, attempting to appear before and give advice to the grand jury, and interrogate witnesses in regard to bribery charges made by certain members of the legislative assembly, consequent upon a senatorial election, then pending before said legislative body, and that the judge of the district court expressly directed the attention of the grand jury to said bribery charges. The opinion granting the writ was written by that eminent jurist, Judge Hunt, then one of the judges of the Supreme

court of Montana, and now a federal judge. We take the liberty of quoting freely from his opinion. The court says: "A duty to exercise supervisory power clearly implies the possession of supervisory power. There is, therefore, in the Attorney General a right to oversee for direction, to inspect with authority all matters pertaining to the duties of the county attorneys of the state, and to direct with superintending oversight the official conduct and acts of such officials; and it is his prescribed duty to exercise and perform these acts, and to do whatever may be necessary and proper to render his power in these respects effective. Duty to exercise general supervisory power over county attorneys would not, however, necessarily carry with it a duty to actively assist a county attorney in the discharge of his duties, for supervision might be exerted without actual assistance. * * * * The legislature stepped further, and, guided by the public interests, announced by another special clause of the statute cited, as one of the attorney *general's* duties, that he shall, when required by the public service, or *direc* ted by the governor, assist the county attorney of any county in the discharge of his duties. Here we have a specific direction by which the attorney general is to do more than to exercise those supervisory powers contemplated by previous requirements of the law—he is to assist the county attorney in the discharge of his duties when the public service requires it, or when the governor directs him to give such assistance. * * * * Nor is there any limit whatever to the assistance to be given—no point where it is to begin or to end, except the bound of the official duty of the county attorney. Just so long as the county attorney has any duty to discharge, and just so far as he may go in discharging it, so long is it the right and obligation of the Attorney General to actively assist him in the discharge of such a duty; and equally far in executing the duties shall he go when the public service requires it, or when directed to assist by the governor.

"The policy of the law is easily discerned. The Attorney General is the principal law officer of the state. His duties are general; his authority is co-extensive with public legal affairs of the whole community. His advice often affects the rights of all persons within the State, and, excepting judgments and orders of court, his opinions control public interests more largely than do the acts of any other official of the State. Responsibilities of so high a character, are usually put upon a lawyer of ability, experience and char

acter, and, presuming the Attorney General to be such, the statute has given him the significant, yet extensive, powers referred to. Again, exigent times occasionally arise in the affairs of a state, where local considerations render it impolitic to intrust a county attorney with the discharge of his duty unaided by learned counsel representing the supreme authority of the state. Circumstances sometimes demand that there shall not only be a supervisory action, but an assistance to an inferior official as well, to the end that justice may be more certainly attained. When considerations of this nature move the Attorney General, or, even when they do not move him, yet the Governor is moved by them, and directs him to exert his authority, he shall assist the county attorney, and must do so in the discharge of the duties which the county attorney is required by law to perform. * * * * It is suggested that the Attorney General cannot conduct examinations before the grand jury, because of section 1910 of the Penal Code, which provides that an indictment must be set aside when a person is present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in section 1788. Section 1788 of the Penal Code is as follows: "The grand jury may, at all reasonable times, ask the advice of the court, or the judge thereof, or the county attorney; but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The county attorney of the county may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he thinks it necessary; but no other person is permitted to be present during the sessions of the grand jury except the members and the witnesses actually under examination, and no person must be permitted to be present during the expression of their opinions or giving their votes upon any matter before them. * * * * The construction contended for would, logically, deny to the attorney general the very right accorded him —to assist the county attorney in the discharge of his duties. * * * We cannot adopt a construction of Section 1788 which will confine the power of the Attorney General within narrow limitations, which are neither expressed nor implied in the law prescribing the duties of the Attorney General or of the county attorney, and which we believe to be wholly against the letter, as well as the

spirit of the law. * * * Our devision rests upon the delegation of authority to the Attorney General to assist the county attorney, the public service requiring it, and upon the broad ground that, under the law, assistance means personal participation and help to the county attorney in the lawful discharge of his official duties, no matter what the tribunal or body may be wherein the duty lies, and no matter what the nature of the official duty may be."

The highest courts in New York and Montana hold that the attorney general is the proper party to determine when the public service requires his taking part or prosecuting actions on the part of the state.

The supreme court of Kansas holds that he can appear before the grand jury in matters relating to the violation of the prohibition law. The supreme court of Montana holds in Nolan vs. The District Court, supra, that the attorney general can appear before the grand jury in any case and at any time he desires. Our statutes give the attorney general more power than the statutes of the state of Montana. The statutes of Montana, under which the supreme court held the attorney general had the right, on his own motion, to appear before the grand jury, only authorized him, in addition to his supervisory power, to assist the county attorney in the discharge of his duties.

Section 1788 of the Penal Code of Montana, stating who may go before the grand jury is practically the same as Section 9829 of the Revised Codes of 1905.

Our statutes as hereinbefore stated, require the attorney general to appear for the state in all cases before the supreme court; to consult with and advise the several state's attorneys and when in his judgment the interests of the state require it, to attend the trial of a party accused of crime and assist in the prosecution. He or his assistants to institute and prosecute any case in which the state is a party, whenever in their judgment it would be to the best interests of the state so to do; to do anything that the state's attorney might do in his county in enforcing the prohibition law; to prosecute all violations of the several laws enacted by the legislatures of 1907 and 1909, as hereinbefore stated.

We cannot believe that the legislature of this state imposed so many duties upon the attorney general and then deprived him of the means of performing those duties.

If he cannot go before the grand jury then his authority to institute and prosecute cases and to prosecute any violation of the several laws, hereinbefore mentioned, is for naught.

Sec. 9841, Revised Codes of 1905, is as follows: "If twelve grand jurors do not concur in finding an indictment against a defendant who has been held to answer, the original complaint and the certified record of the proceedings before the magistrate transmitted to them, must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed."

Sec. 9842, Revised Codes 1905, is as follows: "The dismissal of the charge does not, however, prevent its being again submitted to a grand jury as often as the court may so direct. But without such direction it cannot be again submitted."

In any case in which the attorney general makes a complaint before a magistrate and the defendant is held to answer the same, he or his friends could have a grand jury called and a hostile or luke-warm state's attorney could undoubtedly prevent an indictment, unless the district court ordered the matter to be submitted to another grand jury and the same proceedings might again be had. Thus in every case every prosecution instituted by the attorney general or his assistants could be brought to an end. It is true that the attorney general cannot, by going before the grand jury, force the grand jury to indict any person, but he can lay any matters he desires before said grand jury and have a thorough investigation of such matters.

The power of officers, implied and incidental, is as follows: "The rule respecting such powers is, that in addition to the powers expressly given by statute to an officer or board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers." Throop on Public Officers, Sec. 542, and cases cited.

People v. Stratton, 25 Cal. 242; People v. Oakland Waterfront Co., 118 Cal. 234, 50 Pac. 305; Board of County Commissioners v. Bunting, 111 Ind. 143, 12 N. E. 151; Slotts v. Rockingham County, 53 N. H. 598; Haynes v. Butler, 30 Ark. 69.

In Board of County Commissioners of Franklin County v. Bunting, supra, the statutes of Indiana made it the duty of the board of commissioners to provide and maintain a county jail and made

it the duty of the sheriff to keep such jail. The court there held that without further legislation the commissioners were authorized to erect a jail and sheriff's residence.

In Haynes v. Butler, supra, which was an action by the county treasurer against a tax collector, the court said: "The duty to receive the money from the collector, to keep, and to pay the same over to the persons entitled, being thus devolved upon the treasurer, to discharge his trust and duty he must be clothed with the power to sue for and recover it."

Under a statute authorizing the governor or either branch of the legislature to direct the attorney general to appear and prosecute criminal proceedings in any county, the supreme court of Kansas, in State v. Bowles, supra, held that the attorney general, when so directed by the governor or either branch of the legislature, became the prosecuting attorney of that county in these proceedings, and had all the rights that any prosecuting officer *had, inc*luding those of appearing before the grand jury, signing *indictme*nts, etc. Would he have any less authority if the statutes authorized him to institute and prosecute any criminal proceedings, when in his judgment the best interests of the state required it? We think not.

In People v. Stratton, supra, the laws of California did not authorize the attorney general to commence actions on behalf of the state to cancel patents issued by the state. The state had authority to cancel patents issued in certain cases. The supreme court of California held that, notwithstanding the absence of statutory authority so to do, the attorney general had authority to bring actions to cancel patents.

If the ruling of the respondent in this case is sustained it will nullify, in a large measure, the powers of the attorney general and make him merely a figurehead. He cannot institute and prosecute cases in which the state is a party unless he can go before the grand jury.

It will, we think, be conceded that the attorney general has authority to appear before the grand jury of any county in which the state's attorney refuses or neglects to perform his duties, when the judge of the district court of that county requests the attorney general to take charge of prosecutions therein, but we are of the opinion that without any request by the judge of the district court as herein stated, the attorney general has authority

to go before the grand jury at any time and present any matters to such grand jury that he desires; his assistants have the same authority.

The attorney general is therefore entitled to have the writ prayed for, issue.

Writ awarded.

All concur, except MORGAN, C. J., and FISK, J., dissenting.

MORGAN, C. J. (dissenting). The right of the state's attorney to appear before grand juries for the examination of witnesses, to the exclusion of all other persons except a witness actually under examination, has existed by statute since long before the office of territorial attorney general was created. Section 195, chapter 3, of the Code of Criminal Procedure of 1877 provided that the "District attorney may, at all times, appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them, and may interrogate witnesses before them whenever he thinks it necessary; but no other person is permitted to be present during their session except the members and a witness actually under examination." This section has been in force by express amendment ever since its enactment, and is now section 9829, Revised Codes 1905.

Under chapter 8, laws of 1883, creating the office of attorney general and defining his duties, there is nothing indicating that the attorney general was given any express authority to draw indictments or appear before the grand juries. Besides being authorized to appear for the territory in the Supreme Court to "prosecute and defend" all actions, civil or criminal, in which the territory was interested as a party, he was authorized to appear before any other court and "prosecute and defend in any cause or matter, civil or criminal." Nothing in that act can be construed to give him any authority to appear before grand juries. The duties of the attorney general were again a matter of statutory enactment in chapter 110, laws of 1890, known as the "Prohibition Law." The provisions of section 12 of that act are set forth in the opinion of Judge Carmody. Without doubt, that section warrants a construction that under certain circumstances the attorney general could properly appear before grand juries in the place of the state's attorney, whenever that official has failed to perform the duties of his office; but it is expressly stated by the attorney general in the record in this case, that he does not claim that the

state's attorney of Burleigh county has not fully and faithfully performed his whole duty in reference to the enforcement of the prohibition law. Hence, it needs no further comment to show that the attorney general is not authorized to go before the grand jury under that section, under such facts.

The duties of the attorney general and the duties of the state's attorneys were again the subject of enactments in chapters 24 and 178 of the laws of 1901. In said chapter 24, prescribing the duties of the attorney general, he is given no express power to appear before grand juries. In this chapter, his duties are, in part, "to consult with and advise the several state's attorneys in matters relating to the duties of their office; and when, in his judgment the interests of the state require it, he shall attend the trial of any party accused of crime and assist in the prosecution."

It is not contended by the attorney general that this subdivision confers upon him any authority to appear in an advisory or other capacity before grand juries, and such contention would be repugnant to the terms of this subdivision, which confers authority only upon him to assist the state's attorney in criminal trials, whenever he deems it necessary for him to do so, in the state's interests. Under the provisions of section 9, of chapter 178, it is claimed that the power is expressly granted to the attorney general to appear, generally, before grand juries. That section, so far as material, reads as follows: "It is the intention of this act to make the attorney general, his assistants, and the state's attorney the only public prosecutors in all cases, civil or criminal, wherein the state or county is a party to the action, and that they only shall be authorized and empowered to perform the duties herein set forth, except as hereinafter provided. The attorney general or his assistants are authorized to institute and prosecute any cases in which the state is a party, whenever in their judgment it would be to the interests of the state so to do, and in case the state's attorney of any county refuses or neglects to perform any of the duties prescribed in subdivisions 2 and 3 of this section, after it has been properly brought to his attention, or when he has information that a public offense has been committed, or that a civil suit in which the state is a party should be instituted, and the fact of such refusal or neglect to perform such duty, and that the action is one that should be prosecuted, has been brought before the judge of the district court in the judicial district having juris-

diction of such actions, by affidavit or otherwise, and said judge is satisfied that such action should be prosecuted, and that said attorney has failed or neglected to perform his duty, then, in that case, he shall request the attorney general or an assistant attorney general to take charge of such prosecution, or he shall appoint some suitable person, an attorney at law, and the person so appointed shall thereupon be vested with all the powers of such state's attorney for that action, but for no other purpose, and the district court shall, by order, to be entered in the minutes of the court, fix his fees therefor, etc., etc."

Subdivisions 2 and 3 referred to in section 9, refer to the duties of state's attorneys in reference to instituting proceedings before magistrates for criminal offenses and attending before and giving advice to the grand jury whenever cases are presented to them for their consideration, and drawing of indictments and informations, and prosecuting actions on forfeited bonds, and prosecuting of actions for the recovery of debts, fines, penalties or forfeitures accruing to the state or to his county. The provision in said section 9 that the attorney general and his assistants, and the state's attorney are "authorized to institute and prosecute any case in which the state is a party," in no way authorized the attorney general to appear before grand juries, and that provision in no way refers to grand jury proceedings. Appearing before a grand jury in a criminal matter for the purpose of advising such grand jury or examining witnesses is not "instituting or prosecuting a case in which the state is a party." That chapter was not enacted, as is known as a matter of history, and as shown by its reading, with a view to changing the procedure in reference to appearance before grand juries by the state's attorney. That chapter was enacted to obviate certain alleged abuses which had become prevalent in the state in prosecuting injunctional and abatement proceedings by assistant attorneys general throughout the state, whereby it was claimed that excessive costs and attorney's fees were taxed against buildings where nuisances were kept and maintained. The object of this chapter was to limit the right to bring such injunctional proceedings to states attorneys, attorneys general and their assistants. It was intended to debar or prohibit the appointment of assistant attorneys general, who would not look to the costs to be assessed against the real estate or buildings where nuisances were kept and maintained, and the nuisances declared abated, for their compensation.

The portion of section 9 referring to failures of state's attorneys to perform the duties, as contained in said subdivisions 2 and 3 of that section, cannot be claimed as applicable under the facts, as admitted by the attorney general, to the effect that there is no contention that the state's attorney has failed to fully perform his duty. Irrespective of that fact, the attorney general has no authority to act in the premises except on the request of the judge of the district court. The record in this case does not show that the attorney general was requested to act, nor does it show that the state's attorney has failed to perform his duties.

The attorney general practically concedes that no express authority exists for the official displacement of the state's attorneys, and the substitution of the attorney general in the performance of all duties before grand juries, for them. The attorney general is forced to claim that there is no statute unconditionally authorizing him to appear before the grand juries unless the word "advise," as used in subdivision 4, chapter 24, Laws of 1901, is construed to mean "supervise." I find no authority for adding or enlarging the meaning of the word "advise," and if, for certain purposes not apparent, the word "advise" may be construed to mean "supervise," it would not be authority for the attorney general to appear before grand juries in the place of the state's attorney. I do not think that the attorney general is right in his contention that a new meaning shall be given to the well-understood word "advise."

It must not be forgotten that the attorney general is contending for the right to go before grand juries in all cases and under all circumstances when criminal causes or matters are under investigation. This should not be held to be his right from, or by construing, fragments of statutes, but it should clearly appear that such right was intended to be granted to him before the attempted innovation be sanctioned by this court. Such a radical revolution in procedure should not be established by singling out certain words or sentences, and stretching their meaning. The various statutes should be construed together, and therefrom it should be determined whether the legislature intended to supplant the state's attorneys in every county if it be the will of the attorney general to do so. This should not be construed to be the law by doubtful or uncertain implication.

Every enactment considered in the majority opinion can be construed consistently with retaining section 9829, Revised Codes 1905,

in full force and vigor. If the attorney general may appear before grand juries, then that section has been materially amended without being so understood by district judges, state's attorneys or attorneys general dealing with that section during the past twenty years.

I shall not review the cases relied on in the majority opinion to uphold the attorney general's contention. On reading them I think it a plain conclusion that they are each based on statutes entirely dissimilar, or upon circumstances bringing them within statutes like our own. The only question considered by me in this case has been whether the statutes of the state, when construed together, authorize the attorney general to appear before grand juries, other than in the exceptional cases above mentioned, and my conclusion is that no such authority has been granted to him.

I therefore respectfully dissent from the conclusion written by my brother, Carmody. I am authorized to say that Judge Fisk concurs in the views above expressed.

# INDEX

ABUSE OF DISCRETION. See DISCRETION, 187, 308, 606, 638, 645, 692, 697, 756.

ACCORD AND SATISFACTION.

1. Neither the answer nor evidence shows a defense of accord and satisfaction, when it appears only that there was a computation of the amounts mutually due; and that it was agreed that such accounts should offset each other, although the amount of one was less than the other; and no consideration for the agreement is shown, or that it was executed by satisfactions, releases or payments pursuant thereto, or showing of dispute between the parties as to the amount due. Webster v. McLaren, 751.

ACTION. See COURTS, 645; SPECIFIC PERFORMANCE, 699; VENDOR AND PURCHASER, 737.

1. "Drain commissioners" of any county are a department thereof, with power to draw warrants upon a special fund in the county treasury. An action will not lie against them on their contract; remedy by mandamus. Reed v. Heglie, 801.

ADVERSE CLAIMS. See QUIETING TITLE, 227, 574.

AFFIDAVIT. See APPEAL AND ERROR, 722; ATTACHMENT, 684.

An affidavit for continuance failing to show the probability of procuring the testimony of an absent witness in the event of continuance, that the facts to be proved by the absent witness were true, and defendant's inability to prove such facts by others, warrants denial of the continuance. State v. Stevens, 249.

2. Certain counter affidavits were received and considered in opposition to plaintiff's motion for continuance. Such affidavits merely tended to show that the motion was not made in good faith. *Held*, that such counter affidavits were admissible for such purpose. Webb v. Wegley, 606.

3. Section 8294, Revised Codes 1905, which requires county courts of increased jurisdiction to certify cases to the district court when "it shall appear to the court by affidavit, or if the court shall so order, upon other testimony, that a fair and impartial trial cannot be had in such court by reason of the bias or prejudice of the judge or otherwise," construed, and *held*, not to require a certification of a case to the district court upon an affidavit

AFFIDAVIT—Continued.

setting forth no facts, but merely the conclusion that the moving party had reason to and does believe, that the county judge is so prejudiced against him that he cannot obtain a fair and impartial trial. Waterloo Co. v. O'Neil, 784.

ALIENATION. See Wills, 160.

ALIMONY. See Divorce, 308, 522, 748; Husband and Wife, 613.

AMENDMENT. See Pleading, 473, 606, 677.

ANIMALS.

1. Under section 1933, Revised Codes 1905, it is lawful for certain stock to run at large between the first day of November and the first day of April, except in counties where the electors vote otherwise. *Held*, the object of the statute permitting stock to run at large during the months named is to permit it to feed upon commons and unfenced lands without liability of owners for damages done on such lands, and not to impose upon the owners of such premises a greater degree of care for or towards such stock than is required at other seasons of the year. Corbett v. Railway Co., 450.

2. The statute quoted only affects the remedy or measure of damages in case of injury by such animals, and as applicable to acts of negligence by the owner of the premises on to which stock strays during the open season, such stock is trespassing. Corbett v. Railway Co., 450.

ANSWER. See Judgment, 489.

APPEALABLE ORDERS. See Appeal and Error, 677.

APPEAL AND ERROR. See Constitutional Law, 345; Evidence, 203, 268, 450; Instructions, 426, 450; Statement of Case, 308; Verdict, 1, 10.

1. The sufficiency of findings of fact to enter the conclusions in a judgment may be challenged by assignments of error upon the record proper, in the absence of exceptions to such findings. Western Mfg. Co. v. Peabody, 112.

2. Recovery under a counter claim based upon a contract, whereby the plaintiff agreed that if defendant failed to dispose of enough of the jewelry sold him by the plaintiff within one year, to equal one and one half times the purchase price, plaintiff would take back the unsold portion at the invoice price, cannot be sustained, where the findings fail to show such contingency. The findings are insufficient to support judgment. Western Mfg. Co. v. Peabody, 112.

## APPEAL AND ERROR—Continued.

3. W. held beneficiary certificates, one from each of two fraternal societies, both payable to "his legal heirs," and in his will bequeathed all his property, real and personal, to appellants F and C, specially mentioning all life insurance. The societies paid W's testamentary administrator the amount due under the certificates. Respondents, sole heirs of the testator, resisted the administrator's petition for distribution, claiming the fund received under such certificates; the county court awarded the fund to the appellants. On appeal the district court reversed such decree, and ordered one awarding fund to respondents. *Held*, that the county court has no jurisdiction to try the right and title to such fund, and the district court on such appeal acquired no jurisdiction, and its judgment directing the county court to distribute such fund to respondents, was erroneous. Finn v. Walsh, 61.

4. Motions to extend time to file exceptions to charge and to file amended motion for a new trial, to show newly discovered evidence as an additional ground, are within the discretion of the trial court, and will not be disturbed except for abuse. Soules v. Yeomen, 23.

5. Errors, if any, in sustaining objections to questions put to a party who is under cross-examination as an adverse party, under section 7252, Revised Codes 1905, cannot be taken advantage of when there is no offer showing that the answers would be material under the issue formed by the pleading. Soules v. Yeomen, 23.

6. Questions fairly raised and decided on a former appeal in the same action are not open for consideration on a subsequent appeal, as such decision on the first appeal, whether right or wrong, became and is the law of the case. Schmidt v. Beiseker, 35.

7. Errors of law not appearing on the judgment roll cannot be reviewed on appeal without specifications duly settled in the statement of the case. McLaughlin v. Thompson, 34.

8. A paper purporting to contain specifications of error, which is left with the trial judge after the settlement of the statement of the case, does not become a part of the statement unless so ordered by the judge, and such specifications must be disregarded on appeal. McLaughlin v. Thompson, 34.

9. Sufficiency of the evidence to sustain the verdict not considered, where (a) the record does not affirmatively show that it embraces all the evidence, (b) no proper specification of particulars is incorporated in the statement of the case. Schmidt v. Beiseker, 35.

10. Granting or refusing a new trial for insufficiency of the evidence sustainng the verdict, is within the discretion of the court, and its decision will only be disturbed for abuse. Nilson v. Horton, 187.

APPEAL AND ERROR—Continued.

11. On an appeal by a husband from a decree of divorce against him, whereby his property was assigned to the wife in lieu of permanent alimony, and he was also decreed to pay fixed sums as costs and attorney's fees on the trial in the district court, it is an abuse of discretion to refuse to settle a statement of the case until the husband makes provision for the support of his wife and children pending the appeal, in cases where the trial judge has lost jurisdiction to make an order for support money pending the appeal for the reason that the defendant in that action had perfected an appeal to the Supreme Court. Tuttle v. Pollock, 308.
12. The party alleging error must show it affirmatively on the record. Sockman v. Keim, 317.
13. District judge, after appeal, retains full jurisdiction to settle statement of case or do any act in furtherance of the appeal. *Held*, motion to strike statement from the record is without merit. Rindlaub v. Rindlaub.
14. In answer to a question as to the condition of right of way with reference to snow and other things thereon, witness testified that oats were sprinkled upon track. Answer was stricken out and jury cautioned to disregard it. No reference was made to it in the court's charge. From the pleadings, issues and purpose of the question, *held*, that striking out of the answer did not cure the error, although not declared reversible error. Corbett v. Railway Co., 450.
15. A charge which may lead the jury to believe that the defendant must make out its defense conclusively, or by undisputed evidence, is reversible error. Corbett v. Railway Co., 450.
16. It was error to direct a verdict for the plaintiff, as the evidence as to such waiver was not undisputed, or, at least, was such that reasonable persons might draw opposite conclusions therefrom. Houghton v. Vavrowski, 594.
17. Courts favor trials upon the merits, and where the trial court has refused to open a default and permit a defense, this court will not only inquire as to whether the discretion in denying the application has been soundly exercised, but will examine the facts to determine whether or not in the interest of justice and right, the default should not be set aside and a defense permitted. Bank v. Branden, 489.
18. Where the district court allows counsel fees in a judgment denying a divorce to the wife, the plaintiff, and granting it to the husband, and the wife appeals from the judgment and demands review of the entire case in the Supreme Court, under section 7229, Revised Codes 1905, and pending the appeal, the wife's attorneys unconditionally accept such counsel fees and costs, the appeal is waived and the respondent is entitled to dismissal. Boyle v. Boyle, 522.

## APPEAL AND ERROR—Continued.

19. An opinion of the trial judge is not to be considered as explanatory of a final judgment. Boyle v. Boyle, 522.

20 The case is here for trial de novo. Respondent moved to strike out appellant's statement of case and abstract, as exhibits 40 and 67, shown by the abstract to have been referred to by witnesses, are not present. The trial judge's certificate shows that they were present, and in the record certified to the Supreme Court, but not printed in the abstract because of the inconvenience of reproducing them. The presence of neither of these exhibits is material or necessary to, nor would in any manner affect or influence the decision of the case. *Held*, such motion will not be granted. Liland v. Tweto, 551.

21. The court charged the jury: "It was the duty of the defendants to use ordinary care to furnish for the plaintiff and his fellow workmen a staging that was reasonably safe for the purpose for which it was intended and used; and if you find that the defendants negligently failed to perform this duty, and furnished a staging that was unsafe, and that the plaintiff, while in the exercise of ordinary care and without negligence upon his part and without knowledge of the unsafe condition of the staging, went upon the same to perform his work in the ordinary way, and by reason of the defect therein, if any, fell to the ground and was injured, then plaintiff is entitled to recover." This is erroneous as it assumes that the employees were bound to furnish the scaffold as a completed structure; but if the jury found that the defendant instructed the carpenters to build the staging, and they undertook its safe building, the charge is not prejudicial error. Lang v. Bailes, 582.

22. It is error to exclude evidence of a conditional sale by an agent of a machine company with consent of the company, as such evidence has a bearing on the question of possession of the property in this case, and upon the question whether a return of same to the company was waived. Houghton v. Vavrowski, 594.

23. Trial courts have wide discretion over continuances, and under the facts in the case, *held*, the denial of motion for continuance was not error. Webb v. Wegley, 606.

24. Evidence of payment in full for all services considered, and it is *held*, therefrom, that it was not error to refuse to direct the jury to find in plaintiff's favor for a small balance of 39 cents claimed to be unpaid. McGregor v. Harm, 599.

25. Question as to whether it was error to refuse to strike out the answer of a witness, on the ground that it was not the best evidence, considered, and *held*, not to be prejudicially erroneous. McGregor v. Harm, 599.

## APPEAL AND ERROR—Continued.

26. No question of costs being involved, an error affecting that small sum, would not be considered as the principal of de minimis non curat lex applies. McGregor v. Harm, 599.

27. Plaintiff refused to offer evidence in support of his complaint, and defendant's counsel moved for nonsuit, and the court directed a verdict in his favor, and judgment was entered thereon. *Held*, error with prejudice, as the judgment shows upon its face no testimony introduced and no issue of fact or law tried and adjudicated, hence such judgment is no bar to the action. Webb v. Wegley, 606.

28. The cause was tried, by consent of the parties, as an equity case without a jury. Defendant cannot urged in the appellate court for the first time that issues were for a jury instead of a court. Whether the contract set forth in the opinion created a partnership between the parties, or whether the issues were legal or equitable, is not determined, as the questions were not raised below and appellant will not be permitted to urge in the appellate court a theory contrary to that on which the case was tried and decided in the trial court. DeLaney v. Western Stock Co., 630.

28. To authorize a revision, on appeal, of errors in the taxation of costs, the record must show sufficient data to enable the court to determine whether errors have been committed, where the evidence on which the trial court acted in taxing costs is not in the record. Decision of the trial court will not be disturbed unless error appears in the judgment roll. Hilde v. Nelson, 634.

29. The statement of the case fails to conform to statute and rules of court, contains no specifications of error, and even if specified, they are not available to appellant as the record shows no timely objections and exceptions to the rulings complained of. The statement also fails to specify that appellant desires a review of the entire case, or any particular question of fact, as required in cases triable de novo in the Supreme Court. Hilde v. Nelson, 634.

30. There is nothing contained in the record on this appeal from which the Supreme Court is enabled to intelligently determine what costs appellant is entitled to have taxed. But the judgment roll discloses reversible error in denying any costs to him; and for such error, the judgment is reversed. Hilde v. Nelson, 634.

31. Upon an appeal, where, as in this case, the findings and decree of the court respond to the allegations of the complaint and prayer for relief, but the evidence is not brought into the record by a properly authenticated statement of the case, it will be presumed that all material facts alleged in the complaint are supported by competent proof. Whitney v. Akin, 638.

32. In a case such as this, where the sufficiency of the evidence to support the findings of the court cannot be considered because the appeal is based entirely upon the judgment roll proper, it will

## APPEAL AND ERROR—Continued.

be presumed that the findings of the court are fully supported by competent evidence. Whitney v. Akin, 638.

33. Where the court finds that during two years the crops grown upon land held under a contract of sale, providing for the payment of the purchase price by application each year of the proceeds of one-half the crop, have not been in any part delivered by the vendees to the vendors, and that thereafter there was due upon the contract a certain sum; on an appeal based on the judgment roll alone, it will be presumed, in support of the findings, that the evidence showed the value of the crops for the two years in which they were not delivered, was, at least, equivalent to the sum so found to be due on the contract. Whitney v. Akin, 638.

34. An order denying defendant's motion to dismiss the action, and grant plaintiff's countermotion for leave to amend the complaint, *held*, not appealable. Strecker v. Railson, 677.

35. A verified complaint filed with an affidavit for attachment alleged that defendant was a nonresident of the state, and had absconded therefrom; it was proper to resort to such complaint in aid of the affidavit. From such complaint and affidavit, it is obvious that the use of the word "plaintiff" instead of "defendant," was a mere oversight, and not prejudicial. Hilbish v. Asada, 684.

36. The writ of prohibition will not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. Held, under the facts presented, that relator does not bring himself within such rule, as he possesses such remedy by appeal. Selzer v. Bagley, 697.

37. The findings of the court in an action at law, where a jury is waived, have the same weight on appeal as the verdict of a jury, and will not be disturbed unless clearly against the preponderance of the evidence. Bank v. Weber, 702.

38. Upon the facts stated in the opinion, held, that the affidavits upon which an order extending the time to settle statement of the case, was made, do not show sufficient reason for such extension. Folsom v. Norton, 722.

39. In an action for divorce where counsel fees and suit money are included in the final decree, and the same are accepted by the appellant, she is estopped from maintaining an appeal from the decree of the district court, and such appeal will be dismissed on motion. Tuttle v. Tuttle, 748.

40. Under rule No. 36 (91 N. W. 13) providing that the dismissal of an appeal is in effect an affirmance of the judgment appealed from, unless expressly made without prejudice to another appeal, an appeal from a whole divorce decree will be dismissed without prejudice, where appellant's right to appeal from a part of the decree only is not determined. Tuttle v. Tuttle, 748.

## APPEAL AND ERROR—Continued.

41. Under the showing made by appellant, it was error to deny his motion for a retaxation of costs, but such error does not affect the judgment of conviction. State v. Ball, 782.

42. In an action to foreclose a mechanic's lien for balance due under an express contract, the answer denies that plaintiff had substantially performed the contract, and pleads four counterclaims. Plaintiff moves to strike out certain of such counterclaims and portions of others, which motion the court granted in part and denied the remainder. *Held*, for reasons stated in the opinion, that such ruling was non-prejudicial. Marchand v. Perrin, 794.

43. Relevant and material matter was stricken out of the answer, and the issuance of a peremptory writ was directed. *Held*, (1) that such order "involved the merits and necessarily affected the judgment" within the meaning of section 7081, Revised Codes 1905. Hence it is a part of the judgment roll, and it may be reviewed by this court on appeal from the judgment. (2) Such order was prejudicial error. State v. Meyers, 804.

44. Stipulation of facts used on relator's motion to strike out matter from the answer may be considered on appeal in reviewing the correctness of the order upon such motion, although not incorporated in a statement of the case. State v. Meyers, 804.

45. In the light of the facts thus stipulated, it is held that the statute requiring the publication for four consecutive weeks of a notice of election on such county division proposition was not substantially complied with. This being true, it was prejudicial error to deprive defendant of an opportunity to establish the facts pleaded in his answer, and tending to show that actual prejudice in fact resulted on account of a lack of due notice of election. The notice given merely consisted of the insertion in the notice of the general election at the foot of the list of candidates the words: "Three petitions for county division." By the order in question, defendant was deprived of the right to show the invalidity of the special election on such proposition by showing that there was not a full, fair and intelligent expression of the electors upon such proposition. State v. Meyers, 804.

46. After these defenses were stricken out of his answer, it was not incumbent on defendant to offer proof thereof. There was no issue left for trial, except the naked issue of a want of due notice of election, and by the order complained of, defendant was wrongfully deprived of even the opportunity of showing such fact. State v. Meyers, 804.

## APPROPRIATION.

1. To constitute an "appropriation" the legislature must limit the amount of state funds so appropriated, otherwise officials could not determine the amount of tax to be levied, and the revenue

APPROPRIATION—Continued.

of the state might be exhausted without the legislature intending to appropriate them wholly to the subject covered by appropriation acts. State v. Holmes, 286.

2. The last sentence of section 62 of the Constitution, which reads: "All other appropriations shall be made by special bills, each embracing but one subject"—is equivalent to requiring a specific appropriation for each subject other than those embraced in the general appropriation bill. State v. Holmes, 286.
3. To constitute an appropriation under the provisions of the Constitution of this state, quoted in the opinion, an act must set apart from the public revenue a definite sum of money for the specific object in such a manner that the state officials are authorized to use the amount so set apart, and no more, for that object. State v. Holmes, 286.
4. Chapter 139, page 185, Laws 1903, providing for the payment of a reward to persons who shall secure the arrest and conviction of violators of the "Prohibition Law," while creating an obligation on the part of the state to pay the rewards earned under the terms of that chapter, is inadequate as an appropriation, and does not authorize the auditor to draw his warrant on the state treasurer for the sums so earned for the reason that the act does not limit the total amount which may be paid as such rewards in any year. State v. Holmes, 286.

ASSIGNMENT. See Mortgages, 417.

1. A sheriff's certificate, under foreclosure by advertisement, is personal property and transferable by the executors of the deceased mortgagee to whom such certificate was issued, by assignment under the laws of Massachusetts. Boschker v. Van Beek, 104.
2. Where it does not appear whether sheriff's certificate was held in Massachusetts or this state, but the will of the certificate holder having been probated in this state, and the assignment of such certificate for value paid the executor, having been approved by the probate court and acquiesced in by the devisees, it transferred the latter's interest and that of the deceased holder to the executor's assignees, in case it was held by such executor in this state. Boschker v. Van Beek, 104.
3. A construction company agreed with a bank to sell, and the bank agreed to buy, two town lots for $300 on the occurrence of certain events. The partnershp conducting the bank was dissolved and its assets, except such contract, were distributed. The events happened, but vendee never paid any taxes as agreed, nor the purchase price for the lots. The contract provided that no assignment of it or of the property by the vendees would be recognized or binding unless the vendor consented in writing. It never was assigned to Hammond orally or in writing, and no consent by

ASSIGNMENT—Continued.

the vendor was ever given to any assignment, nor would the party in the bank consent that title be conveyed to Hammond by the construction company. Hammond's interest was one-third; he brought this action to compel specific performance by deed of the whole title in the lots to him alone. The other parties defended. *Held*, that Hammond cannot maintain such action. Hammond v. N. W. C. & I. Co., 699.

ATTACHMENT. See Evidence, 10, 496; Homestead, 613.

1. On authority of Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770, *held*, that the lien of an attachment on personal property of a bankrupt, set aside as exempt in bankruptcy proceedings, is not discharged by a discharge in bankruptcy, and may be enforced through a modified form of judgment as against the property on which it has been created. Mayer v. Ferguson, 496.

2. The judgment in such case, although in form a judgment for money, but providing that it shall be satisfied out of the property attached, and not otherwise, protects the defendant against any balance which may remain unpaid after sale of the attached property under execution. Mayer v. Ferguson, 496.

3. In an action to ascertain the amount due the plaintiff, and to satisfy the same out of property attached for its purchase price, a verdict in accordance with its issues and identifying the property attached for the purchase price, it being alleged in the complaint that the property attached was the identical property and for which the debt in suit was incurred, and no motion having been made to strike out the complaint, and the case having been tried on the theory that the identity of the property was in issue, an objection to a verdict containing such finding, made after it is ordered, and renewed after it is returned, comes too late. Mayer v. Ferguson, 496.

4. An affidavit for attachment in reciting the statutory grounds for nonresidence, etc., used "plaintiff" instead of "defendant." *Held*, a manifest clerical error insufficient to dissolve such attachment; and should be disregarded pursuant to section 6886, Revised Codes 1905. Hilbish v. Asada, 684.

5. A verified complaint filed with an affidavit for attachment alleged that defendant was a nonresident of the state, and has absconded therefrom; it was proper to resort to such complaint in aid of the affidavit. From such complaint and affidavit, it is obvious that the use of the word "plaintiff" instead of "defendant" was a mere oversight, and not prejudicial. Hilbish v. Asada, 684.

6. An irregularity, curable by amendment in an affidavit for attachment, cannot be urged by an intervener in an attachment suit. Hilbish v. Asada, 684.

ATTORNEY AND CLIENT. See Costs, 574.

1. Where counsel of good reputation and large experience is employed, his neglect of matters necessary to the ordlinary procedure of the case is a "surprise" to the party, under the statute entitling him to relief. Bank v. Branden, 489.
2. The 2. The neglect of an attorney regularly retained to prepare and serve an answer in a case before the time for answering expires, when occasioned by intense absorption of mind in the conduct of the trial of another case involving a charge of murder in the first degree, is "excusable neglect," within the meaning of the statute providing for the opening of a judgment entered on default of answer. Bank v. Branden, 489.

ATTORNEY GENERAL. See Venue, Change of, 756.

1. Section 9372, Revised Codes 1905, relating to the prohibition law, provides, among other things, as follows: "Whenever the state's attorney shall be unable, or shall neglect or refuse to enforce the provisions of this chapter in his county, or for any reason whatever the provisions of this chapter shall not be enforced in any county, it shall be the duty of the attorney general to enforce the same in such county, and for that purpose he may appoint as many assistants as he shall see fit, and he and his assistants shall be authorized to sign, verify or file all such complaints, informations, petitions, and papers, as the state's attorney is authorized to sign, verify or file, and to do and to perform any act that the state's attorney might lawfully do or perform * * *." *Held,* attorney general and assistants can appear before the grand jury. State v. District Court, 819.
2. Section 2494, Revised Codes of 1905, provides, among other things, as follows: "The attorney general or his assistants are authorized to institute and prosecute any cases in which the state is a party, whenever in their judgment it would be for the best interests of the state so to do." *Held,* attorney general and assistants can appear before the grand jury when they deem it for the best interests of the state so to do. State v. District Court, 819.
3. The right of the attorney general and his assistants to go before the grand jury is not affected by section 9829, Revised Codes of 1905, allowing only the state's attorney to appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them, and to interrogate witnesses before them whenever he thinks it necessary, and permitting no other person to be present during the sessions of the grand jury except the members and a witness actually under examination. State v. District Court, 819.

BASTARDS.

1. Bastardy proceedings are not strictly either civil or criminal, but partake of the nature of both. Hence, section 6829, Revised Codes

BASTARDS—Continued.

1905, providing for the trial of an action in the county where the defendant or some of the defendants reside at its commencement, does not apply, and the court erred in granting a change of the place of trial to the county of the defendant's residence. State v. Lang, 679.

BANKRUPTCY.

1. K, a wholesale liquor and wine merchant in St. Paul, called on Y, a merchant at Bismarck, and procured him to indorse a draft for $350. Y. had previously indorsed for K., notes aggregating $500. It is not clear whether the notes were then due, or whether Y. had paid them if due. The draft was presented for acceptance in St. Paul on the 29th day of April, 1905, and accepted by K. in the name of the American Wine & Liquor Co., that being the style under which he did business. On the 2d day of May, 1905, the draft was protested for nonpayment. On the day Y. indorsed the draft, the evidence tending to show that it was after the act of indorsement, K. told Y. that, if the draft was not paid, he would turn him over some "stuff." May 1, 1905, the day before the draft was protested, K. delivered to the railway company in St. Paul five barrels of whisky addressed to Y. at Bismarck, and took a bill of lading therefor. May 2, 1905, a petition of creditors of K. was filed in the bankruptcy court in St. Paul to have him adjudicated a bankrupt, and on the same day the appellant was appointed receiver of the effects of K. He qualified on the following day, and immediately notified the railway company of that fact, and that he claimed the whisky, and not to deliver it to the consignee, but hold it subject to the order of the court. The railway company notified him, in response to this notice, that it held the whisky subject to his disposition. No price was agreed upon or mentioned between K. and Y. The character o fthe "stuff" was not indicated. Neither the bill of lading, nor any notice, invoice, or communication of any kind was transmitted to the consignee, and he did not know that anything had been shipped to him until after its arrival in Bismarck, when, on his demand for the whisky being refused by the carrier, he brought this action in claim and delivery. The record does not disclose whether the whisky was sent in payment of, or as a security for, a prospective indebtedness of K. to Y., or whether it was a sale. *Held*, that the whisky at the time this action was commenced was in custodia legis. Yegen v. N. P. Ry. Co., 70.

2. An action in claim and delivery in a state court will not lie to secure possession of property of which the receiver appointed by a bankruptcy court has taken either actual or constructive possession. Yegen v. N. P. Ry. Co., 70.

BANKRUPTCY—Continued.

3. The defense of a discharge under the law of bankruptcy of a claim upon which action is brought is not regarded with any greater disfavor by the courts than any other legitimate and meritorious defense. Bank v. Branden, 489.

4. On authority of Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770, *held*, that the lien of an attachment on personal property of a bankrupt, set aside as exempt in bankruptcy proceedings, is not discharged by a discharge in bankruptcy, and may be enforced through a modified form of judgment as against the property on which it has been created. Mayer v. Ferguson, 496.

5. The judgment in such case, although in form a judgment for money, but providing that it shall be satisfied out of the property attached, and not otherwise, protects the defendant against any balance which may remain unpaid after sale of the attached property under execution. Mayer v. Ferguson, 496.

BANKS AND BANKING.

1. Money paid under a mistake of fact to one not entitled to it, and who cannot in good conscience receive and retain the same, may ordinarily be recovered; the law raising an implied promise on the payee's part to refund. Bank v. Weber, 702.

BILLS AND NOTES. See Negotiable Instruments, 485, 509.

BONA FIDE PURCHASER. See Negotiable Instruments, 485.

BOUNDARIES. See Counties, 805.

BROKERS.

1. A landowner contracted with S. & Co., to sell his land on terms stated therein. Then S. & Co. dissolved. S., continuing business, contracted to sell plaintiff on different terms, signing the landowner's name, by himself as agent. In an action for specific performance of the contract signed by S., *held*, that the contract with S. & Co., was terminated by the dissolution of the firm, and S. had no further power under the contract. Larson v. Newman, 153.

2. The sale by an agent on any other terms and conditions than those authorized by the principal, is not binding on the latter. Larson v. Newman, 153.

3. Evidence insufficient to show a ratification by the principal of the contract of sale by S. to plaintiff. Larson v. Newman, 153.

## CASES CRITICIZED, MODIFIED AND OVERRULED. See JUDGMENT, 249.

1. Standard Sewing Machine Co. v. Church et al., 11 N. D. 420, 92 N. W. 805, distinguished. Emerson Mfg. Co. v. Tvedt, 8
2. The information filed with the committing magistrate examined and *held* sufficient to state an offense when tested by the liberal rule governing complaints before such magistrates, following State v. Barnes, 3 N. D. 131, 54 N. W. 541, which decision is held applicable and controlling in the case at bar. State v. Stevens, 249.
3. Ely v. Rosholt, 11 N. D. 559, 93 N. W. 864, distinguished. Corbett v. Railway Co., 450.
4. The state district court is not the successor of the territorial district court to inquire into the merits of litigation not pending at the time of the admission of North Dakota into the union; and such state court could not vacate a judgment of a territorial court on motion. Bank v. Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653, distinguished. Campbell v. Coulston, 645.

## CHAMPERTY AND MAINTENANCE.

1 The common law doctrine making void, as against a person in possession, a deed of land adversely held as against the grantor, where the grantor has not been in possession of the land or received the rents thereof for a period of at least one year, remains in force in this state. Burke v. Scharf, 227.
2. Section 8733, Revised Codes 1905, making it a misdemeanor to convey a pretended title by one out of possession not receiving the rents of the premises for one year, *held*, deeds executed in violation thereof, are void as to persons in possession, and as to them, title is in the grantor, notwithstanding such deed. Burke v. Scharf, 227.
3. Where the owner of real estate, out of possession, conveys it to a third party also out of possession and at the same time he conveys to one in legal possession through a vendee holding under a contract for the purchase of the land, and the deed to the person not in possession is first delivered, said deed is void on account of the adverse possession of the land against the grantor, and the second deed conveys legal title to the premises. Burke v. Scharf, 227.
4. Where an action is brought by one out of possession against the vendor and vendee in such contract, and the plaintiff in that action has legal title to the land, and conveys such legal title to the vendee, and the action is afterwards dismissed, this does not constitute a constructive eviction of the vendee, entitling him to retain possession under the title thus purchased against the vendor on the contract, as such deed to him is void and champertous as against the vendor in possession. Burke v. Scharf, 227.

CHARITIES. See Wills, 160.

CHATTEL MORTGAGES. See Verdict, 1.

1. Where defendant sold personalty at chattel mortgage foreclosure, subject to a prior lien, it is an implied promise, under the facts of the case, to pay the plaintiff the proceeds of such sale. Hyde v. Thompson, 1.

CITATION. See Taxation, 259.

CITIES. See Municipal Corporations, 98, 538, 672.

CLAIM AND DELIVERY.

1. K., a holesale liquor and wine merchant in St. Paul, called on Y., a merchant at Bismarck, and procured him to indorse a draft for $350. Y. had previously indorsed for K. notes aggregating $500. It is not clear whether the notes were then due, or whether Y. had paid them if due. The draft was presented for acceptance in St. Paul on the 29th day of April, 1905, and accepted by K. in the name of the American Wine & Liquor Company, that being the style under which he did business. On the 2d day of May, 1905, the draft was protested for nonpayment. On the day Y. indorsed the draft, the evidence tending to show that it was after the act of indorsement, K. told Y. that, if the draft was not paid, he would turn him over some "stuff." May 1, 1905, the day before the draft was protested, K. delivered to the railway company in St. Paul five barrels of whisky addressed to Y. at Bismarck, and took a bill of lading therefor. May 2, 1905, a petition of creditors of K. was filed in the bankruptcy court in St. Paul to have him adjudicated a bankrupt, and on the same day the appellant was appointed receiver of the effects of K. He qualified on the following day, and immediately notified the railway company of that fact, and that he claimed the whisky, and to not deliver it to the consignee, but hold it subject to the order of the court. The railway company notified him, in response to this notice, that it held the whisky subject to his disposition. No price was agreed upon or mentioned between K. and Y. The character of the "stuff" was not indicated. Neither the bill of lading nor notice, invoice, or communication of any kind was transmitted to the consignee, and he did not know that anything had been shipped to him until after its arrival in Bismarck, when on his demand for the whisky being refused by the carrier, he brought this action in claim and delivery. The record does not disclose whether the whisky was sent in payment of, or as security for, a prospective indebtedness of K. to Y., or whether it was a sale. *Held*, that the whisky at the time this action was commenced, was in custodia legis. Yegen v. N. P. Ry. Co., 70.

CLAIM AND DELIVERY—Continued.

2. An action in claim and delivery in a state court will not lie to secure possession of property of which the receiver appointed by a bankruptcy court has taken either actual or constructive possession. Yegen v. N. P. Ry. Co., 70.

COLLATERAL ATTACK. See JUDGMENTS, 259.

CLOUD ON TITLE. See JUDGMENTS, 645.

COMMITTING MAGISTRATE. See INDICTMENT AND INFORMATION, 249; JUSTICE OF THE PEACE, 426.

COMMON CARRIERS. See CONSTITUTIONAL LAW, 45; EVIDENCE, 45; NEGLIGENCE, 438.

1. K., a wholesale liquor and wine merchant in St. Paul, called on Y. a merchant at Bismarck, and procured him to indorse a draft for $350. Y. had previously indorsed for K. notes aggregating $500. It is not clear whether the notes were then due, or whether Y. had paid them if due. The draft was presented for acceptance in St. Paul on the 29th day of April, 1905, and accepted by K. in the name of the American Wine & Liquor Company, that being the style under which he did business. On the 2d day of May, 1905, the draft was protested for nonpayment. On the day Y. indorsed the draft, the evidence tending to show that it was after the act of indorsement, K. told Y. that, if the draft was not paid, he would turn him over some "stuff." May 1, 1905, the day before the draft was protested, K. delivered to the railway company in St. Paul five barrels of whisky addressed to Y. at Bismarck, and took a bill of lading therefor. May 2, 1905, a petition of creditors of K. was filed in the bankruptcy court in St. Paul to have him adjudicated a bankrupt, and one the same day the appellant was appointed receiver of the effects of K. He qualified on the following day, and immediately notified the railway company of that fact and that he claimed the whisky, and to not deliver it to the consignee, but hold it subject to the order of the court. The railway company notified him, in response to this notice, that it held the whiskey subject to his disposition. No price was agreed upon or mentioned between K. and Y. The character of the "stuff" was not indicated. Neither the bill of lading nor any notice, invoice or communication of any kind was transmited to the consignee, and he did not know that anything had been shipped to him until after its arrival in Bismarck, when, on his demand for the whisky being refused by the carrier, he brought this action in claim and delivery. The record does not disclose whether the whisky was sent in payment of, or as a security for, a prospective indebtedness of K.

COMMON CARRIERS—Continued.

to Y., or whether it was a sale. *Held,* that the whiskey at the time this action was commenced, was in custodia legis. Yegen v. N. P. Ry. Co., 70.

2. The proper test as to whether the rates fixed are reasonable or unreasonable, is not whether the rate fixed on the particular commodity is sufficiently high to enable the carrier to earn a fair compensation after allowing for the legitimate cost to the carrier of transporting the same, but whether, under such rates, it will be enabled from its total freight reiecpts on all its intrastate traffic to earn a sum, above operating expenses, reasonably necessary for such traffic, sufficient to yield a fair and reasonable profit upon its investment. It is within the power of the legislature to reduce the freight on a particular article, provided the carriers are enabled to earn a fair profit upon their entire intrastate business. State v. N. P. Ry. Co., 45.

3. An absolute requirement that every railroad, express company, car company and every common carrier, except by water, by whatever name called, or by whomsoever operated, engaged wholly or in part in the transportation of live stock by railroad within, or to or from any point in this state, to transport live stock with the utmost diligence and maintain in all trains so transporting live stock, an average minimum rate of speed not less than 20 miles per hour from the time such stock is loaded until the train reaches its destination, deducting only reasonable time necessary to unload, feed, water and rest, and in feeding, watering, resting and reloadig, is unconstitutional and void, as an unreasoable exercise of the police power. Downey v. Railway Co., 621.

COMPLAINT. See Pleading, 473, 736.

CONSTITUTIONAL LAW.

1. The Constitution of North Dakota, section 111, defining the jurisdiction of county courts, confers authority upon such courts in probate, testamentary and guardianship matters merely, and it is beyond the power of the legislature to enlarge such jurisdiction by statute. Finn v, Walsh, 61.

2. Revised Codes 1905, section 8083, was not designed to enlarge the constitutional grant of power to county courts, nor did the legislature by its enactment intend to make the proceeds of such life insurance policies and beneficiary certificates as are therein mentioned a portion of the estate of the insured, but the intent was merely to exempt from the payment of these debts of the decedent all such proceeds as might become assets of such estate. Finn v. Walsh, 61.

3. Chaptr 51, page 73, Laws 1907, amending and re-enactinb section 4395, Revised Codes 1905, prescribing maximum coal rates for the transportation by common carriers of coal in carload lots within

CONSTITUTIONAL LAW—Continued.

the state, is not violative of section 8, artincle 1, of the constitution of the United States, known as the "commerce clause," which confers upon congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" nor does it violate the fourteenth amendment of the federal constitution, nor section 13 of the constitution of North Dakota, providing, in effect, that no person shall be deprived of life, liberty or property without due process of law. State v. N. P. Ry. Co., 45.

4. The legislative assembly possesses the undoubted power, under section 142 of the constitution of North Dakota, to prescribe maximum rates for the transportation by common carriers of commodities between points within the state, provided the rates thus prescribed are reasonable. State v. N. P. Ry. Co., 45.

5. Chapter 51, page 73, Laws 1907, amending and re-enacting section 4395, prescribing maximum coal rates for coal in carload lots within the state is presumptively valid, and the burden is upon the carrier to prove that the rates therein prescribed are clearly unreasonable. State v. N. P. Ry. Co., 45.

6. Where the constitutionality of a law is made to depend upon the existence or nonexistence of some fact or state of facts, the determination thereof is primarily for the legislature, and the court will acquiesce in its decision, unless it clearly appears that such decision was erroneous. State v. N. P. Ry. Co., 45.

7. Under section 9368, Revised Codes 1905, the state's attorney subpoenaed L. to appear before him to testify relative to violation of prohibition laws. L. appeared and testified, whose testimony was reduced to narrative form, and subscribed and sworn to before the state's attorney, such testimony tended to show that defendant maintained a liquor nuisance and the state's attorney filed such testimony with an information charging defendant with such offense with a police magistrate, who issued warrant for defendant's arrest. Defendant was bound over to district court, where he was convicted and sentenced. It is claimed such section attempts to confer judicial power upon the state's attorney and a violation of section 85 of the constitution. *Held*, for reasons more fully stated in the opinion, that the question is not before the court, as neither L. nor the defendant raised it. State v. Stevens, 249.

8. Section 62 of the Constitution, which reads: "All other appropriations shall be made by special bills, each embracing but one subject," is equivalent to requiring a specific appropriation for each subject other than those embraced in the general appropriation bill. State v. Holmes, 286.

9. To constitute an appropriation under the provisions of the Constitution of this state, quoted in the opinion, an act must set apart from the public revenue a definite sum of money for the specific object

CONSTITUTIONAL LAW—Continued.

in such a manner that the state officials are authorized to use the amount so set apart, and no more, for that object. State v. Holmes, 286.

10. Chapter 139, page 185, Laws 1903, providing for the payment of a reward to persons who shall secure the arrest and conviction of violators of the "Prohibition Law," while creating an obligation on the part of the state to pay the rewards earned under the terms of that chapter, is inadequate as an appropriation and does not authorize the auditor to draw his warrant on the state treasurer for the sums so earned, for the reason that the act does not limit the total amount which may be paid as such rewards in any year. State v. Holmes, 286.

11. On a trial on a charge of rape, the making and enforcement of an order excluding all persons from the courtroom except, "all jurors, officers of the court, including attorneys, litigants and their attorneys, witnesses for both parties, and any other person or persons whom the several parties to the action may request to remain," does not deprive the defendant of a public trial, within the statutory and constitutional provisions giving persons accused of crime the right to a "speedy and public trial." State v. Nyhus, 326.

12. Chapter 183, page 266, Laws 1909, which imposes upon district judges certain duties relative to the issuance of druggists' permits, is not unconstitutional, although such duties are held to be administrative and not judicial in character. Kermott v. Bagley, 345.

13. Such statute is not repugnant to section 109 of the Constitution of this state in depriving applicants for such permits of the right of appeal. Said section 109 is held not mandatory, but merely permissive, and furthermore, it has no application to decisions in matters of a nonjudicial character. Kermott v. Bagley, 345.

14. Chapter 187, page 277, Laws 1909, is not in any of its parts repugnant to section 61 of the state constitution, for the reason that the subject of the act is not expressed in the title. Being an amendment to chapter 110, page 309, Laws 1890, it is a sufficient compliance with the constitutional requirement if the subject-matter of such amendment is germane to the subject of the original act of which this amended section is a part, and is within the title of that act. State v. Fargo Bottling Works Co., 396.

15. Any liquor containing alcohol or the alcoholic principle or other intoxicating quality when declared by the legislature to be an intoxicating liquor, will be so regarded by the courts whether or not its ordinary use will produce intoxication in the average man. A definition of intoxicating liquor including within its provisions a liquor contaning the alcoholic principle but which it is admitted will not produce intoxication in any degree, is germane to the

CONSTITUTIONAL LAW—Continued.

general subject of chapter 110, page 309, Laws 1890, and within the title, "An act to prescribe penalties for the unlawful manufacture, sale and keeping for sale of intoxicating liquors and to regulate the sale, barter and giving away of such liquors for medical, scientific and mechanical purposes." State v. Bottling Works Co., 396.

16. Chapter 187, page 277, Laws 1909, is replete in itself, and does not purport to amend section 9353, Revised Codes 1905, providing a penalty for violations of the prohibitory law, and while it by implication affects and modifies somewhat the meaning of said section 9353, as well as many other sections of the general statute, it is not for that reason repugnant to section 64 of the state constitution, requiring that all portions of the amended statute, that are retained in the new enactment, be incorporated and published in the amended act. State v. Fargo Bottling Works Co., 396.

17. A malt liquor retaining the alcoholic principle as a distinctive force which it is admitted is "used throughout the state of North Dakota as a substitute for beer," cannot be regarded as an innocent, harmless and healthful beverage. It is a matter of common knowledge that a liqunor of this description may be harmful in the sense that its use cultivates and stimulates an appetite for intoxicants which may become seriously detrimental to the general welfare. A liquor with these characteristics and used in this manner is a convenient vehicle of subterfuge and fraud and a means of evading the penalties of the prohibitory law. For this reason, a statute prohibiting the sale of such liquor within the state is a legitimate exercise of the police power of the state, and is not repugnant to the provisions of sections 1 and 13 of the state constitution. State v. Fargo Bottling Works Co., 396.

18. An absolute requirement that every railroad, express company, car company and every common carrier, except by water, by whatever name called or by whomsoever operated, engaged wholly or in part in the transportation of live stock by railroad within, or to or from any point in this state, to transport live stock with the utmost diligence and maintain in all trains so transporting live stock, an average minimum rate of speed not less than twenty miles per hour from the time such stock is loaded until the train reaches its destination, deducting only reasonable time necessary to unload, feed, water and rest, and in feeding, watering, resting and reloading, is unconstitutional and void, as an unreasonable exercise of the police power. Downey v. Railway Co., 621.

19. City or village ordinances, although penal, are not "criminal laws." Prosecutions thereunder do not come under the constitutional provision: "All prosecutions shall be in the name, and by the authority, of the state of North Dakota." Such prosecutions are in the name of the city or village. Village of Litchville v. Hanson, 672.

CONSTITUTIONAL LAW—Continued.

20. Municipal corporations may tax dogs; such tax is not assessed by valuation, but is a specific assessment in the nature of a license under police regulation, and is a constitutional exercise under police power. Village of Litchville v. Hanson, 672.

21. An ordinance making it unlawful to keep, own or harbor a dog without first having a license therefor, and imposing a fine for a violation thereof, and authorizing the destruction of any dog found at large on any of the public streets, alleys or grounds of the city or village, upon which license shall be unpaid, is valid and constitutional. Village of Litchville v. Hanson, 672.

CONTINUANCE. See Discretion, 606.

1. An affidavit for continuance failing to show the probability of procuring the testimony of an absent witness in the event of continuance, that the facts to be proved by the absent witness were true and defendant's inability to prove such facts by others, warrants denial of the continuance. State v. Stevens, 249.

CONTRACTS. See Verdict, 1; Vendor and Purchaser, 227, 463, 638; Mechanic's Liens, 433, 516; Guaranty, 509; Frauds, 551; Fixtures, 692; Evidence, 736; Trover and Conversion, 787.

1. Recovery under a counter-claim based upon a contract, whereby the plaintiff agreed that if defendant failed to dispose of enough of jewelry sold him by the plaintiff, within one year to equal one and one-half times the purchase price, plaintiff would take back the unsold portion at the invoice price, cannot be sustained, where the findings fail to show such contingency. Western Mfg. Co. v. Peabody, 112.

2. Plaintiff contracted with defendant to furnish six entertainments at $325. The contract provided that plaintiff should not be liable for damages, if, because of sickness or other unavoidable cause any party failed to keep engagements, and the plaintiff might at its option furnish a substitute at the same booking price; where plaintiff in one entertainment substituted one singer for another, ill and unable to appear, it was entitled under the evidence to recover the full contracted price. Columbian Lyceum Bureau v. Sherman, 58.

3. A final receipt is not a contract between applicant and the United States, and he obtains no vested right to the land filed upon. Forman v. Healy, 116.

4. Where defendant sold personalty at chattel mortgage foreclosure subject to a prior lien, it is an implied promise under the facts of the case, to pay the plaintiff the proceeds of such sale. Hyde v. Thompson, 1.

CONTRACTS—Continued.

5. A rescission of an express contract renders the same of no force or validity so far as its enforcement, or damages for its breach are concerned; but the implied obligation of the parties to restore everything of value received thereunder remains in force, and may be enforced after rescission. Chesley v. Soo Coal Co., 18.

6. Under section 4698, Revised Codes 1905, making officers, agents and stockholders of nonresident corporations doing business within this state without complying with the statutes thereof, "liable on any and all contracts of such corporation * * * made within this state," these officers, agents and stockholders are liable on the implied contracts or obligations of such corporations to return everything which was received by the corporation under an express contract with it by a party who has rescinded the express contract. Chesley v. Soo Coal Co., 18.

7. A land owner contracted with S. & Co., to sell his land on terms stated. Then S. & Co., dissolved, S. continuing business, contracted to sell plaintiff on different terms, signing the land owner's name, by himself as agent. In an action for specific performance of the contract signed by S., *held,* that the contract with S. & Co., was terminated by the dissolution of the of the firm, and S. had no further power under the contract. Larson v. Newman, 153.

8. The abandonment of his contract by a contractor after a substantial portion of it has been performed, does not of itself work a completion of the contract. Langworthy Lbr. Co. v. Hunt, 433.

9. Notice sent by registered letter to the owner by a subcontractor, informing him that he is furnishing material for the contract, after its abandonment by the contractor and before steps are taken to complete the work by the owner, is seasonably sent under the requirement that such notice be given the owner previous to the completion of the contract. Langworthy Lbr. Co. v. Hunt, 433.

10. Under the code system of pleading, in actions to recover on implied contracts, it is neither necessary nor proper to allege a promise to pay on defendant's part. Weber v. Lewis, 473.

11. Under a contract, whereby the owner of land agreed to let the same to another to be farmed on shares pursuant to a written contract, the lessee or cropper went into possession of the land for cropping purposes. Thereafter, and before any rights under the contract had accrued to the owner of the land, he conveyed the same to the defendant without any reservation as to matters connected with the contract. There were 235 acres plowed on the land when the contract was entered into. In the contract it was agreed that the same number of acres should be plowed after the crop was removed, or if the owner did not desire to have the plowing done, the cropper should pay him $1.25 per acre from his proceeds of the crop in lieu of such plowing. The

CONTRACTS—Continued.

cropper or tenant did not plow the land. The owner of the land brought an action against him for a recovery of the money to be paid in lieu of the plowing, and recovered judgment, and the cropper paid the same to the owner of the land, the plaintiff in this suit. The defendants pleads a counterclaim to the amount due on a mortgage given to the plaintiff for the purchase price of the land, the amount paid to plaintiff, which he claims should have been paid to him. *Held*, (1) That the collection of the money was wrongful on the plaintiff's part. (2) That the defendant is entitled to recover it as money had and received, which in equity and good conscience should not be retained; and also under section 4802, Revised Codes 1905. (3) That defendant is entitled to recover same in this action notwithstanding there was no express promise to pay the same by the plaintiff. (4) That the money to be paid if the plowing was not done was compensation for the use of land or rent, and passed to the defendant as an incident to the deed, although the technical relation of landlord and tenant may not have existed between the parties to the contract. (5) Whether the contract was a lease or a cropping contract, not decided. Martin v. Royer, 504.

12. Unless shown to possess authority from his principal to that effect, an expert, sent to repair an engine, cannot bind his principal by changing an existing contract. Houghton v. Vavrowski, 594.

13. Compensation for work, within the scope of a regular employment in addition to the usual but not fixed hours for a day's work, cannot be recovered in the absence of a contract therefor, unless the contract was entered into in reference to a controlling custom. McGregor v. Harm, 599.

14. Where the evidence is undisputed as to the cause for a discharge from service under an existing contract, it is a question of law for the court as to the sufficiency of such cause. McGregor v. Harm, 599.

15. Where the employer requests the servant to do additional work not unreasonable in view of the nature of the employment, and the servant refuses such request without cause, such refusal will justify his discharge by the master. McGregor v. Harm, 599.

16. Where a contract for services as entered into for a sum certain per week, with an additional sum to be paid if the service is continued for one year and the servant remains sober, it is a contract for employment by the week, and not an entire one for a year. McGregor v. Harm, 599.

17. Evidence of payment in full for all services considered, and it is *held*, therefrom, that it was not error to refuse to direct the jury to find in plaintiff's favor for a small balance of 39 cents claimed to be unpaid. McGregor v. Harm, 599.

## CONTRACTS—Continued.

18. A construction company agreed with a bank to sell, and the bank agreed to buy, two town lots for $300 on the occurrence of certain events. The partnership conducting the bank was dissolved and its assets, except such contract, were distributed. The events happened, but vendee never paid any taxes as agreed, nor the purchase price for the lots. The contract provided that no assignment of it or of the property, by the vendees would be recognized or binding unless the vendor consented in writing. It never was assigned to Hammond orally or in writing, and no consent by the vendor was ever given to any assignment. nor would the party in the bank consent that title be conveyed to Hammond by the construction company. Hammond's interest was one-third; he brought this action to compel specific performance by deed of the whole title in the lots to him alone. The other parties defended. *Held*. that Hammond cannot maintain such action. Hammond v. N. W. C. & I. Co., 699.

19. Money paid under a mistake of fact to one not entitled to it, and who cannot in good conscience receive and retain the same, may ordinarily be recovered, the law raising an implied promise on the payee's part to refund. Bank v. Weber, 702.

20. An offer in specific terms, and without conditions, for the purchase of a tract of land made by letter or telegram, unconditionally accepted, becomes a binding contract. Mitchell v. Land Co., 736.

21. The fact, that the requirements of the statute of frauds have not been complied with in making a contract for the sale of real estate, will not defeat an action for the specific performance of such contract, where the vendee has been placed in possession of the land under the contract, and has made valuable improvements and has paid part of the purchase price. Mitchell v. Land Co., 736.

22. A contract of a vendee for the purchase of real estate, made through his agent in his own name, without stating the name of his principal, may be enforced by an action for specific performance by such principal in his own name. Mitchell v. Land Co., 736.

23. In an action for the specific performance of a contract to convey real estate, where the facts show a failure and refusal to specifically perform the contract, the court may retain jurisdiction of the action and award damages, and thus determine the controversy without putting plaintiff to the expense and delay of another action. Mitchell v. Land Co., 736.

24. Evidence considered, and held not to show that plaintiff knew, when contract was entered into, or when suit was begun, that defendants were unable to convey by a sufficient deed. Mitchell v. Land Co., 736.

25. Whether conversion will lie for the oats and speltz depends upon the contract under which they are raised, and the fact being disputed, the case should have gone to the jury. Simmons v. McConville, 787.

CONTRACTS—Continued.

26. In an action to foreclose a mechanic's lien for balance due under an express contract, the answer denies that plaintiff had substantially performed the contract, and pleads four counterclaims. Plaintiff moves to strike out certain of such counterclaims and portions of others, which motion the court granted in part, and denied the remainder. *Held*, for reasons stated in the opinion, that such ruling was non-prejudicial. Marchand v. Perrin, 794.

27. The findings that a building erected by plaintiff under the contract was not completed in a good, substantial and workmanlike manner, but in a careless, negligent, unskillful and unworkmanlike manner and of inferior material. *Held*, amply supported by the testimony. Marchand v. Perrin, 794.

28. Plaintiff, having failed to prove a substantial performance of the contract on his part, cannot recover anything under the contract where defendant is not shown to have waived such performance. Marchand v. Perrin, 794

29 Making payments, taking possession of and occupying a building, does not of itself amount to waiver nor estop defendant from urging nonperformance of the contract for its erection. Marchand v. Perrin, 794.

CONTRIBUTORY NEGLIGENCE. See Negligence, 438.

CORPORATIONS. See Sales, 551.

1. Under section 4698, Revised Codes 1905, making officers, agents and stockholders of nonresident corporations doing business within this state without complying with the statutes thereof "liable on any and all contracts of such corporation * * * made within this state," these officers, agents and stockholders are liable on the implied contracts or obligations of such corporation to return everything which was received by the corporation under an express contract with it by a party who has rescinded the express contract. Chesley v. Soo Coal Co., 18.

COSTS. See Appeal and Error, 599, 634; Divorce, 308, 522.

1. In cases of conviction the costs of prosecution in criminal actions should be taxed by the clerk the same as in civil actions. State v. Kruse, 203.

2. Costs are purely tlhe creature of the statute, and can be awarded only when expressly authorized by law. It is accordingly *held*, that an allowance of $100 by way of attorney's fees is erroneous, and the judgment is modified by eliminating such item therefrom. Cassedy v. Robertson, 574.

3. There is nothing contained in the record on this appeal from which the Supreme Court is enabled to intelligently determine what costs appellant is entitled to have taxed, but the judgment roll does

COSTS—Continued.

disclose reversible error in denying any costs to him, and for such error the judgment is reversed. Hilde v. Nelson, 634.

4. Costs allowed under section 7179, Revised Codes 1905, are in the discretion of the court, and, unless the facts show an abuse of the court's discretion, its rulings refusing certain costs will not be disturbed. Whitney v. Akin, 638.
5. The costs or attorney's fee which may be allowed by the provisions of section 7176, Revised Codes 1905, apply only to actions which are indisputably for the foreclosure of a mortgage upon real or personal property. The fact that the parties in equity stand in a relation that is practically that of mortgagor, and mortgagee, does not itself require or authorize an allowance of costs under this section. Whitney v. Akin, 638.
6. Under the showing made by appellant, it was error to deny his motion for a retaxation of costs, but such error does not affect the judgment of conviction. State v. Ball, 782.

COUNTERCLAIM. See Divorce, 352.

COUNTIES. See Drains, 801; Taxation, 531.

1. Where the result of a vote on the proposition to divide a county and create from a portion thereof a new one, is announced on November 30, 1908, and mandamus to test the accurracy and sufficiency of the result announced by the canvassers is commenced January 2, 1909, and in the interval, the only public act affecting the new county is the appointment of county commissioners by the governor, the laches and delay of the relator are not so gross and unreasonable that its application upon the merits should be refused. State v. Willis, 209.
2. Proceedings for the division of a county and for the organization of new counties are strictly statutory, and no intendment can be indulged in their favor. State v. Meyers, 804.
3. Statutes relating to county division are liberally construed to give effect to the legislative intent; but such intent being reasonably apparent, those seeking to interfere with existing counties by the creation of new ones, must substantially conform to the requirements of the statute. State v. Meyers, 804.
4. It was sought by mandamus to compel the secretary of state to certify to the division and organization of counties; the sufficiency of the alternative writ is challenged as failing to allege facts authorizing any relief. *Held*, that such objection is without merit. The writ shows full compliance for the organization of the proposed new county, and others, with all statutory prerequisites. The petition designates the western boundary as the east and north bank of the Missouri river, whereas it manifestly appears that it was the intention of all concerned that the western boundary of such proposed new county should be co-extensive with

COUNTIES—Continued.

the present western boundary of McLean county, which is the center of the main channel of the Missouri river. *Held,* that such manifest intention will be given effect by construing the petition as designating the western boundary of such new county to be the center of the main channel of such river. State v. Meyers, 804.

COUNTY COURTS. See Courts, 785; Jurisdiction, 61.

1. W. held beneficiary certificates, one from each of two fraternal societies, both payable to "his legal heirs," and in his will bequeathed all his property, real and personal, to appellants F. and C., specially mentioning all life insurance. The societies paid W's testamentary administrator the amount due under the certificates. Respondents, sole heirs of the testator, resisted the administrator's petition for distribution, claiming the fund received under such certificates; the county court awarded the fund to the appellants. On appeal the district court reversed such decree and ordered one awarding fund to respondents. *Held,* that the county court had no jurisdiction to try the right and title to such funds and the district court on such appeal acquired no jurisdiction, and its judgment directing the county court to distribute such fund to respondents, was erroneous. Finn v. Walsh, 61.
2. The Constitution of North Dakota, section 111, defining the jurisdiction of county courts, confers authority upon such courts in probate, testamentary and guardianship matters merely, and it is beyond the power of the legislature to enlarge such jurisdiction by statute. Finn v. Walsh, 61.
3. Revised Codes 1905, section 8083, was not designated to enlarge the constitutional grant of power to county courts, nor did the legislature by its enactment intend to make the proceeds of such life insurance policies and beneficiary certificates as are therein mentioned a portion of the estate of the insured, but the intent was merely to exempt from the payment of those debts of the decedent all such proceeds as might become assets of such estate. Finn v. Walsh, 61.
4. A final decree of distribution of county courts is of equal rank with judgments of courts of record and a distributee named in a final decree can sue the executor or administrator or the bondsmen of either, or both, for the share assigned to him by such decree. Sjoli v. Hogenson, 82.
5. A final decree of distribution is conclusive against the bondsmen as well as the administrator and imports the same degree of verity as judgments of courts of record. Sjoli v. Hogenson, 82.
6. A decree of distribution is the final instrument of the rights of the parties to a proceeding; and upon its entry, the rights are thereafter to be exercised by its terms. Sjoli v. Hogenson, 82.

COURTS. See Appeal and Error, 630; County Courts, 61, 82; District Courts, 61; Supreme Courts, 697.

1. Where the constitutionality of a law is made to depend upon the existence or nonexistence of some fact or state of facts, the determination thereof is primarily for the legislature, and the court will acquiesce in its decision, unless it clearly appears that such decision was erroneous. State v. N. P. Ry. Co., 45.
2. Trial courts have wide discretion as to extension of time to settle statement of case, and their action will be disturbed only for abuse. Tuttle v. Pollock, 308.
3. Courts favor trial upon the merits and where a trial court has refused to open a default and permit defense, this court will not only inquire as to whether the discretion in denying the application has been soundly exercised, but will examine the facts to determine whether or not in the interest of justice and right, the default should not be set aside and a defense permitted. Bank v. Branden, 489.
4. The state district court is not the successor of the territorial district court to inquire into the merits of litigation not pending at the time of the admission of North Dakota into the union; and such state court could not vacate a judgment of a territorial court on motion. Bank v. Braithwaite, 7 N. D. 258, 75 N. W. 244, 66 Am. St. Rep. 653, distinguished. Campbell v. Coulston, 645.
5. Section 8294, Revised Codes 1905, which requires county courts of increased jurisdiction to certify cases to the district court when "it shall appear to the court by affidavit, or if the court shall so order, upon other testimony, that a fair and impartial trial cannot be had in such court by reason of the bias or prejudice of the judge or otherwise," construed, and *held* not to require a certification of a case to the district court upon an affidavit setting forth no facts, but merely the conclusion that the moving party has reason to and does believe, that the county judge is so prejudiced against him that he cannot obtain a fair and impartial trial. Waterloo Engine Co. v. O'Neil, 784.

COVENANTS. See Deeds, 337.

CRIMINAL LAW. See Bastards, 679; Indictment and Information, 249; Intoxicating Liquors, 396; Municipal Corporations, 98, 672; Statutory Construction, 396.

1. Where evidence of good character and reputation is admissible, it must be as to the party's general reputation in the community where he resides, and before a witness can testify thereto, he must show knowledge of such person's general reputation and cannot give his own opinion as to it. State v. Magill, 131.
2. Under the evidence in this case, evidence of the good character or reputation of the complaining witness is inadmissible. State v. Magill, 131.

## CRIMINAL LAW—Continued.

3. An instruction that a battery is any unlawful or wilful use of force or violence upon the person of another is incorrect, as the force or violence used must be both wilful and unlawful. State v. Magill, 131.

4. Where the prosecution for keeping and maintaining a common nuisance is only against the person, and the state seeks no order of abatement or lien against the premises where the nuisance was maintained, an information charging the keeping of the place where the forbidden acts are committed is sufficient. State v. Kruse, 203.

5. In cases of conviction the costs of prosecution in criminal actions should be taxed by the clerk the same as in civil actions. State v. Kruse, 203.

6. Under section 9368, Revised Codes 1905, the state's attorney subpoenaed L. to appear before him to testify relative to violation of the prohibition law. L. appeared and testified, whose testimony was reduced to narrative form, and subscribed and sworn to before the state's attorney. Such testimony tended to show that defendant maintained a liquor nuisance, and the state's attorney filed such testimony with an information charging defendant with such offense with a police magistrate, who issued a warrant for defendant's arrest. Defendant was bound over to the district court where he was convicted and sentenced. It is claimed such section attempts to confer judicial power upon the state's attorney and a violation of section 85 of the constitution. *Held*, for reasons more fully stated in the opinion, that the question is not before the court, as neither L. nor the defendant raised it. State v. Stevens, 249.

7. The information filed with the committing magistrate examined and *held*, sufficient to state an offense when tested by the liberal rule governing complaints before such magistrates, following State v. Barnes, 3 N. D. 131, 54 N. W. 541, which decision is held applicable and controlling in the case at bar. State v. Stevens, 249.

8. The information under which defendant was convicted in the district court charged in effect that continuously between certain designated dates defendant kept and maintained a place (particularly describing it), where intoxicating liquors were continuously sold, bartered and given away, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, etc. *Held*, that such information is sufficiently specific as to the time of the commission of the offense, as the same states that such nuisance was kept and maintained continuously on each of the intervening days between the dates mention to such remarks. State v. Stevens, 249.

9. The state's attorney made certain remarks in his argument to the jury wherein he referred to the defendant as "one of the most arrogant, defiant, outspoken violators of the prohibition law

CRIMINAL LAW—Continued.

that I believe there is in the county of Nelson," and also containing the statement: "We have brought into this court upon this charge the prince of blind piggers of Nelson county." *Held,* the evidence not being before us, that it cannot be said that the trial court abused its discretion in overruling defendant's objection to such remarks. State v. Stevens, 249.

10. The judgment provided a jail sentence and fine and costs amounting to $587.95, and adjudged that in default thereof, defendant to be imprisoned an additional period of 294 days. Under section 9379, Revised Codes 1905, the limit of imprisonment for fine and costs is six months. Judgment is modified accordingly. State v. Stevens, 249.

11. A demurrer to an information in a criminal action upon the ground stated in subdivision 2, section 9900, Revised Codes 1905, as follows: "That it does not substantially conform to the requirements of this Code," is too indefinite. The pleader should specify wherein such information fails to conform to the requirements of the code of criminal procedure, so as to apprize the court of the precise point of objection. State v. Longstreth, 268.

12. An information charging the offense of procuring an abortion need not specifically describe the drug or medicine administered, nor the kind or character of instrument or instruments used, or the manner of such use, where such information alleges that the kind and character of such instrument and the manner of its use are unknown. State v. Longstreth, 268.

13. The strict rules of the common law regarding criminal pleading are abolished by statute, and under section 9856, Revised Codes 1905, an information or indictment is sufficient if the offense is clearly and distinctly set forth in ordinary and concise language without repetition, to enable one of common understanding to know what is intended; it is sufficient if the offense is charged with sufficient certainty to enable the court to pronounced judgment upon a conviction. State v. Longstreth, 268.

14. Section 9891, Revised Codes 1905, enumerates the grounds upon which a motion to quash an information or indictment may be made, and this section is exclusive. State v. Longstreth, 268.

15. That the complaining witness before the committing magistrate did not possess actual personal knowledge of the facts constituting the offense is not sufficient ground for quashing the information based upon the preliminary examination before such magistrate, where the allegations are positive and not on information and belief, and the complaint is sworn to positively. Hence, it was improper practice to permit defendant to examine the complaining witness to prove lack of personal knowledge of the facts set forth in such complaint, and the motion to quash the information was properly overruled, not only for the foregoing reasons, but be-

CRIMINAL LAW—Continued.

cause the record shows that such complaining witness did not act on hearsay evidence in making the complaint, as the defendant had made full admissions of the facts tending to show his guilt. State v. Longstreth, 268.

16. The latitude and extent of a cross-examination rest in the discretion of the trial judge, and will be disturbed only for abuse resulting in prejudice to the complaining party. State v. Longstreth, 268.

17. The state, over objection, was allowed to prove by the official court stenographer, admissions made by defendant while testifying in a previous trial of a civil action wherein he was defendant, which testimony was relevant and material, and the stenographer was permitted to refer to and read from a transcript of his notes, after foundation laid by showing that they were correctly taken, and transcribed. *Held*, not error. State v. Longstreth, 268.

18. Defendant's contention that the evidence is insufficient to support the verdict of guilty, upon the ground that the state failed to prove that the abortion was not necessary to preserve the life of the woman, was properly overruled, as the facts and circumstances sufficiently establish at least a prima facie case in favor of the state on such issue. State v. Longstreth, 268.

19. The state must both allege and prove such negative, but whether in the first instance the state must furnish direct affirmative proof of such negative fact ,or whether, in the absence of any such proof, the presumption that it was not necessary suffices to establish a prima facie case, is not determined, as the evidence, both direct and circumstantial, clearly establishes a prima facie case in behalf of the state without the aid of such presumption. State v. Longstreth, 268.

20. On a trial on a charge of rape, the making and enforcement of an order excluding all persons from the the courtroom except "all jurors, officers of the court, including attorneys, litigants, and their attorneys, witnesses for both parties, and any other person or persons whom the several parties to the action may request to remain," does not deprive the defendant of a public trial, within the statutory and constitutional provisions giving persons accused of crime the right to a "speedy and public trial." State v. Nyhus, 326.

21. On a trial for the offense of rape, it is beyond the limit of proper cross-examination to permit the accused to be asked as to former arrests for other offenses, without the opportunity being given by the questions to answer as to whether he was guilty of the offense for which such former arrest or arrests were made. State v. Nyhus, 326.

22. On a trial for the offense of rape, it is prejudicial misconduct for the attorney for the prosecution, in addressing the jury, to urge

CRIMINAL LAW—Continued.

a conviction "in view of the fact that you have before you two girls whose lives have been ruined by this defendant," etc. State v. Nyhus, 326.

23. Such statement to the jury is not rendered harmless or non-prejudicial by a general caution in the instructions to the jury, that a misstatement of the evidence by the attorneys should be disregarded, and the issue determined from the evidence alone. State v. Nyhus, 326.

24. Defendant, having pleaded guilty to an information charging that it sold within the state a liquor labeled "Purity Malt," and commonly called and known as "malt," which is a malt liquor retaining the alcoholic principle as a distinctive force, which was and is sold and used throughout the state of North Dakota as a substitute for beer, and that said beverage contained 1.75 per cent of alcohol by volume, and 1.40 per cent of alcohol by weight, is guilty of a public offense and liable to an imposition of penalties provided for violation of the prohibitory law of the state. State v. Fargo Bottling Works Co., 396.

25. Where a complaint in justice court on which the accused is held to answer in the district court does not allege the keeping and maintaining of the nuisance as of a second offense, the state's attorney may, under section 9792, Revised Codes 1905, file an information in the district court for the alleged offense, charging it as a second offense. State v. O'Neil, 426.

26. Where accused was bound over on a complaint that he kept and maintained a nuisance in "a one-story log and frame building on a certain farm upon which the said Thomas O'Neal then and there resided and near the east shore of Lake Metigoshe, in Bottineau county, North Dakota," the state's attorney may file an information in the district court of the offense as having been committed in a building situated on a specifically described tract of land. State v. O'Neal, 426.

27. Where the information charges a liquor nuisance to have been maintained in a building on the "Northwest quarter of the northwest quarter of section 1, in township 163, range 76, Bottineau county, North Dakota," it is error, to admit evidence that such nuisance was maintained at a place outside of said described tract of land. State v. O'Neal, 426.

28. Where the information alleges that the accused kept and maintained a liquor nuisance in a certain described building on a specifically described tract of land, it is error to instruct the jury that he may be convicted if shown to have committed that offense at any other place within the county, notwithstanding the specific allegation of the information. State v. O'Neal, 426.

29. Where the state's attorney attempts to prove the maintenance of a liquor nuisance as a second offense, and fails to do so, and the

CRIMINAL LAW—Continued.

jury is expressly cautioned to disregard such offer or evidence, it was not error nor misconduct for the state's attorney to offer such proof. State v. O'Neal, 426.

30 Construing section 9931, Revised Codes 1905, providing that the state may apply for change of venue in a criminal action, and that the court may order such change; *held*, that the granting or denying of such change on the application of the attorney general, on the ground that an impartial trial cannot be had in the county where the action is pending, is within the sound discretion of the trial court, and its ruling will only be disturbed for abuse. State v. Winchester, 756.

31. In a prosecution for keeping and maintaining a common nuisance against the person only, an information charging the keeping of the place where the forbidden act is committed is sufficient. State v. Ball, 782.

32. Where the evidence showed the sale and keeping for sale of beer, it was proper to instruct that beer was a malt liquor and intoxicating. State v. Ball, 782.

33. Other instructions complained of examined, and *held* correct, and not prejudicial to defendant. State v. Ball, 782.

34. Under the showing made by appellant, it was error to deny his motion for a retaxation of costs, but such error does not affect the judgment of conviction. State v. Ball, 782.

CROSS-EXAMINATION. See Evidence, 191, 692; Trial, 268.

CUSTODIA LEGIS. See Claim and Delivery, 70.

CUSTOM.

1. Compensation for work, within the scope of a regular employment in addition to the usual but not fixed hours for a day's work, cannot be recovered in the absence of a contract therefor, unless the contract was entered into in reference to a controlling custom. McGregor v. Harm, 599.

DAMAGES. See Death by Wrongful Act, 38; Streets and Highways, 293; Verdict, 10.

1. A rescission of an express contract renders the same of no force or validity so far as its enforcement or damages for its breach are concerned, but the implied obligation of the parties to restore everything of value received thereunder remains in force, and may be enforced after rescission. Chesley v. Soo Coal Co., 18.

2. The statute quoted only affects the remedy or measure of damages in case of injury by such animals, and as applicable to acts of negligence by the owner of the premises on to which stock strays during the open season such stock is trespassing. Corbett v. Railway Co., 450.

DAMAGES—Continued.

3. In an action to determine adverse claims to a part of a lot in the city of Kenmare, and to recover damages for the withholding thereof, evidence examined, and *held*, sufficient to sustain the judgment for plaintiff. Cassedy v. Robertson, 574.

4. Plaintiff, while walking the sidewalk in Fargo, was frightened by the whistle of a bicycle rider approaching from the rear and without looking, stepped off such walk into a drainage ditch or gutter which ran under the sidewalk at that point, receiving injuries. In an action against the city for such injury, she alleges that it was guilty of culpable negligence contributing to her injury, first, because it suffered weeds to grow in and about such ditch so as to obscure the same from view, and, second, in not placing a cover over such ditch, or a railing or guard along the edge of the walk at said point. *Held*, that from plaintiff's own testimony it appears that the presence of the weeds in no manner contributed to her injuries, she testifying that she did not look where she was stepping and hence was not misled nor deceived as to the dangerous character of the place where she stepped, by reason of such weeds. Braatz v. Fargo, 538.

5. In an action for the specific performance of a contract to convey real estate, where the facts show a failure and refusal to specifically perform the contract, the court may retain jurisdiction of the action and award damages, and thus determine the controversy without putting plaintiff to the expense and delay of another action. Mitchell v. Knudtson Land Co., 736.

6. In a condemnation suit to acquire land wholly within a public highway for telephone and telegraph lines, evidence that the owner of the abutting land was accustomed for years to use for agricultural purposes the part of the highway between the traveled strip on the medium line of the same and his property line, is inadmissible. Tri-State Tel. & Tel. Co. v. Cosgriff, 771.

7. In eminent domain the damage for taking property is the value of the landowner's interest in the land actually taken, and the depreciation in value sustained at the time of the trial by the land not so taken, by reason of the appropriation of a part to the use of the condemner; evidence, as to the future value of the interest of the condemned, or of the right sought to be acquired by the condemner, rather than the rights of the owner in the property taken, is improperly received. Tri-State Tel. & Tel. Co. v. Cosgriff, 771.

8. A grove of growing trees on land sought to be condemned is part of the real estate and should be valued as such. Damage to such trees growing upon the strip sought to be condemned may be considered a diminution in the value of the interest of the landowner. An instruction that "such damage to said grove and trees as will naturally and properly result in the course of time

DAMAGES—Continued.

to said grove and trees by the construction, maintenance and operation" of a telephone line is erroneous, as directing the jury's attention to a future contingency, and not to the damage sustained at the time of the trial. Tri-State Tel. & Tel. Co. v. Cosgriff, 771.

9. Damage to lands abutting upon a highway by taking a strip adjoining for telephone and telegraph use is not merely nominal; but is substantial, as the owner is entitled to be compensated for all damage to the property sustained by him under the conditions. Tri-State Tel. & Tel. Co. v. Cosgriff, 771.

DEATH BY WRONGFUL ACT.

1. Statutes providing for the recovery of damages for death by wrongful act, construed, and held, that brothers and sisters of one killed by wrongful act are included in the term "heirs at law," as used in section 7689, Revised Codes 1905, when no parent, wife or child survives the person killed. Satterberg v. Soo Ry. Co., 38.
2. The statutes providing right of action for damages caused by death by wrongful act do not contemplate a legal obligation of deceased towards surviving heirs to entitle them to sue for the injury sustained by them through the death of the person of whom they are heirs. Satterberg v. Soo Ry. Co., 38.
3. Sections 7686, 7691, Revised Codes 1905, provides recovery for the death of one by wrongful act by such heirs at law of the deceased who are deprived of pecuniary aid, support or benefit which he was obligated to render or which they were receiving or had expectation of receiving, as a duty or recognized sense of obligation. Satterberg v. Soo Ry. Co., 38.
4. It is the fact of injury within the limits of the statute, rather than the legal obligation of the deceased, which governs. Satterberg v. Soo Ry. Co., 38.

DEBTOR AND CREDITOR. See Homestead, 613.

1. A father, financially involved, deeded land to his son for $1.00. In a contest by creditors of the son, involving the good faith of the transfer, a notary was permitted to testify that the father and mother, when the deed was drawn, stated to him in the absence of the son and of the creditor, that the son was dissatisfied with having worked so long on the farm and receiving nothing and unless he got something, would take up a farm for himself; so to pay him for his work they were going to give him the farm. Such statement was not made under circumstances which were substituted for the usual test of an oath or cross-examination, nor as a part of the main action, and was made under circumstances admitting premeditation and voluntary wariness seeking to manufacture evidence. *Held*, that its admission was prejudicial error. Johnson v. Spoonheim, 191.

DEEDS. See CHAMPERTY AND MAINTENANCE, 227; FORECLOSURE, 104; FRAUD, 551; MORTGAGES, 417; TAXATION, 531; VENDER AND PURCHASER, 737.

1. Deeds executed in violation of section 8733, Revised Codes 1905, as to champerty and maintenance, are void as to those in possession, and as to them, title is in the grantor notwithstanding such deed. Burke v. Scharf, 227.

2. A covenant against incumbrances, and one of warranty, are separate and independent and of materially different import and directed to different objects, and there is no presumption that language qualifying one, is to be transferred to, or included in, the other. Smith v. Gaub, 337.

3. An express exception of a mortgage upon the land in the covenant against incumbrances, in the absence of qualifying words making the deed subject to such incumbrances, or the restriction of the covenant against incumbrances, applies also to that of warranty or to all the covenants of the deed, does not except such mortgage from the covenant of warranty. Such covenant may be regarded as full and general and an action may lie for failure of the grantor to protect the grantee in quiet enjoyment of the title as against the mortgage mentioned in the covenant against incumbrances as well as any other paramount title. Smith v. Gaub, 337.

4. The purchase by a warrantor of title to real property, of an incumbrance covered by his warranty for any purpose other than the protection of the title conveyed by him, and the assertion by him adversely to the title of his warrantee of paramount title based on such encumbrance, is a breach of the covenant of warranty. In equity the title so purchased by him inures wholly to the benefit of the warrantee, and a court of equity will not permit him to assert the same adversely to the title so warranted by him to such warrantee. Smith v. Gaub, 337.

5. Plaintiff in his deed warranted as follows: "Well seized in fee of the lands and premis es aforesaid and have good right to sell and convey the same in manner and form aforesaid, that the same are free from incumbrances, except a certain mortgage amounting to $400 in favor of W., and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming, or to claim the whole or any part thereof, the said party of the first part will warrant and defend." After the delivery of this deed and the payment of the consideration named therein to plaintiff, he purchased from W. the mortgage for $400, mentioned in the covenant against incumbrances, and brought action to foreclose the same. *Held*, that such mortgage was not excepted from the covenant of warranty or assumed

DEEDS—Continued.

by defendant, that such purchase inured to the benefit of the defendant and plaintiff could not foreclose. Smith v. Gaub, 337.

6. Where a deed is executed and delivered to a third person to be by him delivered to the grantee upon the grantor's death, it is a question of fact to be determined from the evidence whether the grantor intended to part with all control over the deed or not. O'Brien v. O'Brien, 713.

7. If the grantor clearly intends that the title shall presently pass by such delivery, evidence showing subsequent change of intention by the recall of the deed is not competent. O'Brien v. O'Brien, 713.

8. If the intention of the grantor in delivering the deed is doubtful or equivocal evidence of subsequent acts of the grantor or of the person with whom the deed was deposited is competent as tending to show what the grantor's intention was at the time of the delivery of the deed to such third person. O'Brien v. O'Brien, 713.

9. The burden is upon the grantee to clearly show a delivery of the deed for his benefit, and that such delivery was made. O'Brien v. O'Brien, 713.

10. Evidence reviewed, and *held*, not to show that the grantor's intention was to deliver the deed without reservation or power to recall. O'Brien v. O'Brien, 713.

DEMURRER. See Pleading, 268, 801.

1. When demurred to as not stating facts sufficient to constitute a cause of action, a complaint will be liberally construed and upheld where its allegations reasonably and fairly apprize the defendant of the claim against him. Weber v. Lewis, 473.

2. If the facts constituting a cause of action are stated in the complaint or can be inferred by reasonable intendment from those set forth, although the allegations are imperfect, incomplete and defective as to form rather than substance, the remedy is not by demurrer but by motion to make more definite and certain by amendment. Weber v. Lewis, 473.

3. Under the code system of pleading, the allegations of a legal conclusion instead of the facts upon which it is based, does not usually render a pleading bad on general demurrer. Weber v. Lewis, 473.

4. The function of a complaint is to inform defendant of the nature of plaintiff's demand so that he may prepare his defense, and if the facts are alleged or may reasonably be inferred to constitute a good declaration under the common counts at common law, the same will be sustained on demurrer. Weber v. Lewis, 473.

## DEPOSITION.

1. The testimony of the witness L. was taken in the form of a deposition, and the fact that it was in the narrative, and not by questions and answers, does not render the same ineffective. State v. Stevens, 249.
2. The deposition of the witness L. is *held* to be a substantial compliance with the statute, although, if considered as a complaint or information, it would be insufficient. Such deposition is no part of the information, and whether it states or shows an offense is immaterial. State v. Stevens, 249.

## DISCRETION. See JUDGMENTS, 489; MOTION, 645.

1. Motions to extend time to file exceptions to charge and to file amended motion for a new trial, to show newly discovered evidence as an additional ground, are within the discretion of the trial court, and will not be disturbed except for abuse. Soules v. Yeomen, 23.
2. Granting or refusing a new trial for insufficiency of the evidence sustaining the verdict, is within the discretion of the court, and its discretion will only be disturbed for abuse. Nilson v. Horton, 187.
3. The state's attorney made certain remarks in his argument to the jury wherein he referred to the defendant as "one of the most arrogant, defiant, outspoken violators of the prohibition law, that I believe there is in the county of Nelson," and also containing the statement, "We have brought into this court upon this charge the prince of blind piggers of Nelson county." *Held,* the evidence, not being before us, that it cannot be said that the trial court abused its discretion in overruling defendant's objection to such remarks. State v. Stevens, 249.
4. Trial courts have wide discretion as to extension of time to settle statement of case, and their action will not be disturbed only for abuse. Tuttle v. Pollock, 308.
5. The discretion to be exercised in such cases is in reference to the diligence or delay with which parties have proceeded and other facts pertaining to the conduct of the parties in connection with the appeal. Tuttle v. Pollock, 308.
6. Such discretion is not to be controlled or made to depend on the fact that appellant's conduct has not been conformable to justice or equity or personal duty in respect to matters not connected with the appeal. Tuttle v. Pollock, 308.
7. On an appeal by a husband from a decree of divorce against him, whereby his property was assigned to the wife in lieu of permanent alimony, and he was also decreed to pay fixed sums as costs and attorney's fees on the trial in the district court, it is an abuse of discretion to refuse to settle a statement of the case

DISCRETION—Continued.

until the husband makes provision for the support of his wife and children pending the appeal, in cases where the trial judge has lost jurisdiction to make an order for support money pending the appeal, for the reason that the defendant in that action had perfected an appeal to the Supreme Court. Tuttle v. Pollock, 308.

8. Amendments are within the discretion of trial courts, to be disturbed only for abuse; liberality in allowing them should be shown by the courts when it will promote the ends of justice. Webb v. Wegley, 606.

9. Trial courts have wide discretion over continuances and under the facts in the case, *held,* the denial of motion for continuance was not error. Webb v. Wegley, 606.

10. Costs allowed under section 7179, Revised Codes 1905, are in the discretion of the court, and, unless the facts show an abuse of the court's discretion, its rulings refusing certain costs will not be disturbed. Whitney v. Akin, 638.

11. The grantees in a quit claim deed for a consideration of "$1.00 and other valuable considerations," of land sold upon a judgment in foreclosure, rendered twenty-two years before, moved to vacate such judgment as void upon its fact for defects in the affidavit of publication of summons. *Held,* under the facts, for reasons in the opinion, that the court abused its discretion in entertaining and granting the motion. Campbell v. Coulston, 645.

12. The latitude in cross-examination is largely discretionary with the court, and its rulings will be disturbed only for abouse. Mathews v. Hanson, 692.

13. If the district judge, without cause, refuses to afford relief, or abuses his discretion in denying a writ of prohibition, relator is not without remedy. But such refusal or abuse of discretion affords no ground for the issuance of such writ by the Supreme Court. Selzer v. Bagley, 697.

14. Construing section 9931, Revised Codes 1905, providing that the state may apply for change of venue in a criminal action, and that the court may order such change. *Held,* that the granting or denying of such change on the application of the attorney general, on the ground that an impartial trial cannot be had in the county where the action is pending, is within the sound discretion of the trial court, and its ruling will only be disturbed for abuse. State v. Winchester, 756.

15. Upon the showing in this case this court is not prepared to say that there was an abuse of discretion in denying the motion of the attorney general for a change of venue. State v. Winchester, 756.

DISTRICT COURT. See Jurisdiction, 61, 630.

1. Change of venue must be determined before trial and often before issue. A district court in acting on the motion, may assume that the character of the action is as the complaint purports to state, and refuse to examine the same as it would upon general demurrer for the purpose of determining the exact character of the cause of action stated. Veits v. Silver, 445.

DISTRICT JUDGE. See Mandamus, 308.

1. The Supreme Court will settle a statement of the case when the trial judge refuses to settle it in accordance with the facts, under section 7060, Revised Codes 1905. Tuttle v. Pollock, 308.
2. Chapter 183, page 266, Laws 1909, which impose upon district judges certain duties relative to the issuance of druggists' permits, is not unconstituional, although such duties are held to be administrative and not judicial in character. Kermott v. Bagley, 345.
3. District judge, after appeal, retains full jurisdiction to settle statement of case or do any act in furtherance of the appeal. *Held*, motion to strike statement from the record is without merit. Rindlaub v. Rindlaub, 352.

DIVORCE. See Appeal and Error, 748; Husband and Wife, 613.

1. On an appeal by a husband from a decree of divorce against him whereby his property was assigned to the wife in lieu of permanent alimony, and he was also decreed to pay fixed sums as costs and attorney's fees on the trial in the district court, it is an abuse of discretion to refuse to settle a statement of the case until the husband makes provision for the support of his wife and children pending the appeal, in cases where the trial judge has lost jurisdiction to make an order for support money pending the appeal for the reason that the defendant in that action had perfected an appeal to the Supreme Court. Tuttle v. Pollock, 308.
2. Marriage will be dissolved only where its purpose is defeated by grave and serious misconduct which to warrant a divorce must be established by evidence of a clear and satisfactory character. Public policy, good morals and the interest of society require that the marriage should be surrounded by every safeguard, and its severance adjudged only where complainant is satisfactorily brought within the terms of the statute. Rindlaub v. Rindlaub, 352.
3. Under section 4049, Revised Codes 1905, "extreme cruelty" is a ground for divorce and by section 4051, it is defined as: "The infliction by one party to the marriage of grievous bodily injury or grievous mental suffering upon the other." *Held*, that mental suffering may be sufficient to warrant a divorce under the statute, although not productive of perceptible bodily injury; but whether grievous mental suffering has been inflicted by one party upon

DIVORCE—Continued.

the other is purely a question of fact to be determined in the light of the particular circumstances surrounding each individual case. Rindlaub v. Rindlaub, 352.

4. Evidence examined, and *held* not of that clear and satisfactory character to warrant the granting to plaintiff of a divorce for extreme cruelty. Rindlaub v. Rindlaub, 352.
5. Evidence relating to plaintiff's other alleged ground for a divorce, named habitual intemperance in the use of morphine to such a degree as to disqualify defendant, a great portion of the time, from properly attending to business, and which has reasonably inflicted upon plaintiff a course of great mental anguish, examined and *held* not established. Rindlaub v. Rindlaub, 352.
6. Defendant's counterclaim, alleging facts constituting extreme cruelty on plaintiff's part, *held* for reasons stated in the opinion, not sufficiently established by the evidence. Rindlaub v. Rindlaub, 352.
7. Defendant's counterclaim for wilful desertion by plaintiff *held* fully established. Rindlaub v. Rindlaub, 352.
8. Where the district court allows counsel fees in a judgment denying a divorce to the wife, the plaintiff, and granting it to the husband, and the wife appeals from the judgment and demands review of the entire case in the Supreme Court, under section 7229, Revised Codes 1905, and pending the appeal the wife's attorneys unconditionally accept such counsel fees and costs, the appeal is waived and the respondent is entitled to dismissal. Boyle v. Boyle, 522.
9. An opinion of the trial judge is not to be considered as explanatory of a final judgment. Boyle v. Boyle, 522.
10. In an action for divorce where counsel fees and suit money are included in the final decree, and the same are accepted by the appellant, she is estopped from maintaining an appeal from the decree of the district court, and such appeal will be dismissed on motion. Tuttle v. Tuttle, 748.

DOGS. See MUNICIPAL CORPORATIONS, 672.

DRAINS.

1. "Drain commissioners" of any county are a department thereof, with power to draw warrants upon a special fund in the county treasury. An action will not lie against them on their contract; remedy is by mandamus. Reed v. Heglie, 801.
2. This rule applies when the boards of two or more counties act together in laying out and constructing a drain through such counties. Reed v. Heglie, 801.
3. The complaint must show the representative character in which the defendant is sued. Reed v. Heglie, 801.

DRAINS—Continued.

4. The proper disposition of a bill presented to a board of drain commissioners is to audit it, and, if allowed, issue a warrant on the proper drain fund in payment of such bill. Reed v. Heglie, 801.
5. The demurrer in this case was properly sustained. Reed v. Heglie, 801.

EMINENT DOMAIN.

1. In a condemnation suit to acquire land wholly within a public highway for telephone and telegraph lines, evidence, that the owner of the abutting land was accustomed for years to use for agricultural purposes the part of the highway between the travelled strip on the medium line of the same, and his property line, is inadmissible. Tri-State Tel. & Tel. Co. v. Cosgriff, 771.
2. In eminent domain the damage for taking property is the value of the landowner's interest in the land actually taken and the depreciation in value sustained at the time of the trial by the land not so taken, by reason of the appropriation of a part to the use of the condemner; evidence, as to the future value of the interest condemned, or of the right sought to be acquired by the condemner, rather than the rights of the owner in the property taken is improperly received. Tri-State Tel. & Tel. Co. v. Cosgriff, 771.
3. A grove of growing trees on land sought to be condemned is part of the real estate and should be valued as such. Damage to such trees growing upon the strip sought to be condemned may be considered a diminution in the value of the interest of the landowner. An instruction that "such damage to said grove and trees as will naturally and properly result in the course of time to said grove and trees by the construction, maintenance and operation" of a telephone line is erroneous, as directing the jury's attention to a future contingency, and not to the damage sustained at the time of the trial. Tri-State Tel. & Tel. Co. v. Cosgriff, 771.
4. Damage to lands abutting upon a highway by taking a strip adjoining it for telephone and telegraph use is not merely nominal, but is substantial, as the owner is entitled to be compensated for all damage to the property sustained by him under the conditions. Tri-State Tel. & Tel. Co. v. Cosgriff, 771.

EQUITY. See Mortgages, 417, 638; Pleading, 736.

1. The grantee of the mortgagor cannot have sheriff's certificate and deed cancelled as against the mortgagee in possession without paying the mortgaged debt, even if the mortage is barred by the statute of limitations. Boschker v. Van Beek, 104.
2. The purchase by warrantor of title to real property, of an incumbrance covered by his warranty for any purpose other than the protection of the title conveyed by him, and the assertion by him adversely to the title of his warrantee of paramount title based

EQUITY—Continued.

on such incumbrance, is a breach of the covenant of warranty. In equity the title so purchased by him inures wholly to the benefit of the warrantee, and a court of equity will not permit him to assert the same adversely to the title so warranted by him to such warrantee. Smith v. Gaub, 337.

3. In addition to the sum paid by H. B. L. Co. to the county for such deed, the company paid to the county certain taxes for subsequent years on the land and defendant for certain other years. *Held*, that in equity defendant is subrogated to the lien of the county for all taxes, interest and penalty paid by him or his grantor to the county, and that plaintiff will be granted relief only on condition that he reimburse defendant for all sums thus paid, as he who seeks equity must do equity. McKenzie v. Boynton, 531.

4. The cause was tried, by consent of the parties, as an equity case without a jury. Defendant cannot urge in the appellate court for the first time that issues were for a jury instead of a court. Whether the contract set forth in the opinion created a partnership between the parties or whether the issues were legal or equitable, is not determined as the questions were not raised below and appellant will not be permitted to urge in the appellate court a theory contrary to that on which the case was tried and decided in the trial court. DeLaney v. Western Stock Co., 630.

5. The fact that the requirements of the statute of frauds have not been complied with in making a contract for the sale of real estate will not defeat an action for specific performance of such contract, where the vendee has been placed in possession of the land under the contract, and has made valuable improvement and has paid part of the purchase price. Mitchell v. Knudtson Land Co., 736.

6. A contract of a vendee for the purchase of real estate, made through his agent in his own name, without stating the name of his principal, may be enforced by an action for specific performance by such principal in his own name. Mitchell v. Knudtson Land Co., 736.

7. In an action for the specific performance of a contract to convey real estate, where the facts show a failure and refusal to specifically perform the contract, the court may retain jurisdiction of the action and award damages, and thus determine the controversy without putting plaintiff to the expense and delay of another action. Mitchell v. Knudtson Land Co., 736.

ESCROW.

1. Where a deed is executed and delivered to a third person to be by him delivered to the grantee upon the grantor's death, it is a question of fact to be determined from the evidence, whether the

ESCROW—Continued.

grantor intended to part with all control over the deed or not. O'Brien v. O'Brien, 713.

2. If the grantor clearly intends that the title should presently pass by such delivery, evidence showing subsequent change of intention by the recall of the deed is not competent. O'Brien v. O'Brien, 713.
3. If the intention of the grantor in delivering the deed is doubtful or equivocal, evidence of subsequent acts of the grantor or of the person with whom the deed was deposited, is competent as tending to show what the grantor's intention was at the time of the delivery of the deed to such third person. O'Brien v. O'Brien, 713.
4. The burden is upon the grantee to clearly show a delivery of the deed for his benefit, and that such delivery was made. O'Brien v. O'Brien, 713.
5. Evidence reviewed, and *held*, not to show that the grantor's intention was to deliver the deed without reservation or power to recall. O'Brien v. O'Brien, 713.

ESTATE OF DECEDENTS. See Executors and Administrators, 417, 546; Probate Law, 13, Wills, 160.

ESTOPPEL.

1. While the contract remains in force, and the vendee remains in possession thereunder, he is estopped from buying an outstanding title and thereby repudiate the vendor's contract and at the same time retain the possession secured by him in virtue of the contract. Burke v. Scharf, 227.
2. In an action for divorce, where counsel fees and suit money are included in the final decree, and the same are accepted by the appellant, she is estopped from maintaining an appeal from the decree of the district court, and such appeal will be dismissed on motion. Tuttle v. Tuttle, 748.
3. Making payments, taking possession of and occupying a building does not of itself amount to a waiver nor estop defendant from urging nonperformance of the contract for its erection. Marchand v. Perrin, 794.

EVIDENCE. See Accord and Satisfaction, 751; Appeal and Error, 551, 634, 638; Continuance, 249; Criminal Law, 326, 426; Judgments, 638; Laches, 139; Municipal Corporations, 538; Negligence, 438; Practice, 23; Witness, 268 .

1. In an action for money had and received, it was error to direct a verdict for defendant where proof showed that he had a prior lien on certain personalty sold by defendant under chattel mort-

EVIDENCE—Continued.

gage foreclosure. The proof disclosing that defendants promised for consideration to pay plaintiff the proceeds of the sale, is a breach of such agreement. Hyde v. Thompson, 1.

2. Evidence examined, and *held* amply sufficient to sustain the allegations of the complaint, both as to the existence of plaintiff's lien, and the promise aforesaid; hence the direction of a verdict in defendant's favor constitutes reversible error. Hyde v. Thompson, 1.
3. Action against sheriff for failure to levy execution upon personal property attached by him. Court directed verdict for defendant on the theory that complaint failed to state, and proof to show, a cause of action, there being no allegation nor proof negativing facts justifying's defendant's official acts. *Held*, error, as burden was on defendant to justify his failure and complaint was sufficient and testimony showed a prima facie case. Bank of Portal v. Lee, 10.
4. Burden is on insurance company to show death by suicide, although proofs of death on information and belief state such facts, where statement was made under circumstances not to be attributed to plaintiff, such proof being made by her agent. Soules v. Yeomen, 23.
5. The question whether assured committed suicide is for the jury, where circumstances are conflicting, and that death may have been caused by criminal assault. Soules v. Yeomen, 23.
6. The opinions of farmers on the value of farm lands are admissible where they live in its vicinity, are acqauinted with its situation, quality and adaptability for agricultural purposes, although they are not engaged in buying and selling land and have no knowledge of an actual sale of the lands or similar lands. Schmidt v. Beiseker, 35.
7. Sufficiency of the evidence to sustain the verdict is not considered, where (a) the record does not affirmatively show that it embraces all the evidence, (b) no proper specification of particulars is incorporated in the statement of the case. Schmidt v. Beiseker, 35.
8. Chapter 51, page 73, Laws 1907, amending and reenacting section 4395, prescribing maximum coal rates for coal in carload lots within the state is presumtively valid, and the burden is upon the carrier to prove that the rates therein prescribed are clearly unreasonable. State v. N .P. Ry. Co., 45.
9. Evidence examined, and *held* not sufficient to overcome the prima facie presumption that the rates prescribed by said act are reasonable. State v. N. P. Ry. Co., 45.
10. A receipt obtained from a distributee through fraud and misrepresentation is invalid, and open to explanation and impeachment. Sjoli v. Hogenson, 82.

EVIDENCE—Continued.

11. Where evidence of good character and reputation is admissible, it must be as to the party's general reputation in the community where he resides, and before a witness can testify thereto, he must show knowledge of such person's general reputation and cannot give his own opinion as to it. State v. Magill, 131.

12. Under the evidence in this case, evidence of the good character or reputation of the complaining witness is inadmissible. State v. Magill, 131.

13. Under section 7252, Revised Codes 1905, forbidding a party to an action against the heirs or representatives of a decedent to testify to conversations or transactions with decedent; testimony by plaintiff, in an action to specifically enforce an alleged contract of sale of land with a decedent, that decedent promised to go to a certain town the next day, and fix up the deal on the terms of the contract of sale, was inadmissible. Larson v. Newman, 153.

14. Courts must be governed by the facts and circumstances of each case as considered, and from them alone determine whether the declarations of a party in interest, made in the absence of the litigant, are admissible in evidence. Johnston v. Spoonheim, 191.

15. As a general rule, statements of parties in interest, made in the absence of the litigant, are incompetent as evidence, unless there exists in the surrounding circumstances or the nature of the case, some acceptable substitute for the usual test of an oath and cross-examination. Johnston v. Spoonheim, 191.

16. A father, financially involved, deeded land to his son for $1.00. In a contest by creditors of the son, involving the good faith of the transfer, a notary was permitted to testify that the father and mother when the deed was drawn stated to him in the absence of the son, and of the creditor, that the son was dissatisfied with having worked so long on the farm and receiving nothing, and unless he got something, would take up a farm for himself; so to pay him for his work they were going to give him the farm. Such statement was not made under circumstances which were substituted for the usual test of an oath or cross-examination, nor as a part of the main action, and was made under circumstances admitting premeditation and voluntary wariness seeking to manufacture evidence. *Held,* that its admission was prejudicial error. Johnston v. Spoonheim, 191.

17. Where the evidence is conflicting, and there is evidence legally sufficient to sustain the verdict under the instructions given, the verdict cannot be said to be contrary to such instructions. Nilson v. Horton, 187.

18. Evidence as to who rented the building where the alleged nuisance was maintained was, on motion of the state, stricken out. *Held,* error. State v. Kruse, 203.

EVIDENCE—Continued.

19. The evidence sufficiently shows that John A. Johnson was a member of the firm of Johnson & Gregerson. Hanson v. Franklin, 259.

20. Citations issued for the taxes of each year were introduced in evidence and were prima facie evidence of the legality of the taxes assessed for these years. Hanson v. Franklin, 259.

21. Thet latitude and extent of a cross-examination rests in the discretion of the trial judge and will be disturbed only for abuse resulting in prejudice to the complaining party. State v. Longstreth, 268.

22. The state, over objection, was allowed to prove by the official court stenographer, admissions made by defendant, while testifying in a previous trial of a civil action wherein he was defendant, which testimony was relevant and material, and the stenographer was permitted to refer to and read from a transcript of his notes, after foundation laid by showing that they were correctly taken and transcribed. *Held*, not error. State v. Longstreth, 268.

23. Defendant's contention that the evidence is insufficient to support the verdict of guilty, upon the ground that the state failed to prove that the abortion was not necessary to preserve the life of the woman, was properly overruled, as the facts and circumstances sufficiently establish at least a prima facie case in favor of the state on such issue. State v. Longstreth, 268.

24. The state must both allege and prove such negative, but whether in the first instance the state must furnish direct affirmative proof of such negative fact, or whether, in the absence of any such proof, the presumption that it was not necessary suffices to establish a prima facie case, is not determined, as the evidence, both direct and circumstantial, clearly establishes a prima facie case in behalf of the state, without the aid of such presumption. State v. Longstreth, 268.

25. Where a city paid a judgment to a person injured upon its streets in an action for failure to keep its streets safe, sues a party, who, under license, express or implied, from the city, places obstructions in the street which caused the injury, the defendant, if given notice by defendant to the original action to defend it, is concluded as to all matters of fact establishing the liability of the city to the persons injured, and as to any defense of the city to such liability. Unless it appears that the evidence of the indemnitor's liability was necessarily involved in the original action, and passed upon by the court rendering the judgment, the defendant is not concluded upon the point, that notwithstanding his liability to the city, he was not in fault, and has failed in no duty owing to the city or to the persons injured, and he may plead such defense upon the trial. City of Grand Forks v. Paulsness, 293.

EVIDENCE—Continued.

26. On a trial for the offense of rape, it is beyond the limits of proper cross-examination to permit the accused to be asked as to former arrests for other offenses, without the opportunity being given by the questions to answer as to whether he was guilty of the offense for which such former arrest or arrests were made. State v. Nyhus, 326.

27. A covenant against incumbrances and one of warranty are separate and independent, and of materially different import, and directed to different objects; and there is no presumption that language qualifying one, is to be transferred to or included in the other. Smith v. Gaub, 337.

28. Marriage will be dissolved only where its purpose is defeated by grave and serious misconduct, which, to warrant a divorce, must be established by evidence of a clear and satisfactory character. Public policy, good morals and the interest of society require that the marriage be surrounded by every safeguard, and its severance adjudged only where complainant is satisfactorily brought within the terms of the statute. Rindlaub v. Rindlaub, 352.

29. Under section 4049, Revised Codes 1905, "extreme cruelty" is a ground for divorce, and by section 4051, it is defined as: "The infliction by one party to the marriage of grievous bodily injury or grievous mental suffering upon the other." *Held*, that mental suffering may be sufficient to warrant a divorce under the statute, although not productive of perceptible bodily injury; but whether grievous mental suffering has been inflicted by one party upon the other is purely a question of fact, to be determined in the light of the particular circumstances surrounding each individual case. Rindlaub v. Rindlaub, 352.

30. Evidence examined, and *held* not of that clear and satisfactory character to warrant the granting to plaintiff of a divorce for extreme cruelty. Rindlaub v. Rindlaub, 352.

31. Evidence relating to plaintiff's other alleged ground for a divorce, namely, habitual intemperance in the use of morphine to such a degree as to disqualify defendant a great portion of the time from properly attending to business, and which has reasonably inflicted upon plaintiff a course of great mental anguish, examined, and *held* not established. Rindlaub v. Rindlaub, 352.

32. Defendant's counterclaim, alleging facts constituting extreme cruelty on plaintiff's part, *held*, for reasons stated in the opinion, not sufficiently established by the evidence. Rindlaub v. Rindlaub, 352.

33. Defendant's counterclaim for wilful desertion by plaintiff held fully established. Rindlaub v. Rindlaub, 352.

34. Where the information charges a liquor nuisance to have been maintained in a building on the "northwest quarter of the northwest quarter of section 1, in township 163, range 76, Bottineau

EVIDENCE—Continued.

county, North Dakota," it is error to admit evidence that such nuisance was maintained at a place outside of said described tract of land. State v. O'Neal, 426.

35. Plaintiff was asked on direct examination as to the condition of the right of way with reference to snow and other things lying there. Objection was made that it was not within the issues, the action being for neglect in running the train and not the maintenance of the right of way, which was overruled. *Held,* for reasons stated in the objections, and under the circumstances of this case, error. Corbett v. G. N. Ry. Co., 450.

36. In answer to a question as to the condition of right of way with reference to snow and other things thereon, witness testified that oats were sprinkled upon the track. Answer was stricken out and jury cautioned to disregard it. No reference was made to it in the court's charge. From the pleadings, issues and purpose of the question, *held,* that striking out the answer did not cure the error, although not declared reversible error. Corbett v. G. N. Ry. Co., 450.

37. A charge which may lead the jury to believe that the defendant must make out its defense conclusively, or by undisputed evidence, is reversible error. Corbett v. G. N. Ry. Co., 450.

38. Section 4297, Revised Codes 1905, provides that killing or damaging any horses, cattle or other stock by the cars or locomotives along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation. In an action for killing or injuring stock, proof of ownership, killing or damaging, and its value, make a prima facie case; but where the plaintiff relies solely upon the statutory presumption of negligence, and the testimony of those in charge of the running of the train is unequivocal that everything was done that could be done, after the discovery of the stock upon the track, to prevent its injury, and that the train was properly equipped and all appliances in good order, and no conflicting evidence is offered as to material questions, and the circumstances are not in conflict with such evidence, the prima facie case made under the statute is overcome, and the defendant is entitled on proper motion, to a directed verdict. Corbett v. G. N. Ry. Co., 450.

39. Whether the statutory presumption has been fully met and overcome is in the first instance a question of law. Corbett v. G. N. Ry. Co., 450.

40. The declarations of an agent, not made while acting within the scope of his agency, are not binding on the principal. Rounseville v. Paulson, 466.

41. Evidence considered, and *held* not to show that certain declarations by the agent were made while acting within the scope of the agency. Rounseville v. Paulson, 466.

EVIDENCE—Continued.

42. Conceding, but not holding, that certain evidence of a witness M., should not have been received or considered by the court, it is *held* that, disregarding the evidence of such witness entirely, the personal property described in the complaint was fully identified as property purchased from the plaintiff by the defendant, and for the purchase price of which the indebtedness sued upon was contracted. Mayer v. Ferguson, 496.

43. General objections to questions and to a verdict that fail to point out the specific grounds of the objections are inadequate. Mayer v. Ferguson, 496.

44. In an action to determine adverse claims to a part of a lot in the city of Kenmare, and to recover damages for the withholding thereof, evidence examined, and *held*, sufficient to sustain the judgment for plaintiff. Cassedy v. Robertson, 574.

45. The burden of proving knowledge of facts giving rise to the right to rescind, and of the time of acquiring such knowledge, rests on the defendant. Liland v. Tweto, 551.

46. An order denying a motion for a new trial or for judgment notwithstanding the verdict, which is based upon the insufficiency of the evidence to justify the verdict, will not be disturbed where it appears that there is a substantial conflict in the evidence. Lang v. Bailes, 582.

47. Under the evidence in this case, it was a question for the jury to determine whether a waiver of the return of an engine on a breach of a warranty, was intended or not. Houghton v. Vavrowski, 594.

48. It was error to direct a verdict for the plaintiff, as the evidence as to such waiver was not undisputed, or, at least, was such that reasonable persons might draw opposite conclusions therefrom. Houghton v. Vavrowski, 594.

49. It is error to exclude evidence of a conditional sale by an agent of a machine company with consent of the company, as such evidence has a bearing on the question of possession of the property in this case, and upon the question whether a return of same to the company was waived. Houghton v. Vavrowski, 594.

50. Where the evidence is undisputed as to the cause for a discharge from service under an existing contract, it is a question of law for the court as to the sufficiency of such cause. McGregor v. Harm, 599.

51. Evidence of payment in full for all services considered, and it is *held* therefrom, that it was not error to refuse to direct the jury to find in plaintiff's favor for a small balance of 39 cents claimed to be unpaid. McGregor v. Harm, 599.

52. Questions as to whether it was error to refuse to strike out the answer of a witness on the ground that it was not the best evi-

EVIDENCE—Continued.

dence, considered, and *held,* not to be prejudicially erroneous. McGregor v. Harm, 599.

53. Plaintiff refused to offer evidence in support of his complaint and defendant's counsel moved for nonsuit, and the court directed verdict in his favor, and judgment was entered thereon. *Held,* error, without prejudice, as the judgment shows upon its face no testimony was introduced and no issue of fact or law tried and adjudicated, hence such judgment is no bar to the action. Webb v. Wegley, 606.

54. Evidence examined and *held,* that the findings and conclusions of the trial court are substantially correct and amply supported by the testimony. DeLaney v. Western Stock Co., 630.

55. Where the court finds, that during two years the crops grown upon land held under a contract of sale, providing for payment of the purchase price by application each year of the proceeds of one-half the crop, have not been in any part delivered by the vendees to the vendors, and that thereafter there was due upon the contract a certain sum, on an appeal based on the judgment roll alone, it will be presumed in support of the findings, that the evidence showed the value of the crops for the two years in which they were not delivered, was, at least, equivalent to the sum so found to be due on the contract. Whitney v. Akin, 638.

56. Section 5119, Revised Codes 1905, provides: "When a testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section." *Held,* construing such section, that parol testimony is admissible to establish the fact that a child omitted from the will was intentionally thus omitted. Schultz v. Schultz, 688.

57. The fact of an omission by the testator to provide in his will for any of his children, or for the issue of any deceased child, merely raises a prima facie presumption that such issue was unintentionally omitted, and such presumption is rebuttable by evidence extrinsic the will. Schultz v. Schultz, 688.

58. In an action to recover property, a judgment in a former action against a third person, which invested plaintiff with all the rights and title of such third person to the property, is admissible. Mathews v. Hanson, 692.

59. The latitude in cross-examination is largely discretionary with the court, and its rulings will be disturbed only for abuse. Mathews v. Hanson, 692.

60. In an action to recover property, a judgment in a former action against a third person, which invested plaintiff with all the rights

and title of such third person to the property, is admissible, and it is immaterial whether the mechanic's liens, on which the judgment was rendered, under which plaintiff obtained his right to the property in question, were valid or invalid. Mathews v. Hanson, 692.

61. The findings of the court in an action at law, where a jury is waived, have the same weight on appeal as the verdict of a jury, and will not be disturbed unless clearly against the preponderance of the evidence. Bank v. Weber, 702.

62. Evidence examined and *held* clearly sufficient to support the findings. Bank v. Weber, 702.

63. Where a deed is executed and delivered to a third person to be by him delivered to the grantee upon the grantor's death, it is a question of fact to be determined from the evidence whether the grantor intended to part with all control over the deed or not. O'Brien v. O'Brien, 713.

64. If the grantor clearly intends that the title should presently pass by such delivery, evidence showing subsequent change of intention by the recall of the deed is not competent. O'Brien v. O'Brien, 713.

65. If the intention of the grantor in delivering the deed is doubtful or equivocal, evidence of subsequent acts of the grantor or of the person with whom the deed was deposited is competent as tending to show what the grantor's intention was at the time of the delivery of the deed to such third person. O'Brien v. O'Brien, 713.

66. The burden is upon the grantee to clearly show a delivery of the deed for his benefit, and that such delivery was made. O'Brien v. O'Brien, 713.

67. Evidence reviewed, and *held*, not to show that the grantors intention was to deliver the deed without reservation or power to recall. O'Brien v. O'Brien, 713.

68. An allegation in a complaint for the specific performance of a contract for the sale of real estate, that "O. A. Knudtson was the duly and authorized agent of the Knudtson Land Company," admitted to be true in answer, is sufficient, without proof that such agent had authority to bind his principal by his contract to sell real estate. Mitchell v. Knudtson Land Co., 736.

69. Evidence of a settlement of a cause of action set forth in a complaint is not admissible under general denial. Mitchell v. Knudtson Land Co., 736.

70. Evidence consisting of letters written by an agent on behalf of his principal, received in evidence without objections, is sufficient prima facie to establish an authorized agency. Mitchell v. Knudtson Land Co., 736.

EVIDENCE—Continued.

71. Evidence considered, and *held* not to show that plaintiff knew, when contract was entered into, or when suit was begun, that defendants were unable to convey by a sufficient deed. Mitchell v. Knudtson Land Co., 736.

72. Upon the showing in this case, this court is not prepared to say that there was an abuse of discretion in denying the motion of the attorney general for a change of venue. State v. Winchester, 756.

73. In a condemnation suit to acquire land wholly within a public highway for telephone and telegraph lines, evidence, that the owner of the abutting land was accustomed for years to use for agricultural purposes the part of the highway between the travelled strip on the medium line of the same and his property line, is inadmissible. Tri-State Tel. & Tel. Co. v. Cosgriff, 771.

74. In eminent domain the damage for taking property is the value of the land owner's interest in the land actually taken, and the depreciation in value sustained at the time of the trial by the land not so taken, by reason of the appropriation of a part to the use of the condemner; evidence, as to the future value of the interest condemned, or of the right sought to be acquired by the condemner, rather than the rights of the owner in the property taken, is improperly received. Tri-State Tel & Tel. Co. v. Cosgriff, 771.

75. The finding that a building erected by plaintiff under the contract was not completed in a good substantial and workmanlike manner, but in a careless, negligent, unskillful and unworkmanlike manner, of inferior material, *held,* amply supported by the testimony. Marchand v. Perrin, 794.

76. Evidence examined and *held* insufficient to show such waiver. Marchand v. Perrin, 794.

77. Making payments, taking possession of and occupying a building does not of itself amount to waiver nor estop defendant from urging nonperformance of the contract for its erection. Marchand v. Perrin, 794.

EXECUTORS AND ADMINISTRATORS. See Payment, 82; Wills, 160.

1. A sheriff's certificate, under foreclosure by advertisement, is personal property and transferable by the executor of the deceased mortgagee to whom such certificate was issued by assignment under the laws of Massachusetts. Boschker v. Van Beek, 104.

2. Where it does not appear whether sheriff's certificate was held in Massachusetts or this state, but the will of the certificate holder having been probated in this state, and the assignment of such certificate for value paid the executor having been approved by

EXECUTORS AND ADMINISTRATORS—Continued.

the probate court and acquiesced in by the devisees, it transferred the latters' interest and that of the deceased holder to the executor's assignees in case it was held by such executor in this state. Boschker v. Van Beek, 104.

3. W. held beneficiary certificates, one from each of two fraternal societies, both payable to "his legal heirs," and in his will bequeathed all his property, real and personal, to appellants F. and C., specially mentioning all life insurance. The societies paid W's testamentary administrator the amount due under the certificates. Respondents, sole heirs of the testator, resisted the administrator's petition for distribution, claiming the fund received under such certificates; the county court awarded the fund to the appellants. On appeal the district court reversed such decree and ordered one awarding fund to respondents. *Held,* that the county court had no jurisdiction to try the right and title to such fund, and the district court on such appeal acquired no jurisdiction, and its judgment directing the county court to distribute such fund to respondents, was erroneous. Finn v. Walsh, 61.

4. A final decree of distribution of county courts is of equal rank with judgments of courts of record, and a distributee named in a final decree can sue the executor or administrator or the bondsmen of either, or both, for the share assigned to him by such decree. Sjoli v. Hogenson, 82.

5. A final decree of distribution is conclusive against the bondsmen as well as the administrator, and imports the same degree of verity as judgments of courts of record. Sjoli v. Hogenson, 82.

6. An executor may sell and assign a sheriff's certificate of foreclosure held by him as executor, and a sale legally and regularly so made conveys all the interest therein of the devisees under the will of which he is executor. Winterberg v. Van de Vorste, 417.

7. Under section 8105, Revised Codes 1905, requiring a claimant within three months after his claim has been rejected to bring suit thereon, otherwise the same will be barred forever, *held,* that plaintiff's claim is barred. Singer & Co. v. Austin, 546.

8. Such statute is operative as to claims presented and constructively rejected by nonaction for ten days as provided in section 8105, Revised Codes 1905, although notice to creditors as provided in section 8097, Revised Codes 1905, has not been given. Singer & Co. v. Austin, 546.

9. Section 8097, supra, requiring the publication of notice to creditors, being independent of section 8105, requiring suit to be brought within three months after the claim is rejected, the publication of notice under the former is an unnecessary condition to the enforcement of the latter. Singer & Co. v. Austin. 546.

EXEMPTIONS.

1. On authority of Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A. 770, *held*, that the lien of an attachment on personal property of a bankrupt, set aside as exempt in bankruptcy proceedings, is not discharged by a discharge in bankruptcy, and may be enforced through a modified form of judgment as against the property on which it has been created. Mayer v. Ferguson, 496.
2. The judgment in such case, although in form a judgment for money, but providing that it shall be satisfied out of the property attached and not otherwise, protects the defendant against any balance which may remain unpaid after sale of the attached property under execution. Mayer v. Ferguson, 496.

EXPERT TESTIMONY. See Evidence, 35.

FINDINGS. See Appeal and Error, 112, 638; Evidence, 630

1. The findings of the court in an action at law, where a jury is waived, have the same weight on appeal as the verdict of a jury, and will not be disturbed unless clearly against the preponderance of the evidence. Bank v. Weber, 702.
2. Evidence examined and *held* clearly sufficient to support the findings. Bank v. Weber, 702.
3. Upon consideration of the pleadings and the findings of the trial court, *held*, that the judgment entered by the trial court was fully justified by such findings. Folsom v. Norton, 722.
4. Recovery under a counterclaim based upon a contract, whereby the plaintiff agreed that if defendant failed to dispose of enough of jewelry sold him by the plaintiff within one year, to equal one and one-half times the purchase price, plaintiff would take back the unsold portion at the invoice price, cannot be sustained where the findings fail to show such contingency. The findings are insufficient to support judgment. Western Mfg. Co. v. Peabody, 112.

FIRE LIMITS. See Municipal Corporations, 98.

FIXTURES.

1. Parties are at liberty to make any agreement or arrangement with regard to their property that they see fit, and to give to fixtures the legal character of realty or personalty at their option; and, if the agreement is such a one as will make the property personal property, as between the parties, it is personal property, and may be so treated. Mathews v. Hanson, 692.

FORECLOSURE. See Homestead, 613; Mortgages, 139, 417, 445, 613, 638.

1. The holder of a sheriff's certificate, or deed, under an invalid foreclosure of a real estate mortgage by advertisement, in possession of the premises with the implied consent of the mortgagor, is a mortgagee in possession. Boschker v. Van Beek, 104.

FORECLOSURE—Continued.

2. The grantee of the mortgagor cannot have sheriff's certificate and deed cancelled as against the mortgagee in possession without paying the mortgage debt, even if the mortgage is barred by the statute of limitations. Boschker v. Van Beek, 104.
3. A sheriff's certificate under foreclosure by advertisement, is personal property and transferable by the executor of the deceased mortgagee to whom such certificate was issued by assignment under the laws of Massachusetts. Boschker v. Van Beek, 104.
4. Where it does not appear whether sheriff's certificate was held in Massachusetts or this state, but the will of the certificate holder having been probated in this state, and the assignment of such certificate for value paid the executor having been approved by the probate court and acquiesced in by the devisee, it transferred the latter's interest and that of the deceased holder to the executor's assignees, in case it was held by such executor in this state. Boschker v. Van Beek, 104.

FOREIGN CORPORATIONS. See Corporations, 18.

FRAUD. See Debtor and Creditor, 191; Mortgages, 417.

1. A receipt obtained from a distributee through fraud and misrepresentation is invalid, and open to explanation and impeachment. Sjoli v. Hogenson, 82.
2. Respondent purchased two mares from appellant, one of whom had glanders and knots on the head and neck at the time. In response to respondent's question as to what caused the knots, appellant Keim said she had a cold and that "for all I know, she is just as sound as the other." The other was sound. *Held,* not a warranty. *Held,* further, if respondent can recover under the complaint and evidence, it is for fraud and deceit. Sockman v. Keim, 317.
3. Fraud and deceit in the sale of personal property may be perpetrated either by false representations, or by concealment of soundness in the article sold. Sockman v. Keim, 317.
4. While no exact definition of the terms "confidential relations" and "relations of confidence" applicable to all cases can be given, such relations exist when the parties to a transaction do not meet upon an equality, one having a full knowledge of the subject of traffic, and the other but slight knowledge, and no ability to acquire full knowledge, and the innocent person relies on and places confidence in the representations made by the other party to the transaction. Liland v. Tweto, 551.
5. When relations of confidence exist between the parties to an exchange of property, one of whom has full knowledge of the character and condition of the property, and the other but slight knowledge, and no means of obtaining full knowledge, representa-

FRAUD—Continued.

tions as to value which under most circumstances would only amount to expressions of opinion, if made knowing them to be false by the party making them, and with an intent to deceive the other party to the transaction, constitute such fraudulent misrepresentation as may warrant a rescission of the contract or transaction. Liland v. Tweto, 551.

6. In an action to rescind a conveyance of real estate, brought by the grantor against the grantee, where the consideration received was stock in a corporation, the character, condition and value of whose assets were known only to the grantee, and could not be ascertained by the grantor, the suggestion as a fact that the stock was of a certain value, such suggestion being made to induce the trade, and without which the transaction would not have been consummated, and made by one who in the nature of things must have known it to be untrue, constitute fraud which may entitle the grantor to a rescission of the transfer. Liland v. Tweto, 551.

7. Under the circumstances of the case the failure of the owner of stock to disclose to his purchaser the insolvent condition of the corporation by which it was issued, the seller knowing such condition, is the suppression of the truth which entitled the grantor to the rescission of his deed of land conveyed for such stock. Liland v. Tweto, 551.

8. To work a ratification of a contract or transfer induced by fraud which will defeat the innocent party's right to a rescission, the innocent party must have done some act, after he acquired full knowledge of the fraud, inconsistent with a rescission or rendering it impossible to place the other party in statu quo. Liland v. Tweto, 551.

9. The rule that impossibility of restitution is a defense to an action for a rescission does not apply when complete restitution to the statu quo has been rendered impossible by the act of the defendant. Liland v. Tweto, 551.

10. The burden of proving knowledge of facts giving rise to the right to rescind, and of the time of acquiring such knowledge, rests on the defendant. Liland v. Tweto, 551.

11. The plaintiff had some conversation with a third party regarding the purchase by the third party of stock held by the plaintiff after plaintiff acquired knowledge of his right to rescind. The third party made an offer to buy, which was accepted. *Held*, that this did not work a ratification of the transfer complained of as fraudulent. Liland v. Tweto, 551.

FRAUDS, STATUTE OF.

1. The fact that the requirements of the statute of frauds have not been complied with in making a contract for the sale of real estate, will not defeat an action for the specific performance of such contract, where the vendee has been placed in possession of the land under the contract, and has made valuable improvement, and has paid part of the purchase price. Mitchell v. Knudtson Land Co., 736.

FRAUDULENT CONVEYANCE. See Debtor and Creditor, 191.

GLANDERS. See Sales, 317.

GRAND JURY. See Attorney General, 819.

GUARANTY.

1. Defendant signed and delivered the following instrument: "In consideration of one dollar to me in hand paid by Emerson Manufacturing Company, the receipt of which I hereby acknowledge, I hereby guarantee the fulfillment of the within contract and the prompt payment of all obligations given under or arising out of it, and all renewals of the same, on the part of I. K. Tvedt, Kindred, N. D., and waive demand and notice of nonfulfillment and nonpayment. This guaranty is given at the time of the execution of the within contract, and is made a part of the same." *Held*, that such instrument constitutes an absolute guaranty, and hence notice to defendant of plaintiff's acceptance thereof was unnecessary in order to bind him. Emerson Mfg. Co. v. Tvedt, 8.

2. The contract of one who indorses a promissory note in the words, "For value received, I hereby guarantee the payment of the within note, and hereby waive presentment, demand, protest and notice of protest," and who receives no consideration or benefit from the loan made to the principal debtor upon the execution of said note, is that of guarantor of payment, and his liability must be measured by the settled rules applicable to that relation. Northern State Bank v. Bellamy, 509.

3. Under the law in force prior to the enactment of chapter 113, Laws 1899, relating to negotiable instruments, an extension of time of payment made by the holder of a promissory note to the principal debtor for a valuable consideration, and without the knowledge or consent of a guarantor of said note, operated to release the guarantor from liability. This principal is still in force, unless it is changed by the adoption, as part of the law of 1899, of section 6422, Revised Codes 1905, providing the terms upon which a person secondarily liable upon a negotiable instrument is discharged. Northern State Bank v. Bellamy, 509.

GUARANTY—Continued.

4. The liability of a guarantor of payment is predicated wholly upon the term of his contract of guaranty, which is separate and distinct from the terms of the instrument on which it is endorsed. He is not a joint contractor with the principal debtor, and does not agree to make the debt his own, but only to answer for the consequences of his principal's default. His contract, while it may result in requiring him to pay the note, is secondary, within the meaning of section 6494, Revised Codes 1905. Northern State Bank v. Bellamy, 509.

5. The terms "primarily liable," and "secondarily liable," as used in section 6494, Revised Codes 1905, have reference to the remedy provided by law for enforcing the obligation of one signing a negotiable instrument, rather than to the character and limits of the obligation itself. The remedy against a guarantor, depending as it does, upon his separate contract of guaranty, and not upon the terms of the instrument, is not primary and direct, but collateral and secondary. Northern State Bank v. Bellamy, 509.

6. A guarantor of payment of a negotiable instrument, not being by the terms of the instrument absolutely required to pay the same, is secondarily liable thereon; and an extension of time to the principal debtor without his consent operates, under section 6422, Revised Codes 1905, as under the law formerly in force, to release him from liability. Northern State Bank v. Bellamy, 509.

HEIRS. See Death by Wrongful Act, 38.

HERD LAWS. See Animals, 450.

HOMESTEAD.

1. On January 25, 1904, J., a married man, to secure a loan of $800, mortgaged his homestead to D., fraudulently representing the forged signature of his wife as genuine. J's. wife deserted him in September, 1903, moved to Washington, where, when the mortgage was executed by J., she was living as the assumed wife of another. In December, 1908, J. abandoned the homestead, never resuming the residence thereon. On April 20, 1905, respondent was divorced from J. in the state of Washington, and had judgment for alimony, suit money and attorneys' fees, and in October, 1906, sued J. in the district court of Eddy county upon her judgment, attached the homestead and obtained judgment in December, 1906, for $903.74. The assignee of the mortgage foreclosed it in December, 1905, and in one year got a sheriff's deed pursuant to the foreclosure. This action was begun December 29, 1906, to have the mortgage and foreclosure and sheriff's deed cancelled as null and void and to adjudge that the purchaser at the foreclosure sale had no interest in or incumbrance upon the prem-

HOMESTEAD—Continued.

ises. *Held,* for reasons stated in the opinion, that the relief awarded respondent is unwarranted under the facts. Justice v. Souder, 613.

2. Respondent is before the court, not as a claimant of homestead rights in such premises, but merely in the capacity of an attaching creditor, and as such she acquired, through her attachment proceedings, no greater rights in the premises than J., the judgment debtor, had at the date of the levy of the attachment. Justice v. Souder, 613.

3. By operation of section 5054, Revised Codes 1905, all remedies possessed by J. against such mortgage became barred on January 1, 1906, and as a necessary result the mortgage and the foreclosure proceedings thereunder becoming, after January 1, 1906, unassailable by J., appellant acquired, by lapse of time, a perfect title to the premises as against him, and those claiming under him, and plaintiff's action should be dismissed. Justice v. Souder, 613.

HUSBAND AND WIFE. See Divorce, 308, 352, 522, 748.

1. On January 25, 1904, J., a married man, to secure a loan of $800, mortgaged his homestead to D., fraudulently representing the forged signature of his wife as genuine. J's wife deserted him in September, 1903, moved to Washington, where, when the mortgage was executed by J., she was living as the assumed wife of another. In December, 1908, J. abandoned the homestead, never resuming the residence thereon. On April 20, 1905, respondent was divorced from J. in the state of Washington, and had judgment for alimony, suit money and attorneys' fees, and in October, 1906, sued J. in the district court of Eddy county upon her judgment, attached the homestead and obtained judgment in December, 1906, for $903.74. The assignee of the mortgage foreclosed it in December, 1905, and in one year got a sheriff's deed pursuant to the foreclosure. This action was begun December 29, 1906, to have the mortgage and foreclosure and sheriff's deed cancelled as null and void and to adjudge that the purchaser at the foreclosure sale had no interest in or incumbrance upon the premises. *Held,* for reasons stated in the opinion, that the relief awarded respondent is unwarranted under the facts. Justice v. Souder, 613.

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INDICTMENT AND INFORMATION. See Criminal Law, 326.

1. Where the prosecution for keeping and maintaining a common nuisance is only against the person, and the state seeks no order of abatement or lien against the premises where the nuisance was maintained, an information charging the keeping of the place where the forbidden acts are committed is sufficient. State v. Kruse, 203.
2. The information filed with the committing magistrate examined and *held*, sufficient to state an offense when tested by the liberal rule governing complaints before such magistrates, following State v. Barnes, 3 N. D. 131, 54 N. Y. 541, which decision is held applicable and controlling in the case at bar. State v. Stevens, 249.
3. The deposition of the witness L. is held to be substantial compliance with the statute, although, if considered as a complaint or information, it would be insufficient. Such deposition is no part of the information, and whether it states or shows an offense is immaterial. State v. Stevens, 249.
5. The information under which defendant was convicted in the district court charged in effect that continuously between certain designated dates defendant kept and maintained a place (particularly describing it), where intoxicating liquors were continuously sold, bartered and given away, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, etc. *Held*, that such information is sufficiently specific as to the time of the commission of the offense, as the same states that such nuisance was kept and maintained continuously on each of the intervening days between the dates mentioned. State v. Stevens, 249.
5. A demurrer to an information in a criminal action upon the ground stated in subdivision 2, section 9900, Revised Codes 1905, as follows: "That it does not substantially conform to the requirements of this code," is too indefinite. The pleader should specify wherein such information fails to conform to the requirements of the code of civil procedure, so as to apprize the court of the precise point of the objection. State v. Longstreth, 268.
6. An information charging the offense of procuring an abortion need not specifically describe the drug or medicine administered, nor the kind or character of instrument or instruments used, or the manner of such use, where such information alleges that the kind and character of such instrument and the manner of its use are unknown. State v. Longstreth, 268.
7. The strict rules of the common law regarding criminal pleading are abolished by statute, and under section 9856, Revised Codes 1905, an information and indictment is sufficient if the offense is clearly and distinctly set forth in ordinary and concise language,

INDICTMENT AND INFORMATION—Continued.

without repetition, to enable one of common understanding to know what is intended; it is sufficient if the offense is charged with sufficient certainty to enable the court to pronounce judgment upon a conviction. State v. Longstreth, 268.

8. Section 9891, Revised Codes 1905, enumerates the grounds upon which a motion to quash an information or indictment may be made, and this section is exclusive. State v. Longstreth, 268.

9. Where a complaint in justice court on which the accused is held to answer in the district court does not allege the keeping and maintenance of the nuisance as of a second offense, the state's attorney may, under section 9792, Revised Codes 1905, file an information in the district court for the alleged offense charging it as a second offense. State v. O'Neal, 426.

10. Where the accused was bound over on a complaint that he kept and maintained a nuisance in "a one-story log and frame building on a certain farm upon which the said Thomas O'Neal then and there resided and near the east shore of Lake Metigoshe, in Bottineau county, North Dakota," the state's attorney may file an information in the district court for the offense as having been committed in a building situated on a specifically described tract of land. State v. O'Neal, 426.

11. Where the information charges a liquor nuisance to have been maintained in a building on the "northwest quarter of the northwest quarter of section 1, in township 163, range 76, Bottineau county, North Dakota," it is error to admit evidence that such nuisance was maintained at a place outside of said described tract of land. State v. O'Neal, 426.

12. Where the information alleges that the accused kept and maintained a liquor nuisance in a certain described building on a specifically described tract of land, it is error to instruct the jury that he may be convicted if shown to have committed the offense at any other place within the county, notwithstanding the specific allegation of the information. State v. O'Neal, 426.

13. In a prosecution for keeping and maintaining a common nuisance against the person only, an information charging the keeping of the place where the forbidden act is committed is sufficient. State v. Ball, 782.

INJUNCTION. See Mortgages, 139.

INSTRUCTIONS. See Criminal Law, 326.

1. An instruction that a battery is any unlawful or wilful use of force or violence upon the person of another is incorrect, as the force or violence used must be both wilful and unlawful. State v. Magill, 131.

INSTRUCTIONS—Continued.

2. Where the evidence is conflicting, and there is evidence legally sufficient to sustain the verdict under the instructions given, the verdict cannot be said to be contrary to such instructions. Nilson v. Horton, 187.

3. Instruction complained of examined, and *held*, prejudicial to defendants. State v. Kruse, 203.

4. Where the information alleges that the accused kept and maintained a liquor nuisance in a certain described building on a specifically described tract of land, it is error to instruct the jury that he may be convicted if shown to have committed the offense at any other place within the county notwithstanding the specific allegation of the information. State v. O'Neal, 426.

5. Where the state's attorney attempts to prove the maintenance of a liquor nuisance as a second offense, and fails to do so, and the jury is expressly cautioned to disregard such offer or evidence it was not error nor misconduct for the state's attorney to offer such proof. State v. O'Neal, 426.

6. Plaintiff's horses were killed by defendant's train after escaping from a yard inclosed by fence, consisting on one side of only one wire and located near defendant's track. Defendant pleaded that leaving the horses in such yard and proximity to the track was contributory negligence, and the court charged the jury that it did not constitute contributory negligence. *Held*, error. Corbett v. G. N. Ry. Co., 450.

7. In answer to a question as to the condition of right of way with reference to snow and other things thereon, witness testified that oats were sprinkled upon the track. Answer was stricken out and jury cautioned to disregard it. No reference was made to it in the court's charge. From the pleadings, issues and purpose of the question, *held*, that striking out of the answer did not cure the error, although not declared reversible error. Corbett v. G. N. Ry. Co., 450.

8. A charge which may lead the jury to believe that the defendant must make out its defense conclusively, or by undisputed evidence, is reversible error. Corbett v. G. N. Ry. Co., 450.

9. The court charged the jury: "It was the duty of the defendants to use ordinary care to furnish for the plaintiff and his fellow workmen a staging that was reasonably safe for the purpose for which it was intended and used; and if you find that the defendants negligently failed to perform this duty, and furnished a staging that was unsafe, and that the plaintiff, while in the exercise of ordinary care and without negligence upon his part, and without knowledge of the unsafe condition of the staging, went upon the same to perform his work in the ordinary way, and by reason of the defect therein, if any, fell to the ground and

INSTRUCTIONS—Continued.

was injured, then plaintiff is entitled to recover." This is erroneous as it assumes that the employes were bound to furnish scaffold as a completed structure, but if the jury found that the defendant instructed the carpenters to build the staging, and they undertook its safe building, such charge is not prejudicial error. Lang v. Bailes, 582.

10. A grove of growing trees on land sought to be condemned is part of the real estate and should be valued as such. Damage to such trees growing upon the strip sought to be condemned may be considered a diminution of the value of the interest of the landowner. An instruction that "such damage to said grove and trees as will naturally and properly result in the course of time to said grove and trees by the construction, maintenance and operation"of a telephone line is erroneous, as directing the jury's attention to a future contingency, and not to the damage sustained at the time of the trial. Tri-State Tel. & Tel. Co. v. Cosgriff, 771.

11. Where the evidence showed the sale and keeping for sale of beer, it was proper to instruct that beer was a malt liquor and intoxicating. State v. Ball, 782.

12. Other instructions complained of examined, and *held* correct, and not prejudicial to defendant. State v. Ball, 782.

INSURANCE.

1. W. held beneficiary certificates, one from each of two fraternal societies, both payable to "his legal heirs," and in his will bequeathed all his property, real and personal, to appellants, F. and C., specially mentioning all life insurance. The societies paid W's testamentary administrator the amount due under the certificates. Respondents, sole heirs of the testator, resisted the administrator's petition for distribution, claiming the fund received under such certificates; the county court awarded the fund to the appellants. On appeal the district court reversed such decree, and ordered one awarding fund to respondents. *Held*, that the county court had no jurisdiction to try the right and title to such funds and that the district court on such appeal acquired no jurisdiction and its judgment directing the county court to distribute such fund to respondents, was erroneous. Finn v. Walsh, 61.

2. Under the facts, decedent's estate has no interest in the proceeds of such life benefit certificates. Finn v. Walsh, 61.

3. Section 8083, Revised Codes 1905, was not designed to enlarge the constitutional grant of power to county courts, nor did the legislature by its enactment intend to make the proceeds of such life insurance policies and beneficiary certificates as are therein mentioned a portion of the estate of the insured, but the intent was merely to exempt from the payment of these debts of the dece-

INSURANCE—Continued.

dent, all such proceeds as might become assets of such estate. Finn v. Walsh, 61.

4. Section 5934, Revised Codes 1905, providing that misrepresentations in applications or contracts for insurance shall not be deemed material unless made "with actual intent to deceive or unless the matter misrepresented increased the risk of loss," includes statements in applications called warranties by the law of insurance. Such statutes are remedial and liberally construed. Soules v. Yeomen, 23.
5. Burden is on insurance company to show death by suicide, although proofs of death on information and belief state such facts, where statement was made under circumstances not to be attributed to plaintiff, such proof being made by her agent. Soules v. Yeomen, 23.
6. The question whether assured committed suicide is for the jury, where circumstances are conflicting and that death may have been caused by criminal assault. Soules v. Yeomen, 23.

INTERPLEADER. See Practice, 134.

INTERVENTION.

1. Section 6825, Revised Codes 1905, authorizes the intervention and interpleader in pending action only before the trial of parties whose rights are undetermined, and will not permit intervention after judgment of an intervener, whose petition does not show a clear, unmistakable or adjudicated interest in the judgment rendered. St. P. M. & M. Ry. Co. v. Blakemore, 134.
2. An irregularity curable by amendment in an affidavit for attachment, cannot be urged by an intervener in an attachment suit. Hilbish v. Asada, 684.

INTOXICATING LIQUORS. See Appropriations, 286; Indictment and Information, 249.

1. K., a wholesale liquor and wine merchant in St. Paul, called on Y., a merchant at Bismarck, and procured him to endorse a draft for $350. Y. had previously indorsed for K. notes aggregating $500. It is not clear whether the notes were then due, or whether Y. had paid them if due. The draft was presented for acceptance in St. Paul on the 29th day of April, 1905, and accepted by K., in the name of the American Wine & Liquor Company; that being the style under which he did business. On the 2d day of May, 1905, the draft was protested for nonpayment. On the day Y. indorsed the draft, the evidence tending to show that it was after the act of indorsement, K. told Y. that, if the draft was not paid, he would turn him over some "stuff." May 1, 1905, the day before the draft was protested, K. delivered to the railway company in

St. Paul, five barrels of whiskey, addressed to Y. at Bismarck, and took a bill of lading therefor. May 2, 1905, a petition of creditors of K. was filed in the bankruptcy court in St. Paul to have him adjudicated a bankrupt, and on the same day the appellant was appointed receiver of the effects of K. He qualified on the following day, and immediately notified the railway company of that fact, and that he claimed the whisky, and to not deliver it to the consignee, but hold it subject to the order of the court. The railway company notified him, in response to this notice, that it held the whisky subject to his disposition. No price was agreed upon or mentioned between K. and Y. The character of the "stuff" was not indicated. Neither the bill of lading nor any notice, invoice or communication of any kind was transmitted to the consignee, and he did not know that anything had been shipped to him until after its arrival in Bismarck, when on his demand for the whisky being refused by the carrier, he brought this action in claim and delivery. The record does not disclose whether the whiskey was sent in payment of, or as security for, a prospective indebtedness of K. to Y., or whether it was a sale. *Held*, that the whisky at the time this action was commenced was in custodia legis. Yegen v. N. P. Ry. Co., 70.

2. Where the prosecution for keeping and maintaining a common nuisance is only against the person, and the state seeks no order of abatement or lien against the premises where the nuisance was maintained, an information charging the keeping of the place where the forbidden acts are committed, is sufficient. State v. Kruse, 203.

3. Evidence as to who rented the building where the alleged nuisance was maintained was, on motion of the state, stricken out. *Held*, error. State v. Kruse, 203.

4. Under section 9368, Revised Codes 1905, the state's attorney subpoenaed L. to appear before him to testify relative to violation of the prohibition law. L. appeared and testimony, whose testimony was reduced to narrative form, and subscribed and sworn to before the state's attorney, and such testimony tended to show that defendant maintained a liquor nuisance, and the state's attorney file such testimony with an information charging defendant with such offense with a police magistrate, who issued warrant for defendant's arrest. Defendant was bound over to the district court, where he was convicted and sentenced. It is claimed such section attempts to confer judicial power upon the state's attorney, and a violation of section 85 of the constitution. *Held*, for reasons more fully stated in the opinion, that the question is not before the court as neither L. nor the defendant raised it. State v. Stevens.

5. The testimony of the witness L. was taken in the form of a deposition, and the fact that it was in the narrative form, and not by

questions and answers, does not render the same ineffective. State v. Stevens, 249.

6. The information under which defendant was convicted in the district court, charged in effect that continuously between certain designated dates defendant kept and maintained a place (particularly describing it), where intoxicating liquors were continuously sold, bartered and given away, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, etc. *Held,* that such information is sufficiently specific as to the time of the commission of the offense, as the same states that such nuisance was kept and maintained continuously on each of the intervening days between the dates mentioned. State v. Stevens, 249.

7. Chapter 183, page 266, Laws 1909, which imposes upon district judges certain duties relative to the issuance of druggists' permits, is not unconstitutional, although such duties are held to be administrative and not judicial in character. Kermott v. Bagley, 345.

8. Such statute is not repugnant to section 109 of the constitution of this state, in depriving applicants for such permits of the right of appeal. Said section 109 is held not mandatory, but merely permissive, and furthermore, it has no application to decisions in matters of a nonjudicial character. Kermott v. Bagley, 345.

9. Defendant having pleaded guilty to an information charging that it sold within the state a liquor labeled "Purity Malt," and commonly called and known as "malt," which is a malt liquor retaining the alcoholic principle as a distinctive force, which was and is sold and used throughout the state of North Dakota as a substitute for beer, and that said beverage contained 1.75 per cent of alcohol by volume and 1.40 per cent of alcohol by weight, is guilty of a public offense and liable to an imposition of penalties provided for the violation of the prohibitory law of the state. State v. Fargo Bottling Works Co., 396.

10. Considered with its context, under a fair, reasonable and ordinary interpretation of the wording, the clause contained in chapter 187, page 277, Laws 1909, in the words, 'any kind of beverage whatsoever, which, retaining the alcoholic principle or other intoxicating qualities as a distinctive force, may be used as a beverage and become a substitute for the ordinary intoxicating drinks," is intended to describe a beverage which contains alcohol or other drug having an intoxicating quality, in a quantity reasonably appreciable, and in which said drug has not, by chemical combination with other drugs also contained in the liquor, lost its intoxicating principle, which liquor, according to common experience and observation will be resorted to by those accustomed to use intoxicating drinks in the usual way. In such liquor, alcohol or other drug of kindred quality preserving its native characteristics

INTOXICATING LIQUORS—Continued.

must be present, but not necessarily in such quantity as to produce intoxication. State v. Fargo Bottling Works Co., 396.

11. Any liquor containing alcohol or the alcoholic principle or other intoxicating quality when declared by the legislature to be an intoxicating liquor, will be so regarded by the courts, whether or not its ordinary use will produce intoxication in the average man. A definition of intoxicating liquor including within its provisions a liquor containing the alcoholic principle, but which it is admitted will not produce intoxication in any degree, is germane to the general subject of chapter 110, page 309, Laws 1890, and within the title, "An act to prescribe penalties for the unlawful manufacture, sale and keeping for sale of intoxicating liquors and to regulate the sale, barter and giving away of such liquors for medical, scientific and mechanical purposes." State v. Fargo Bottling Works Co., 396.

12. Chapter 187, page 277, Laws 1909, is replete in itself, and does not purport to amend section 9353, Revised Codes 1905, providing a penalty for violations of the prohibitory law, and while it by implication affects and modifies somewhat the meaning of said section 9353, as well as many other sections of the general statute, it is not for that reason repugnant to section 64 of the state constitution, requiring ah all portions of the amended statute that are retained in the new enactment be incorporated and published in the amended act. State v. Fargo Bottling Works Co., 396.

13. A malt liquor retaining the alcoholic principle as a distinctive force which it is admitted is "used throughout the state of North Dakota as a substitute for beer," cannot be regarded as an innocent, harmless and healthful beverage. It is a matter of common knowledge that a liquor of this description may be harmful in the sense that its use cultivates and stimulates an appetite for intoxicants which may become seriously detrimental to the general welfare. A liquor with these characteristics, and used in this manner is a convenient vehicle of subterfuge and fraud and a means of evading the penalties of the prohibitory law. For this reason, a statute prohibiting the sale of such liquor within the state is a legitimate exercise of the police power of the state, and is not repugnant to the provisions of section 1 and 13 of the state constitution. State v. Fargo Bottling Works Co., 396.

14. Where a complaint in justice court on which the accused is held to answer in the district court does not allege the keeping and maintenance of the nuisance as of a second offense, the state's attorney may, under section 9792, Revised Codes 1905, file an information in the district court for the alleged offense, charging it as a second offense. State v. O'Neal, 426.

15. Where accused was bound over on a complaint that he kept and maintained a nuisance in "a one-story log and frame building on a certain farm upon which the said Thomas O'Neal then and there

INTOXICATING LIQUORS—Continued.

resided, and near the east shore of Lake Metigoshe, in Bottineau county, North Dakota," the state's attorney may file an information in the district court for the offense as having been committed in a building situated on a specifically described tract of land. State v. O'Neal, 426.

16. Where the information charges a liquor nuisance to have been maintained in a building on the "northwest quarter of the northwest quarter of section 1, in township 163, range 76, Bottineau county, North Dakota," it is error to admit evidence that such nuisance was maintained at a place outside of said described tract of land. State v. O'Neal, 426.

17. Where the information alleges that the accused kept and maintained a liquor nuisance in a certain described building on a specifically described tract of land, it is error to instruct the jury that he may be convicted if shown to have committed that offense at any other place within the county, notwithstanding the specific allegation of the information. State v. O'Neal, 426.

18. Where the state's attorney attempts to prove the maintenance of a liquor nuisance as a second offense, and fails to do so, and the jury is expressly cautioned to disregard such offer of evidence, it was not error nor misconduct for the state's attorney to offer such proof. State v. O'Neal, 426.

19. In a prosecution for keeping and maintaining a common nuisance against the person only, an information charging the keeping of the place where the forbidden act is committed is sufficient. State v. Ball, 782.

20. Where the evidence showed the sale and keeping for sale of beer, it was proper to instruct that beer was a malt liquor and intoxicating. State v. Ball, 782.

21. Other instructions complained of examined, and *held* correct, and not prejudicial to defendant. State v. Ball, 782.

JUDGMENTS. See Appeal and Error, 748; Costs, 574; Divorce, 613; Evidence, 574, 582, 692; Findings, 112; Indictment and Information, 268; Limitation of Actions, 259; Parties, 134; Practice, 489; Verdict, 606.

1. A final decree of distribution of county courts is of equal rank with judgments of courts of record and a distributee named in a final decree can sue the executor or administrator or the bondsmen of either, or both, for the share assigned to him by such decree. Sjoli v. Hogenson, 82.

2. A final decree of distribution is conclusive against the bondsmen as well as the administrator, and imports the same degree of verity as judgments of courts of record. Sjoli v. Hogenson, 82.

JUDGMENTS—Continued.

3. A "decree of distribution" is an instrument by virtue of which heirs receive the property of the deceased. It is the final determination of the rights of the parties in a proceeding, and, upon its entry their rights are thereafter to be exercised by the terms of the decree. Sjoli v. Hogenson, 82.
4. The decision of the land department in the cancellation of an entry and awarding land to a party, is final and conclusive and binding on the courts as to parties heard or having an opportunity to be heard. Forman v. Healy, 116.
5. Disregard of rules, if any, which does not result in the denial of the right or in the loss of an opportunity to be heard, will not affect the decision. Forman v. Healy, 116.
6. The judgment provided a jail sentence and fine and costs amounting to $587.95, and adjudged that in default thereof, defendant to be imprisoned an additional period of 294 days. Under section 9379, Revised Codes 1905, the limit of imprisonment for fine and costs is six months. Judgment is modified accordingly. State v. Stevens, 249.
7. The return of the service of the citation issued for the taxes of 1891, sufficiently shows service on John A. Johnson. The inserting of the name "John O. Fadden," in said return, was a clerical mistake, and will not vitiate the judgment. Defects in the proof of service of a process must be taken advantage of in a direct proceeding, and will not furnish grounds for a collateral attack on the judgment. Hanson v. Franklin, 259.
8. The judgment and the taxes on which they were rendered, were liens on the real estate in controversy. Hence appellant was not prejudiced by the allowance of the amended answer, setting up the taxes as additional liens on the said real estate. Hanson v. Franklin, 259.
9. Where judgment was obtained and docketed for personal property taxes pursuant to the provisions of chapter 132, page 376, Laws 1890, and became liens upon the real property in question, such liens continued, notwithstanding the repeal of the law under which the liens were acquired. Hanson v. Franklin, 259.
10. Courts favor trial upon the merits and where the trial court has refused to open a default and permit a defense, this court will not only inquire as to whether the discretion in denying the application has been soundly exercised, but will examine the facts to determine whether or not in the interest of justice and right, the default should not be set aside and a defense permitted. Citizens Nat'l Bank v. Branden, 489.
11. The neglect of an attorney regularly retained to prepare and serve an answer in a case before the time for answering expires, when occasioned by intense absorption of mind in the conduct of the trial of another case, involving a charge of murder in the first de-

JUDGMENTS—Continued.

gree, is "excusable neglect," within the meaning of the statute providing for the opening of a judgment entered on default of answer. Citizens Nat'l. Bank v. Branden, 489.

12. Upon application to vacate a judgment entered by default, where the answer presented discloses a good defense upon the merits, and a reasonable excuse for delay occassioning default is shown, and no substantial prejudice appears to have arisen from the delay, the court should open the default and bring the case to trial. Citizens Nat'l. Bank v Branden, 489.

13. Where the circumstances shown upon an application to vacate a judgment entered by default are such as to lead a court to hesitate before it refuses to open the judgment, it is better, as a general rule, that the doubt should be solved in favor of the application. Citizens Nat'l Bank v. Branden, 489.

14. On authority of Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L. R. A 770, *held*, that the lien of an attachment on personal property of a bankrupt, set aside as exempt in bankruptcy proceedings, is not discharged by a discharge in bankruptcy, and may be enforced through a modified form of judgment as against the property on which it has been created. Mayer v. Ferguson, 496.

15. The judgment in such case, although in form a judgment for money, but providing that it shall be satisfied out of the property attached and not otherwise, protects the defendant against any balance which may remain unpaid after sale of the attached property under execution. Mayer v. Ferguson, 496.

16. Where the district court allows counsel fees in a judgment denying a divorce to the wife, the plaintiff, and granting it to the husband, and the wife appeals from the judgment and demands review of the entire case in the Supreme Court, under section 7229, Revised Codes 1905, and pending the appeal the wife's attorney's unconditionally accept such counsel fees and costs, the appeal is waived and respondent is entitled to dismissal. Boyle v. Boyle, 522.

17. An opinion of the trial judge is not to be considered as explanatory of a final judgment. Boyle v. Boyle, 522.

18. In an action by vendors for specific performance by vendees to pay each year from the purchase price the sum equivalent to one-half the crop grown upon the land sold, during that year, an allegation in the complaint admitted by the answer that the entire balance of the purchase price in a stated sum is due and unpaid, will support a judgment of the court requiring that defendants within a reasonable time to pay the sum to the plaintiffs, and that they thereupon convey the land to the defendants. Whitney v. Akin, 638.

JUDGMENTS—Continued.

19. One who buys property, upon which a judgment, void on its face for want of jurisdiction, is a cloud, cannot as a matter of right vacate it on motion. Campbell v. Coulston, 645.

20. The court in which such motion is made may in its discretion entertain it, or direct a resort to the remedy by action. Campbell v. Coulston, 645.

21. The grantees in a quit claim deed for a consideration of "$1.00 and other valuable considerations," of land sold upon a judgment in foreclosure rendered twenty-two years before, moved to vacate such judgment as void upon its face for defects in the affidavit for publication of summons. *Held,* under the facts, for reasons stated in the opinion, that the court abused its discretion in entertaining and granting the motion. Campbell v. Coulston, 645.

22. In an action to recover property, a judgment in a former action against a third person, which invested plaintiff with all the rights and title of such third person to the property, is admissible, and it is immaterial whether the mechanics' liens, on which the judgment was rendered, under which plaintiff obtained his right to the property in question, were valid or invalid. Mathews v. Hanson, 692.

23. Upon consideration of the pleadings and the findings of the trial court, *held,* that the judgment entered by the trial court was fully justified by such findings. Folsom v. Norton, 722.

24. In an action for divorce where counsel fees and suit money are included in the final decree, and the same are accepted by the appellant, she is estopped from maintaining an appeal from the decree of the district court, and such appeal will be dismissed on motion. Tuttle v. Tuttle, 748.

25. A motion for judgment notwithstanding the verdict, should not be granted, unless it appears fairly that the defect in pleading or insufficiency of evidence cannot be supplied on another trial. Webster v. McLaren, 752.

JURISDICTION.

1. W. held beneficiary certificates, one from each of two fraternal societies, both payable to 'his legal heirs," and in his will bequeathed all his property, real and personal, to appellants F. and C., specially mentioning all life insurance. The societies paid W's testamentary administrator the amount due under the certificates. Respondents, sole heirs of the testator, resisted the administrator's petition for distribution, claiming the fund received under such certificates; the county court awarded the fund to the appellants. On appeal the district court reversed such decree, and ordered one awarding fund to respondents. *Held,* that the county court had no jurisdiction to try the right and title to such funds,

and the district court on such appeal acquired no jurisdiction, and its judgment directing the county court to distribute such fund to respondents, was erroneous. Finn v. Walsh, 61.

2. Under the facts, decedent's estate has no interest in the proceeds of such life benefit certificates. Finn v. Walsh, 61.

3. The constitution of North Dakota, section 111, defining the jurisdiction of county courts, confers authority upon such courts in probate, testamentary and guardianship matters merely, and it is beyond the power of the legislature to enlarge such jurisdiction by statute. Finn v. Walsh, 61.

4. Section 8083, Revised Codes 1905, was not designed to enlarge the constitutional grant of power to county courts, nor did the legislature by its enactment intend to make the proceeds of such life insurance policies and beneficiary certificates as are therein mentioned a portion of the estate of the insured, but the intent was merely to exempt from payment of these debts of the decedent, all such proceeds as might become assets of such estate. Finn v. Walsh, 61.

5. A final decree of distribution of county courts is of equal rank with judgments of courts of record and a distributee named in a final decree can sue the executor or administrator or the bondsmen of either, or both, for the share assigned to him by such decree. Sjoli v. Hogenson, 82.

6. A final decree of distribution is conclusive against the bondsmen as well as the administrator and imports the same degree of verity as judgments of courts of record. Sjoli v. Hogenson, 82.

7. The land department had power to order a hearing as to the rights of the parties to the land in controversy, and it was not error for the local land officers to refuse to dismiss the hearing on the grounds of the insufficiency of the affidavit and notice of hearing when both parties appeared and took part in the proceedings. Forman v. Healy, 116.

8. The commissioner of the general land office has power to cancel an entry. Forman v. Healy, 116.

9. The decision of the land department in the cancellation of an entry and awarding land to a party, is final and conclusive and binding on the courts as to parties heard or having an opportunity to be heard. Forman v. Healy, 116.

10. Disregard of rules, if any, which does not result in the denial of the right or in the loss of an opportunity to be heard, will not affect the decision. Forman v. Healy, 116.

11. On an appeal by a husband from a decree of divorce against him, whereby his property was assigned to the wife in lieu of permanent alimony, and he was also decreed to pay fixed sums as costs and attorney's fees on the trial in the district court, it is

JURISDICTION—Continued.

an abuse of discretion to refuse to settle a statement of the case until the husband makes provision for the support of his wife and children pending the appeal, in cases where the trial judge has lost jurisdiction to make an order for support money pending the appeal, for the reason that the defendant in that action had perfected an appeal to the Supreme Court. Tuttle v. Pollock, 308.

12. District judge, after appeal, retains full jurisdiction to settle statement of case or do any act in furtherance of the appeal. *Held*, motion to strike statement from the record is without merit. Rindlaub v. Rindlaub, 352.

13. Regardless of the nature of the issues, the district court possessed the requisite jurisdiction to try and decide the same without a jury, where the parties impliedly consented thereto. DeLaney v. Western Stock Co., 630.

14. The grantees in a quitclaim deed for a consideration of "$1.00 and other valuable considerations," of land sold upon a judgment in foreclosure rendered twenty-two years before, moved to vacate such judgment as void upon its face for defects in the affidavit for publication of summons. *Held*, under the facts, for reasons stated in the opinion, that the court abused its discretion in entertaining and granting the motion. Campbell v. Coulston, 645.

15. In an action for the specific performance of a contract to convey real estate, where the facts show a failure and refusal to specifically perform the contract, the court may retain jurisdiction of the action and award damages, and thus determine the controversy without putting plaintiff to the expense and delay of another action. Mitchell v. Knudtson Land Co., 736.

JURY. See Instructions, 450, 582, 771; Jurisdiction, 630; Trial, 326, 787.

1. The question whether assured committed suicide is for the jury, where circumstances are conflicting and that death may have been caused by criminal assault. Soules v. Yeomen, 23.

2. Evidence of payment in full for all services considered, and it is held therefrom that it was not error to refuse to direct the jury to find in plaintiff's favor for a small balance of 39 cents claimed to be unpaid. McGregor v. Harm, 599.

JUSTICE OF THE PEACE. See Indictment and Information, 249.

1. Where a complaint in justice court, on which the accused is held to answer to the district court, does not allege the keeping and maintenance of the nuisance as of a second offen e, the state's attorney may, under section 9792, Revised Codes 1905, file an information in the district court for the alleged offense charging it as a second offense. State v. O'Neal, 426.

LACHES.

1. Under the evidence in this case, the plaintiff cannot complain of the laches of the defendant and its predecessor in interest prior to the mortgage foreclosure. Hodgson v. State Finance Co., 134.
2. Where the result of a vote on the proposition to divide a county and create from a portion thereof a new one, is announced on November 30, 1908, and mandamus to test the accuracy and sufficiency of the result announced by the canvassers is commenced January 2, 1909, and in the interval, the only public act affecting the new county is the appointment of county commissioners by the governor, the laches and delay of the relator are not so gross and unreasonable that its application upon the merits should be refused. State v. Willis, 209.

LANDLORD AND TENANT. See Trover and Conversion, 787.

1. Under a contract whereby the owner of land agreed to let the same to another to be farmed on shares pursuant to a written contract, the lessee or cropper went into possession of the land for cropping purposes. Thereafter, and before any rights under the contract had accrued to the owner of the land, he conveyed the same to the defendant without any reservation as to matters connected with the contract. There were 235 acres plowed on the land when the contract was entered into. In the contract it was agreed that the same number of acres should be plowed after the crop was removed, or, if the owner did not desire to have the plowing done, the cropper should pay him $1.25 per acre from his proceeds of the crop in lieu of such plowing. The cropper or tenant did not plow the land. The owner of the land brought an action against him for a recovery of the money to be paid in lieu of the plowing, and recovered judgment, and the cropper paid the same to the owner of the land, the plaintiff in this suit. The defendant pleads, as a counterclaim to the amount due on a mortgage given to the plaintiff for the purchase price of the land, the amount paid to plaintiff, which he claims should have been paid to him. *Held* (1), that the collection of the money was wrongful on the plaintiff's part; (2) that the defendant is entitled to recover it as money had and received, which in equity and good conscience should not be retained; and also under section 4802, Revised Codes 1905; (3) that defendant is entitled to recover same in this action, notwithstanding there was no express promise to pay the same by the plaintiff. (4) That the money to be paid, if the plowing was not done, was compensation for the use of land or rent, and passed to the defendant as an incident to the deed, although the technical relation of landlord and tenant may not have existed between the parties to the contract. (5) Whether the contract was a lease or a cropping contract, not decided. Martin v. Royer, 504.

LEASES. See Landlord and Tenant, 504.

LEGISLATURE. See Appropriation, 286; Constitutional Law, 45; Statutory Construction, 396.

1. Where the constitutionality of a law is made to depend upon the existence or nonexistence of some fact or state of facts, the determination thereof is primarily for the legislature, and the court will acquiesce in its decision, unless it clearly appears that such decision was erroneous. State v. N. P. Ry. Co., 45.
2. Legislature has power to reduce freight on a particular article provided the carriers are enabled to earn a fair profit upon their entire intrastate business. State v. N. P. Ry. Co., 45.
3. To constitute an "appropriation," the legislature must limit the amount of state funds so appropriated, otherwise officials could not determine the amount of tax to be levied and the revenue of the state might be exhausted without the legislature intending to appropriate them wholly to the subject covered by appropriation acts. State v. Holmes, 286.

LETTERS. See Evidence, 737.

LIENS. See Attachment, 496; Equity, 531; Mechanic's Liens, 433, 463, 516; Taxation, 259, 531.

1. Tax sale certificates, barred by the provisions of chapter 165, page 220, Laws 1901, are not liens on the land. Hodgson v State Finance Co., 134.

LIFE INSURANCE. See Insurance, 61.

LIMITATION OF ACTIONS.

1. The grantee of the mortgagor cannot have sheriff's certificate and deed cancelled as against the mortgagee in possession without paying the mortgaged debt, even if the mortgage is barred by the statute of limitations. Boschker v. Van Beek, 104.
2. Tax judgments obtained under the provisions of section 57, chapter 132, page 398, Laws 1890, are not ordinary money judgments, and do not expire by the statute of limitations. Hanson v. Franklin, 259.
3. Under section 8105, Revised Codes 1905, requiring a claimant within three months after his claim has been rejected to bring suit thereon, otherwise the same will be barred forever, *held*, that plaintiff's claim is barred. Singer & Co. v. Austin, 546.
4. Such statute is operative as to claims presented and constructively rejected by nonaction for ten days as provided in section 8103, Revised Codes 1905, although notice to creditors as provided in section 8097, Revised Codes 1905, has not been given. Singer & Co. v. Austin, 546.

## LIMITATION OF ACTIONS—Continued.

5. Section 8097, supra, requiring the publication of notice to creditors, being independent of section 8105, supra, requiring suit to be brought within three months after the claim is rejected, the publication of notice under the former is an unnecessary condition to the enforcement of the latter. Singer & Co. v. Austin, 546.

6. By operation of section 5954, Revised Codes 1905, all remedies possessed by J. against a certain mortgage became barred on January 1, 1906, and as a necessary result the mortgage and the foreclosure proceedings thereunder becoming, after January 1, 1906, unassailable by J., appellant acquired, by lapse of time, a perfect title to the premises as against him, and those claiming under him, and plaintiff's action should be dismissed. Justice v. Souder, 613.

## MANDAMUS.

1. Parties in mandamus in the name of the state on the relation of one, not an official, showing the relator seeks to vindicate a matter of public interest concerning all the electors and taxpayers in the county interested equally with him, may be presented to the court by any citizen of the locality. State v. Willis, 209.

2. Where the result of a vote on the proposition to divide a county and create from a portion thereof a new one, is announced on November 30, 1908, and mandamus to test the accuracy and sufficiency of the result announced by the canvassers, is commenced January 2, 1909, and in the interval, the only public act affecting the new county is the appointment of county commissioners by the governor, the laches and delay of the relator are not so gross and unreasonable that its application upon the merits should be refused. State v. Willis, 209.

3. The writ of mandamus is not one of right but a high prerogative mandate that will, in the exercise of sound judicial discretion, and on equitable principles, be issued only in cases so exceptional that, if the relief be refused, justice will fail. It will not issue in a proceeding involving only the public interest, even where a prima facie right to legal relief is shown, if it serves no other purpose than to require an idle ceremony on the part of public officers or produce a barren and fruitless result not affecting public interest. State v. Willis, 209.

4. The more adequate and speedy remedy which a suitor must possess to defeat his right to a mandamus is a legal remedy rather than a physical one. State v. Holmes, 286.

5. Mandamus is a proper remedy to compel a trial judge to settle a statement of the case when presented to him in accordance with the facts and in time, and he refuses to settle it. Tuttle v. Pollock, 308.

MANDAMUS—Continued.

6. A citizen of a county, acting as relator in a matter affecting only the public right, and applying in the name of the state for a writ of mandamus, will not be regarded as acting in any personal sense whatever, but only as a representative of the public interest, and is concluded with reference to any fact adjudged or admitted, or which might have been adjudged, in a former judicial proceeding in which the same public interest was plaintiff or defendant, and is bound by the facts that are or might have been adjudged in a former judicial proceeding as fully as though he were named as a party thereto. A judgment, duly entered in an action or proceeding of which the court has jurisdiction, against a county or its legal representative, in a matter of general interest to all its citizens, is binding upon the latter, though they are not nominally parties to the suit. To hold that each citizen of the county, after a question is once adjudicated on the application of a public representative, is still at liberty to commence an action in court and relitigate the question in his own name, would be in effect to nullify the judgment, and to ignore the rule that the well-being of society requires that matters once judicially settled shall not be again repeatedly brought into litigation. Appellant, as a citizen of Ward county, applies for a writ of mandamus requiring the county board of canvassers to reconvene and prepare a new abstract of its canvass of the vote cast at an election, held upon a proposition legally submitted, to divide Ward county and create from a part thereof the new county of Mountraille. As ground for such application he shows that said board, on its first canvass of the votes cast, considered and entered in its certified abstract, certain results taken from tally sheets, and other memoranda not entitled to official recognition. *Held,* that, unless it can be said that the appellant states facts showing that if the writ issue and the county board of canvassers produce a new abstract, it will show an aggregate result the reverse of that formerly produced, appellant does not present a case that will warrant the exercise of the extraordinary remedy of mandamus. If, however, it can be said that the petition shows that the result produced by a recanvass, appellant is concluded, and will not be heard to question such result, as in a proceeding in certiorari, formerly adjudicated and necessarily involving the same fact, the representative of the public interest admitted that the result shown by the abstract of the county canvassers upon its first canvass was the true result of the vote, and the court, in passing upon such fact, so determined and adjudged. State v. Willis, 209.

7. "Drain commissioners" of any county are a department thereof, with power to draw warrants upon a special fund in the county treasury. An action will not lie against them on their contract; remedy by mandamus. Reed v. Heglie, 801.

MARRIAGE. See Divorce, 352.

MASTER AND SERVANT.

1. The rule as to the duty of a master in respect to providing a safe place to work is not applicable to a case where a servant is injured by reason of defects in, or insufficiency of, a temporary structure such as a scaffolding or framework for supporting heavy materials, which are appliances or instrumentalities by means of which the work is done. When, by the express or implied contract between the master and servants the former undertakes to furnish the necessary tools or appliances, it is his duty to use ordinary care to see to it that such instrumentalities are safe and suitable; and this duty, when it exists, is one of the absolute and personal duties. Any servant to whom the master delegates it is pro hac vice, a vice principal, for whose negligence the master is responsible. Lang v. Bailes, 582.
2. The court charged the jury: "It was the duty of the defendants to use ordinary care to furnish for the plaintiff and his fellow-workmen a staging that was reasonably safe for the purpose for which it was intended and used; and if you find that the defendants negligently failed to perform this duty, and furnished a staging that was unsafe, and that the plaintiff, while in the exercise of ordinary care and without negligence upon his part, and without knowledge of the unsafe condition of the staging, went upon the same to perform his work in the ordinary way, and by reason of the defect therein, if any, fell to the ground and was injured, then plaintiff is entitled to recover." This is erroneous, as it assumes that the employees were bound to furnish the scaffold as a completed structure, but if the jury found that the defendant instructed the carpenters to build the staging, and they undertook its safe building, such charge is not prejudicial error. Lang v. Bailes, 582.
3. Where the employer requests the servant to do additional work not unreasonable in view of the nature of the employment, and the servant refuses such request without cause, such refusal will justify his discharge by the master. McGregor v. Harm, 599.
4. Where a contract for services is entered into for a sum certain per week, with an additional sum to be paid if the service is continued for one year and the servant remains sober, it is a contract for employment by the week, and not an entire one for a year. McGregor v. Harm, 599.

MEASURE OF DAMAGES. See Damages, 771.

MECHANIC'S LIENS. See Contract, 794.

1. Under the mechanic's lien law (chapter 79, Revised Codes 1905), a subcontractor is entitled to a direct lien for work done or materials furnished the contractor, irrespective of the state of the accounts on the contract between the owner and the contractor,

MECHANIC'S LIENS—Continued.

or the amount due or unpaid upon their contract. Langworthy Lbr. Co. v. Hunt, 433.

2. The owner must keep advised whether material used in his building is paid for or not, and, if he pays the contractor within the time specified by the statute, he does so at his peril. Langworthy Lbr. Co. v. Hunt, 433.
3. The abandonment of his contract by a contractor after a substantial portion of it has been performed, does not of itself work a completion of the contract. Langworthy Lbr. Co. v. Hunt, 433.
4. Notice sent by registered letter to the owner by a subcontractor, informing him that he is furnishing material for the contract, after its abandonment by the contractor and before steps are taken to complete the work by the owner, is seasonably sent under the requirement that such notice be given the owner previous to the completion of the contract. Langworthy Lbr. Co. v. Hunt, 433.
5. Under the provisions of the mechanic's lien law the "owner" of real estate on whose interest a mechanic's lien will attach, is the person for whose immediate use and benefit the building, erection or improvement is made. Johnson v. Soliday, 463.
6. A mechanic's lien will not attach to the interest of a vendor under an executory contract of sale, whose vendee is in possession, and who makes improvements by erecting buildings on the real estate covered by such executory contract. Johnson v. Soliday, 463.
7. Where the vendee in an executory contract for the purchase of real estate is in possession and erects buildings thereon, in which the vendor has no interest except by reason of his holding the legal title as security for the purchase price, and when such vendor is not a party to the purchase of the material or the construction of the improvements, the question of his knowledge of or consent to the furnishing of material or the making of the improvements is immaterial. Johnson v. Soliday, 463.
8. Where a subcontractor seeks the benefit of the mechanic's lien law, he must bring himself within its provisions and is not entitled to a lien without notice to the owner by registered letter previous to the completion of the contract that he has furnished materials. Personal knowledge of the owner does not supply a statutory notice upon which a mechanic's lien on his property can be predicated. N. D. Lbr. Co. v. Bulger, 516.
9. In an action to recover property, a judgment in a former action against a third person, which invested plaintiff with all the rights and title of such third person to the property, is admissible, and it is immaterial whether the mechanics' liens, on which the judgment was rendered, under which plaintiff obtained his right to the property in question, were valid or invalid. Mathews v. Hanson, 692.

MECHANIC'S LIENS—Continued.

10. In an action to foreclose a mechanic's lien for balance due under an express contract, the answer denies that plaintiff had substantially performed the contract, and pleads four counterclaims. Plaintiff moves to strike out certain of such counterclaims and portions of others, which motion the court granted in part and denied the remainder. *Held*, for reasons stated in the opinion, that such ruling was non-prejudicial. Marchand v. Perrin, 794.

MISTAKE.

1. Money paid under a mistake of fact to one not entitled to it, and who cannot in good conscience receive and retain the same, may ordinarily be recovered; the law raising an implied promise on the payee's part to refund. Bank v. Weber, 702.
2. The fact that plaintiff had the means of knowledge of the facts at his command, and negligently failed to avail himself thereof, will not defeat his recovery, where such negligence has not resulted in loss or damage to defendant. Bank v. Weber, 702.

MOTION. See Appeal and Error, 551, 748; Criminal Law, 268; Indictment and Information, 268; Practice, 23, 352, 606.

1. Change of venue must be determined before trial and often before issue. A district court in acting on the motion may assume that the character of the action is as the complaint purports to state, and refuse to examine the same as it would upon general demurrer for the purpose of determining the exact character of the cause of action stated. Viets v. Silver, 445.
2. If the facts constituting a cause of action are stated in the complaint or can be inferred by reasonable intendment from those set forth, although the allegations are imperfect, incomplete and defective as to form rather than substance, the remedy is not by demurrer, but by motion to make more definite and certain by amendment. Weber v. Lewis, 473.
3. One who buys property, upon which a judgment, void on its face for want of jurisdiction, is a cloud, cannot as a matter of right vacate it on motion. Campbell v. Coulston, 645.
4. The court in which such motion is made may in its discretion entertain it, or direct a resort to the remedy by action. Campbell v. Coulston, 645.
5. The grantees in a quit claim deed for a consideration of "$1.00 and other valuable considerations," of land sold upon a judgment in foreclosure rendered twenty-two years before, moved to vacate such judgment as void upon its face for defects in the affidavit for publication of summons. *Held*, under the facts, for reasons stated in the opinion, that the court abused its discretion in entertaining and granting the motion. Campbell v. Coulston, 645.

MOTION—Continued.

6. An order denying defendant's motion to dismiss the action, and granting plaintiff's countermotion for leave to amend the complaint, *held,* not appealable. Strecker v. Railson, 677.

MORTGAGEE IN POSSESSION. See Foreclosure, 104.

MORTGAGES. See Homestead, 613; Warranty, 337.

1 The holder of a sheriff's certificate, or deed, under an invalid foreclosure of a real estate mortgage by advertisement, in possession of the premises with the implied consent of the mortgagor, is a mortgagee in possession. Boschker v. Van Beek, 104.

2. The grantee of the mortgagor cannot have sheriff's certificate and deed cancelled as against the mortgagee in possession without paying the mortgage debt, even if the mortage is barred by the statute of limitations. Boschker v. Van Beek, 104.

3. A sheriff's certificate, under foreclosure by advertisement, is personal property and transferable by the executors of the deceased mortgagee to whom such certificate was issued by assignment under the laws of Massachusetts. Boschker v. Van Beek, 104.

4. Where it does not appear whether sheriff's certificate was held in Massachusets or this state, but the will of the certificate holder having been probated in this state, and the assignment of such certificate for value paid the executor having been approved by the probate court and acquiesced in by the devisees, it transferred the latter's interest and that of the deceased holder to the executor's assignees in case it was held by such executor in this state. Boschker v. Van Beek, 104.

5. The purchaser of land at a tax sale cannot avail himself of the ex parte remedy provided by section 7454, of the Revised Codes 1905, to enjoin the foreclosure of a mortgage. Hodgson v. State Finance Co., 139.

6. Under the evidence in this case, the plaintiff cannot complain of the laches of the defendant and its predecessors in interest prior to the mortgage foreclosure. Hodgson v. State Finance Co., 139.

7. The purchaser at a mortgage foreclosure is, under the facts in this case, entitled to the rents and profits during the period of redemption. Hodgson v. State Finance Co., 139.

8. An executor may sell and assign a sheriff's certificate of foreclosure held by him as executor, and a sale legally and regularly so made conveys all the interest therein of the devisees under the will of which he is executor. Winterberg v. Van de Vorste, 417.

9. Foreclosure of a real estate mortgage begun in the name of the mortgagee who died pending the advertisement, land was bid in and certificate issued to the mortgagee, and subsequently assigned by her executor to a third party ignorant of any defect in the proceedings, and who, after taking the sheriff's deed, conveyed

MORTGAGES—Continued.

by warranty deed to appellant. The papers and records in the foreclosure disclose no defects. The mortgagor abandoned the premises on giving the mortgage, never paid any interest, taxes or principal, knew of the foreclosure, acquiesced therein, and in appellant's possession for years. *Held,* that a party who, for a nominal consideration, and by misrepresentation, secures quit-claim deeds from the devisees under the will of the mortgagee, after the final account of the executor had been approved and the proceeds of the sale of the certificate had been distributed to and accepted by such devisees, who, when executing such deeds, claimd no interest in or title to the real estate in question, took no title by such conveyance. *Held,* further, following the authority of Higbee v. Daeley et al., 15 N. D. 339, 109 N. W. 318, that such party, by deed from the original mortgagor, obtained for a nominal consideration and through misrepresentation of the condition of the title to the premises atempted to be conveyed, acquired no title which a court of equity will protect. Winterberg v. Van de Vorste, 417.

10. Where the complaint states a cause of action for the foreclosure of a real estate mortgage, the action must, on due demand of defendant, be tried in the county where the land is situated and motion to change to such county will be sustained, even if a critical examination of the complaint reveals that it does not state a cause of action for foreclosure of a mortgage, but merely one for the recovery of money alone. Viets v. Silver, 445.

11. On January 25, 1904, J., a married man, to secure a loan of $800, mortgaged his homestead to D., fraudulently representing the forged signature of his wife as genuine. J's wife deserted him in September, 1903, moved to Washington, where, when the mortgage was executed by J., she was living as the assumed wife of another. In December, 1908, J. abandoned the homestead, never resuming the residence thereon. On April 20, 1905, respondent was divorced from J., in the state of Washington, and had judgment for alimony, suit money and attorneys' fees, and in October, 1906, sued J. in the district court of Eddy county upon her judgment; attached the homestead and obtained judgment in December, 1906, for $903.74. The assignee of the mortgage foreclosed it in December, 1905, and in one year got a sheriff's deed pursuant to the foreclosure. This action was begun December 29, 1906, to have the mortgage and foreclosure and sheriff's deed cancelled as null and void, and to adiudge that the purchaser at the foreclosure sale had no interest in or incumbrance upon the premises. *Held,* for reasons stated in the opinion, that the relief awarded respondent is unwarranted under the facts. Justice v. Souder, 613.

12. The costs or attorney's fee which may be allowed by the provisions of section 7176, Revised Codes 1905, apply only to actions which

MORTGAGES—Continued.

are indisputably for the foreclosure of a mortgage upon real or personal property. The fact that the parties in equity stand in a relation that is practically that of mortgagor and mortgagee, does not itself require or authorize an allowance of costs under this section. Whitney v. Akin, 638.

MUNICIPAL CORPORATIONS.

1. An ordinance to the effect that it should be unlawful to construct any wooden building within the fire limits of a city, is not violated by the repairing or remodeling of it, unless there is a substantial erecting of a "new building," as that word is commonly understood. Mayville v. Rosing, 98.
2. To be unlawful, an act must be brought within the terms of the ordinance, or synonymous terms, or terms included within the terms of the ordinance. Mayville v. Rosing, 98.
3. If the terms of such an ordinance be liberally construed, there can be no conviction thereunder based solely on the fact that the acts are within the spirit or purpose of the ordinance. Mayville v. Rosing, 98.
4. Facts stated in the opinion held not to show a violation of an ordinance declaring it unlawful to construct a wooden building within the fire limits of the city. Mayville v. Rosing, 98.
5. One who, for his own benefit, or under license from the city, places upon the street a structure, which from its nature, or failure to guard it, and keep it in repair, is, or may become, dangerous, is under implied contract with the city that while such structure is maintained upon the street he will exercise ordinary care to protect the public from danger and the city from loss, and if one using a street is injured by reason of such structure or the way in which it is kept, the one who thus rendered the street unsafe is the real wrongdoer, and if the city is subjected to damages to the person injured, he will be held to be an indemnitor of the city. Grand Forks v. Paulsness, 293.
6. Where a city paid a judgment to a person injured upon its streets, in an action for failure to keep its streets safe, sues a party, who, under license, express or implied, from the city, places obstructions in the street which caused the injury, the defendant, if given notice of the original action, is concluded as to all matters of fact establishing the liability of the city to the persons injured, and as to any defense of the city to such liability. Unless it appears that the evidence of the indemnitor's liability was necessarily involved in the original action and passed upon by the court rendering the judgment, the defendant is not concluded upon the point, that notwithstanding his liability to the city, he was not in fault and has failed in no duty owing by the city to the persons injured, and may plead such defense upon the trial. Grand Forks v. Paulsness, 293.

MUNICIPAL CORPORATIONS—Continued.

7. One placing obstructions on a street for his own benefit or convenience, under an implied contract to protect the public and the city from danger and loss, must maintain such structure in a safe condition, keep it in repair and free from changes or additions which with reasonable care may be anticipated; such supervision does not extend to changes and additions which the original structure from its nature or cause does not invite, or which were in the reasonable contemplation when the party placed it there. Grand Forks v. Paulsness, 293.

8. A party under license from the city, placed in a street a one-inch waterpipe, fastened to the pavement on either side of a two-inch plank to protect the pipe from injury and from being shifted from its place in the street. Later, without his knowledge, by an unknown agency, for an unknown purpose, manure was placed upon the pipe and planks and a third plank upon the manure. This third plank was not attached to the pavement or the plank guarding the water pipe, but was loose and movable. It was so placed that pedestrians stepping on one end caused the other to raise five or ten inches from the street. While in this position a passer stepping over the loose end, caught his foot upon it and fell to the pavement, sustaining injuries, for which he sued the city, recovering a judgment which the city paid. City then sued the party placing the waterpipe and the planks guarding it, as an indemnitor, alleging failure on his part to keep safe the structure so placed by him. *Held*, that the party placing the waterpipe and the planks guarding it could not be said to have contemplated some other person would change or add to the structure placed by him, by putting manure on it and a loose plank on top of the manure, that would rise when stepped upon and cause an accident, and that the accident did not result proximately from such act of the defendant or the failure to perform any duty imposed upon him thereby to keep the structure safe. Grand Forks v. Paulsness, 293.

9. Plaintiff, while walking the sidewalk in Fargo, was frightened by the whistle of a bicycle rider approaching from the rear and without looking, stepped off such walk into a drainage ditch or gutter which ran under the sidewalk at that point, receiving injuries. In an action against the city for such injury, she alleges that it was guilty of culpable negligence contributing to her injury, first, because it suffered weeds to grow in and about such ditch so as to obscure the same from view, and, second, in not placing a cover over such ditch or a railing or guard along the edge of the walk at said point. *Held*, that from plaintiff's own testimony, that the presence of the weeds in no manner contributed to her injuries, she testifying that she did not look where she was stepping and hence was not misled or deceived as to the dangerous character of the place where she stepped by rason of such weeds. Braatz v. Fargo, 538.

MUNICIPAL CORPORATIONS—Continued.

10. The sidewalk at the place in question was five feet in width, and concededly in good repair. The drainage ditch or gutter was constructed in the ordinary method for the purpose of carrying off surface water, and the height of the sidewalk above the bottom of such ditch was approximately from eighteen to twenty-four inches. *Held*, that the failure of defendant city to guard against possible accidents by covering such ditch, or by placing or maintaining a railing at the edge of the walk over such ditch, did not constitute actionable negligence on its part, as no careful or prudent person could reasonably anticipate that any such accident would happen to pedestrians using such walk. Braatz v. Fargo, 538.
11. A municipal corporation is only required to guard against such dangers in its streets, which includes sidewalks, as can or ought to be anticipated or foreseen in the exercise of reasonable prudence and care. Braatz v. Fargo, 538.
12. City or village ordinances, although penal, are not "criminal laws." Prosecutions thereunder do not come under the constitutional provision: "All prosecutions shall be in the name, and by the authority, of the city or village. Village of Litchville v. Hanson, 672.
13. Municipal corporations may tax dogs; such tax is not assessed by valuation, but is a specific assessment in the nature of a license under police regulation, and is a constitutional exercise under police power. Village of Litchville v. Hanson, 672.
14. An ordinance making it unlawful to keep, own or harbor a dog without first having a license therefor, and imposing a fine for a violation thereof, and authorizing the destruction of any dog found at large on any of the public streets, alleys or grounds of the city or village, upon which license shall be unpaid, is valid and constitutional. Village of Litchville v. Hanson, 672.

NEGLIGENCE. See Attorneys at Law, 489; Mistake, 702; Streets and Highways, 293.

1. Action against a sheriff for failure to levy execution upon personal property attached by him. Court directed verdict for defendant on the theory that complaint failed to state, and proof to show, a cause of action, there being no allegation nor proof negativing facts justifying defendant's official acts. *Held*, error, as burden was on defendant to justify his failure, and complaint was sufficient, and testimony showed a prima facie case. Bank of Portal v. Lee, 10.
2. Whether the alleged fault, or failure of defendant to perform a legal duty, was the proximate cause of the injury, was for the court to determine, upon material facts presented, and with such inferences as might be drawn therefrom. Grand Forks v. Paulsness, 293.

NEGLIGENCE—Continued.

3. Plaintiff drove his team to town with a load of wheat. After unloading the wheat at an elevator south of the railroad track and east of the highway crossing the railroad track, he drove out of the east side of the elevator, swung west to the highway and turned north to the crossing. His view of approaching trains from the east was completely obstructed by freight cars standing on the side tracks and the three elevators. It was a cold day. He was dressed quite warmly, and had his cap pulled down about the edges of his ears. He had a lumber wagon with a double box, and was driving rapidly. The ground was frozen, and the wagon made considerable noise. When he was about thirty feet from the main track he jerked up his team so as not to gallop over the crossing. Just then the team gave a jump and struck the side of the engine of the regular passenger train coming from the east. Both horses were injured and the wagon badly damaged. The driver did not look for any train coming from the east after he drove out of the elevator, neither did he hear any train coming or make any effort to ascertain if there was one. *Held,* he was guilty of contributory negligence. *Held,* that the doctrine of the last clear chance to prevent an accident is not applicable under the evidence in this case. Hope v. G. N. Ry. Co., 438.

4. Plaintiff's horses were killed by defendant's train after escaping from a yard enclosed by fence, consisting on one side of only one wire and located near defendant's track. Defendant pleaded that leaving the horses in such yard and proximity to the track was contributory negligence, and the court charged the jury that it did not constitute contributory negligence. *Held,* error. Corbett v. G. N. Ry. Co., 450.

5. Plaintiff was asked on direct examination as to the condition of the right of way with reference to snow and other things lying there. Objection was made that it was not within the issues, the action being for neglect in running the train and not the maintenance of the right of way, which was overruled. *Held,* for reasons stated in opinion, and under the circumstances of this case, error. Corbett v. G. N. Ry. Co., 450.

6. Section 4297, Revised Codes 1905, provides that killing or damaging any horses, cattle or other stock by the cars or locomotives along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation. In an action for killing or injuring stock, proof of ownership, killing or damaging and its value, makes a prima facie case; but when the plaintiff relies solely upon the statutory presumption of negligence, and the testimony of those in charge of the running of the train is unequivocal that everything was done that could be done, after the discovery of the stock upon the track, to prevent its injury,

NEGLIGENCE—Continued.

and that the train was properly equipped and all appliances in good order, and no conflicting evidence is offered as to material questions, and the circumstances are not in conflict with such evidence, the prima facie case made under the statute is overcome, and the defendant is entitled, on proper motion, to a directed verdict. Corbett v. G. N. Ry. Co., 450.

7. The statute quoted only affects the remedy or measure of damages in case of injury by such animals, and as applicable to acts of negligence by the owner of the premises on to which stock strays during the open season, such stock is trespassing. Corbett v. G. N. Ry. Co., 450.

8. Following the previous decisions of this court, it is held that as to trespassing stock, the duty of the railway company and its servants is to use ordinary care not to injure it after its discovery upon the track or right of way. Corbett v. G. N. Ry. Co., 450.

9. Plaintiff, while walking the sidewalk in Fargo, was frightened by the whistle of a bicycle rider approaching from the rear, and without looking, stepped off such walk into a drainage ditch or gutter which ran under the sidewalk at that point, receiving injuries. In an action against the city for such injury, she alleges that it was guilty of culpable negligence contributing to her injury, first, because it suffered weeds to grow in and about such ditch as to obscure the same from view, and, second, in not placing a cover over such ditch or a railing or guard along the edge of the walk at said point. *Held*, from plaintiff's own testimony, that the presence of the weeds in no manner contributed to her injuries, she testifying that she did not look where she was stepping and hence was not misled or deceived as to the dangerous character of the place where she stepped by reason of such weeds. Braatz v. Fargo, 538.

10. The sidewalk at the place in question was five feet in width, and concededly in good repair. The drainage ditch or gutter was constructed in the ordinary method for the purpose of carrying off surface water, and the height of the sidewalk above the bottom of such ditch was approximately from eighteen to twenty-four inches. *Held*, that the failure of defendant city to guard against possible accident by covering such ditch, or by placing or maintaining a railing at the edge of the walk over such ditch, did not constitute actionable negligence on its part, as no careful or prudent person could reasonably anticipate that any such accident would happen to pedestrians using such walk. Braatz v. Fargo, 538.

11. The rule as to the duty of a master in respect to providing a safe place to work is not applicable to a case where a servant is injured by reason of defects in, or insufficiency of a temporary structure, such as a scaffolding or framework for supporting

NEGLIGENCE—Continued.

heavy materials, which are appliances or instrumentalities by means of which the work is done. When, by the express or implied contract between the master and servants the former undertakes to furnish the necessary tools or appliances, it is his duty to use ordinary care to see to it that such instrumentalities are safe and suitable; and this duty, when it exists, is one of the absolute and personal duties. Any servant to whom the master delegates it is pro hac vice, a vice principal, for whose negligence the master is responsible. Lang v. Bailes, 582.

NEGOTIABLE INSTRUMENTS. See Payment, 82.

1. The indorsee before maturity of negotiable paper as collateral security to an indebtedness created concurrently with the indorsement and delivery of such paper, and in consideration thereof, in good faith, and without notice of infirmities, is an innocent holder for value within the meaning of our negotiable instruments law. Second Nat'l Bank of Bucyrus v. Werner, 485.

2. Evidence examined, and *held,* that each plaintiff took the note, indorsed and assigned to it in the regular course of business in good faith, before maturity, and for a valuable consideration. Bank v. Werner, 485.

3. The contract of one who indorses a promissory note in the words "For value received, I hereby guarantee the payment of the within note and hereby waive presentment, demand, protest and notice of protest," and who receives no consideration or benefit from the loan made to the principal debtor upon the execution of said note, is that of guarantor of payment, and his liability must be measured by the settled rules applicable to that relation. Bank v. Bellamy, 509.

4. Under the law in force prior to the enactment of chapter 113, Laws 1899, relating to negotiable instruments, an extension of time of payment made by the holder of a promissory note to the principal debtor for a valuable consideration and without the knowledge or consent of a guarantor of said note, operated to release the guarantor from liability. This principle is still in force, unless it is changed by the adoption, as part of the law of 1899, of section 6422, Revised Codes 1905, providing the terms upon which a person secondarily liable upon a negotiable instrument is discharged. Bank v. Bellamy, 509.

5. The liability of a guarantor of payment is predicated wholly upon the terms of his contract of guaranty, which is separate and distinct from the terms of the instrument on which it is indorsed. He is not a joint contractor with the principal debtor, and does not agree to make the debt his own, but only to answer for the consequences of his principal's default. His contract, while

NEGOTIABLE INSTRUMENTS—Continued.

it may result in requiring him to pay the note, is secondary, within the meaning of section 6494, Revised Codes 1905. Bank v. Bellamy, 509.

6. The terms "primarily liable," and "secondarily liable," as used in section 6494, Revised Codes 1905, have reference to the remedy provided by law for enforcing the obligation of one signing a negotiable instrument rather than to the character and limits of the obligation itself. The remedy against a guarantor, depending as it does, upon his separate contract of guaranty, and not upon the terms of the instrument, is not primary and direct, but collateral and secondary. Bank v. Bellamy, 509.

7. A guarantor of payment of a negotiable instrument, not being by the terms of the instrument absolutely reqnuired to pay the same, is secondarily liable thereon; and an extension of time to the principal debtor without his consent operates, under section 6422, Revised Codes 1905, as under the law formerly in force, to release him from liability. Bank v. Bellamy, 509.

NEW TRIAL.

1. Motions to extend time to file exceptions to charge and to file amended motion for a new trial, to show newly discovered evidence as an additional ground, are within the discretion of the trial court, and will not be disturbed except for abuse. Soules v. Yeomen, 23.

2. Granting or refusing a new trial for insufficiency of the evidence sustaining the verdict, is within the discretion of the court, and its decision will only be disturbed for abuse. Nilson v. Horton, 187.

3. An order denying a motion for a new trial or for judgment notwithstanding the verdict, which is based upon the insufficiency of the evidence to justify the verdict, will not be disturbed where it appears that there is a substantial conflict in the evidence. Lang v. Bailes, 582.

NONSUIT. See Practice, 606.

NOMINAL DAMAGES. See Damages, 771.

NOTES AND BILLS. See Payment, 82.

NOTICE. See Appeal and Error, 804; Executors and Administrators, 546; Frauds, 551.

1. K., a wholesale liquor and wine merchant in St. Paul, called on Y., a merchant at Bismarck, and procured him to indorse a draft for $350. Y. had previously indorsed for K. notes aggregating $500. It is not clear whether the notes were then due, or whether Y. had paid them if due. The draft was presented for acceptance

NOTICE—Continued.

in St. Paul on the 29th day of April, 1905, and accepted by K. in the name of the American Wine & Liquor Company, that being the style under which he did business. On the 2d day of May, 1905, the draft was protested for nonpayment. On the day Y. indorsed the draft, the evidence tending to show that it was after the act of indorsement, K. told Y. that, if the draft was not paid, he would turn him over some "stuff." May 1, 1905, the day before the draft was protested, K. delivered to the railway company in St. Paul five barrels of whiskey, addressed to Y. at Bismarck, and took a bill of lading therefor. May 2, 1905, a petition of creditors of K. was filed in the bankruptcy court in St. Paul to have him adjudicated bankrupt, and upon the same day appellant was appointed receiver of the effects of K. He qualified on the following day, and immediately notified the railway company of the fact and that he claimed the whisky, and to not deliver it to the consignee, but hold it subject to the order of the court. The railway company notified him, in response to this notice, that it held the whisky subject to his disposition. No price was agreed upon or mentioned between K. and Y. The character of the "stuff" was not indicated. Neither the bill of lading nor any notice, invoice, or communication of any kind was transmitted to the consignee, and he did not know that anything had been shipped to him until after its arrival in Bismarck, when, on his demand for the whisky being refused by the carrier, he brought this action in claim and delivery. The record does not disclose whether the whisky was sent in payment of, or as security for, a prospective indebtedness of K. to Y., or whether it was a sale. *Held*, that the whisky at the time this action was commenced was in custodia legis. Yegen v. N. P. Ry. Co., 70.

2. Service of the notice of the time when the period of redemption from a tax sale will expire on the holder of a void tax deed as owner, is not effectual for any purpose. Hodgson v. State Finance Co., 139.

3. Service of the notice of the time when the period for redemption from a tax sale will expire must be made upon the owner of the land personally, if known to be a resident of the state; but if the owner be a nonresident, service shall be made by registered letter, addressed to the owner's last known post office address, and must also be served personally on the person in possession. Hodgson v. State Finance Co., 139.

4. Defendant signed and delivered the following instrument: "In consideration of one dollar to me in hand paid by Emerson Manufacturing Company, the receipt of which I hereby acknowledge, I hereby guarantee the fulfillment of the within contract, and the prompt payment of all obligations given under, or arising out of it, and all renewals of the same, on the part of I. K.

NOTICE—Continued.

Tvedt, Kindred, N. D., and waive demand and notice of nonfulfillment and nonpayment. This guaranty is given at the time of the execution of the within contract, and is made a part of the same." Held, that such instrument constitutes an absolute guaranty, and hence, notice to defendant of plaintiff's acceptance thereof was unnecessary, in order to bind him. Emerson Mfg. Co. v. Tvedt, 8.

5. Notice sent by registered letter to the owner by a subcontractor, informing him that he is furnishing material for the contract, after its abandonment by the contractor and before steps are taken to complete the work by the owner, is seasonably sent under the requirement that such notice be given the owner previous to the completion of the contract. Langworthy Lbr. Co. v. Hunt, 433.

6. Where a subcontractor seeks the benefits of the mechanic's lien law, he must bring himself within its provisions, and is not entitled to a lien without notice to the owner by registered letter previous to the completion of the contract that he has furnished materials. Personal knowledge of the owner does not supply a statutory notice upon which a mechanic's lien on his property can be predicated. N. D. Lbr. Co. v. Bulger, 516.

7. Under the so-called "Wood Law" (chapter 67, Laws 1897), Emmons county obtained a judgment for taxes in October, 1897. In December following the sheriff sold the lands to the county, to whom certificates were issued. Ninety days preceding the maturity of the certificates the treasurer assumed to give the owner the statutory notice of expiration of time for redemption. The notice was signed "Emmons County, N. D., by H. W. Allen, County Treasurer," and service was attempted by registered mail and also by copy left to an employee at the hotel where the owner resided. The owner had no family nor was he residing in the family of another within subdivision 7, section 6838, Revised Codes 1905. *Held,* service was void. McKenzie v. Boynton, 531.

8. There being no legal service of the notice of expiration of time for redemption from the sale, the county acquired no title through its certificates. McKenzie v. Boynton, 531.

9. In the light of the facts stipulated, it is held that the statute requiring the publication for four successive weeks of a notice of election on a certain county division proposition was not substantially complied with. This being true, it was prejudicial error to deprive defendant of an opportunity to establish the facts pleaded in his answer, and tending to show that actual prejudice in fact resulted on account of a lack of due notice of election. The notice given merely consisted of the insertion in the notice of the general election at the foot of the list of candidates the words: "Three petitions for county division." By the order in question defendant was deprived of the right to show the invalidity

NOTICE—Continued.

of the special election on such proposition by showing that there was not a full, fair and intelligent expression of the electors upon such proposition. State v. Meyers, 806.

NUISANCE. See Intoxicating Liquors, 203, 249, 426, 782.

OPINION EVIDENCE. See Evidence, 35.

ORDINANCES. See Municipal Corporations, 98, 672.

PARTIES. See Death by Wrongful Act, 38.

1. Section 6824, Revised Codes 1895, does not authorize bringing in, by order of court, additional parties after entry of Judgment. St. P., M. & M. R. Co. v. Blakemore, 134.
2. Parties in mandamus in the name of the state on the relation of one, not an official, showing the relator seeks to vindicate a matter of public interest concerning all the electors and taxpayers in the county interested equally with him, may be presented to the court by any citizen of the locality. State v. Willis, 209.

PARTITION.

1. In making the partition, referees must divide the real property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered. Hammond v. N. W. C. & I. Co., 709.
2. Evidence examined, and *held* sufficient to sustain the judgment entered by the trial court partitioning the real property in controversy in this action. Hammond v. N. W. C. & I. Co., 709.

PARTNERSHIP. See Appeal and Error, 630.

1. A land owner contracted with S. & Co., to sell his land on terms stated therein Then S. & Co. dissolved, S. continuing business, contracted to sell plaintiff on different terms, signing the land owner's name, by himself as agent. In an action for specific performance of the contract signed by S., *held,* that the contract with S. & Co., was terminated by the dissolution of the firm, and S. had no further power under the contract. Larson v. Newman, 153.
2. The evidence sufficiently shows that John A. Johnson was a member of the firm of Johnson & Gregerson. Hanson v. Franklin, 259.

PAYMENT. See Evidence, 794; Frauds, Statute of, 737; Guaranty, 509.

1. A payment means a payment in money. If paid by promissory note, or anything else than cash, it must be accepted by the payee as payment. *Held,* under the evidence in this case, that the so-called promissory note, given by the administrator to plaintiff's husband, did not constitute a payment. Sjoli v. Hogenson, 82.

PAYMENT—Continued.

2. Evidence of payment in full for all services rendered, considered, and it is *held*, therefrom, that it was not error to refuse to direct the jury to find in plaintiff's favor for a small balance of 39 cents claimed to be unpaid. McGregor v. Harm, 599.
3. Money paid under a mistake of fact to one not entitled to it, and who cannot in good conscience receive and retain the same, may ordinarily be recovered; the law raising an implied promise on the payee's part to refund. Bank v. Weber, 702.
4. The fact that plaintiff had the means of knowledge of the facts at his command, and negligently failed to avail himself thereof, will not defeat his recovery, where such negligence has not resulted in loss or damage to defendant. Bank v. Weber, 702.

PERFORMANCE. See CONTRACT, 794.

PERPETUITIES. See WILLS, 160.

PERSONAL PROPERTY.

1. A sheriff's certificate, under foreclosure by advertisement, is personal property, and transferable by the executors of the deceased mortgagee to whom such certificate was issued by assignment under the laws of Massachusetts. Boschker v. Van Beek, 104.
2. Parties are at liberty to make any agreement or arrangement with regard to their property that they see fit, and to give to fixtures the legal character of realty or personalty at their option; and, if the agreement is such a one as will make the property personal property, as between the parties, it is personal property, and may be so treated. Mathews v. Hanson, 692.

PLACE OF TRIAL. See VENUE, 445, 679; VENUE, CHANGE OF, 756.

PLEADINGS. See ACCORD AND SATISFACTION, 751; BANKRUPTCY, 489; CRIMINAL LAW, 268; INDICTMENT AND INFORMATION, 268; JUDGMENT, 259, 722; MUNICIPAL CORPORATIONS, 293; NEGLIGENCE, 450; PRACTICE, 23, 268.

1. In an action for money had and received, it was error to direct a verdict for defendant, where proof showed that he had a prior lien on certain personalty sold by defendant under chattel mortgage foreclosure, the proof disclosing that defendants promised, for consideration, to pay plaintiff the proceeds of the sale, and a breach of such agreement. Hyde v. Thompson, 1.
2. Action against a sheriff for failure to levy execution upon personal property attached by him. Court directed verdict for defendant on the theory that complaint failed to state, and proof to show, a cause of action, there being no allegation nor proof negativing facts justifying defendant's official acts. *Held*, error, as burden

PLEADINGS—Continued.

was on defendant to justify his failure and complaint was sufficient and testimony showed a prima facie case. Bank of Portal v. Lee, 10.

3. A demurrer to an information in a criminal action upon the ground stated in subdivision 2, section 9900, Revised Codes 1905, as follows: "That it does not substantially conform to the requirements of this code," is too indefinite. The pleader should specify wherein such information fails to conform to the requirements of the code of criminal procedure, so as to apprize the court of the precise point of the objection. State v. Longstreth, 268.

4. In determining place of trial of civil action under chapter 6, Code Civil Procedure, defendant need not examine the complaint critically and with technical exactness, but may assume that the action is what it purports upon the face of the complaint to be, and plaintiff having chosen the form and substance of his pleading, cannot claim that the action through deficiency and material allegations is other than on the face of the complaint it appears to be. Viets v. Silver, 445.

5. Where the complaint states a cause of action for the foreclosure of a real estate mortgage, the action must, on due demand of defendant, be tried in the county where the land is situated and motion to change to such county will be sustained, even if a critical examination of the complaint reveals that it does not state a cause of action for foreclosure of a mortgage, but merely one for the recovery of money only. Viets v. Silver, 445.

6. Change of venue must be determined before trial and often before issue. A district court in acting on the motion may assume that the character of the action is as the complaint purports to state, and refuse to examine the same as it would upon general demurrer for the purpose of determining the exact character of the cause of action stated. Viets v. Silver, 445.

7. In answer to a question as to the condition of right of way with reference to snow and other things thereon, witness testified that oats were sprinkled upon the track. Answer was stricken out and jury cautioned to disregard it. No reference was made to it in the court's charge. From the pleadings, issues and purpose of the question, *held*, that striking out of the answer did not cure the error, although not declared reversible error. Corbett v. G. N. Ry. Co., 450.

8. When demurred to as not stating facts sufficient to constitute a cause of action, a complaint will be liberally construed and upheld where its allegations reasonably and fairly apprize the defendant of the claim against him. Weber v. Lewis, 473.

9. If the facts constituting a cause of action are stated in the complaint or can be inferred by reasonable intendment from those

PLEADINGS—Continued.

set forth although the allegations are imperfect, incomplete and defective as to form rather than substance, the remedy is not by demurrer but by motion to make more definite and certain by amendment. Weber v. Lewis, 473.

10. Under the code system of pleading, the allegation of a legal conclusion instead of the facts upon which it is based, does not usually render a pleading bad on general demurrer. Weber v. Lewis, 473.

11. Under the code system of pleading, in actions to recover on implied contracts, it is neither necessary nor proper to allege a promise to pay on defendant's part. Weber v. Lewis, 473.

12. The function of a complaint is to inform defendant of the nature of plaintiff's demand so that he may prepare his defense, and if the facts are alleged or may reasonably be inferred to constitute a good declaration under the common counts at common law, the same will be sustained on demurrer. Weber v. Lewis, 473.

13. A defense to the effect that the engine involved in this suit was not purchased on the order set forth in the complaint, and admitted by the answer, cannot be raised under such pleading. Houghton v. Vavrowski, 594.

14. Amendments are within the discretion of trial courts, to be disturbed only for abuse, liberality in allowing them should be shown by the courts when it will promote the ends of justice. Webb v. Wegley, 606.

15. In an action by vendors for specific performance by vendees to pay each year from the purchase price the sum equivalent to one-half the crop grown upon the land sold, during that year, an allegation in the complaint admitted by the answer that the entire balance of the purchase price in a stated sum is due and unpaid, will support a judgment of the court requiring that defendants within a reasonable time pay that sum to the plaintiffs and that they thereupon convey the land to the defendants. Whitney v. Akin, 638.

16. An order denying defendant's motion to dismiss the action, and granting plaintiff's countermotion for leave to amend the complaint, *held* not appealable. Strecker v. Railson, 677.

17. An allegation in a complaint for the specific performance of a contract for the sale of real estate, that "C. A. Knudtson was the duly and authorized agent of the Knudtson Land Company," admitted to be true in answer, is sufficient, without proof that such agent had authority to bind his principal by his contract to sell real estate. Mitchell v. Knudtson Land Co., 736.

18. Evidence of a settlement of a cause of action set forth in a complaint is not admissible under general denial. Mitchell v. Knudtson Land Co., 736.

PLEADINGS—Continued.

19. The complaint must show the representative character in which the defendant is sued. Reed v. Heglie, 801.

20. The demurrer in this case was properly sustained. Reed v. Heglie, 801.

POLICE POWER. See CONSTITUTIONAL LAW, 621, 672.

POSSESSION. See CHAMPERTY AND MAINTENANCE, 227; EVIDENCE, 794; FRAUDS, STATUTE OF, 736; SALES, 594.

1. The holder of a sheriff's certificate, or deed, under an invalid foreclosure of a real estate mortgage by advertisement, in possession of the premises with the implied consent of the mortgagor, is a mortgagee in possession. Boschker v. Van Beek, 104.

2. The common law doctrine making void, as against a person in possession, a deed of land adversely held as against the grantor, where the grantor has not been in possession of the land or received the rent thereof for a period of at least one year, remains in force in this state. Burke v. Scharf, 227.

3. Under chapter 5, page 9, Laws 1901, an action to determine adverse claims and to quiet title may be brought by one in possession, or by one out of possession, and the right of possession may be determined in such action, and a restitution of the possession may be adjudged in the decree. Burke v. Scharf, 227.

4. Where vendee is in possession under a contract of sale, such possession is that of the vendor where the contract is in force, and not adverse to him. Burke v. Scharf, 227.

5. While the contract remains in force, and the vendee remains in possession thereunder, he is estopped from buying an outstanding title, and thereby repudiate the vendor's contract and at the same time retain the possession secured by him by virtue of the contract. Burke v. Scharf, 227.

6. Where an action is brought by one out of possession against the vendor and vendee in such contract, and the plaintiff in that action has legal title to the land and conveys such legal title to the vendee, and the action is afterwards dismissed this does not constitute a constructive eviction of the vendee, entitling him to retain possession under the title thus purchased against the vendor in the contract, as such deed to him is void and champertous as against the vendor in possession. Burke v. Scharf, 227.

7. Where the owner of real estate, out of possession, conveys it to a third party also out of possession, and at the same time he conveys to one in legal possession through a vendee holding under a contract for the purchase of the land, and the deed to the person not in possession is first delivered, said deed is void on account of the adverse possession of the land as against the grantor, and the second deed conveys legal title to the premises. Burke v. Scharf, 227.

POSSESSION—Continued.

8. A mechanic's lien will not attach to the interest of a vendor under an executory contract of sale, whose vendee is in possession, and who makes improvements by erecting buildings on the real estate covered by such executory contract. Johnson v. Soliday, 463.
9. Where the vendee in an executory contract for the purchase of real estate is in possession and erects buildings thereon, in which the vendor has no interest, except by reason of his holding the legal title as security for the purchase price, and when such vendor is not a party to the purchase of the material or the construction of the improvements, the question of his knowledge of, or consent to, the furnishing of material or the making of the improvements is immaterial. Johnson v. Soliday, 463.

POWERS. See Trusts, 160.

PRACTICE. See Appeal and Error, 112, 317, 634; Attachment, 684; Attorney General, 819; Continuance, 249; Courts, 645; Criminal Law, 268; Mandamus, 209; Pleadings, 606; Quieting Title, 227; Trial, 450.

1. Disregard of rules, if any, which does not result in the denial of the right or in the loss of an opportunity to be heard, will not affect the decision. Forman v. Healy, 116.
2. Motions to extend time to file exceptions to charge and to file amended motion for a new trial, to show newly discovered evidence as an additional ground, are within the discretion of the trial court and will not be disturbed except for abuse. Soules v. Yeomen, 23.
3. Errors, if any, in sustaining objections to questions put to a party who is under cross-examination as an adverse party, under section 7252, Revised Codes 1905, cannot be taken advantage of when there is no offer showing that the answers would be material under the issue formed by the pleading. Soules v. Yeomen, 23.
4. Section 6824, Revised Codes 1905, does not authorize bringing in, by order of court, additional parties after entry of judgment. St. P. M. & M. Ry. Co. v. Blakemore, 134.
5. Section 6825, Revised Codes 1905, authorizes the intervention and interpleader, in a pending action only before trial, of parties whose rights are undetermined, and will not permit intervention, after judgment, of an intervenor, whose petition does not show a clear, unmistakable or adjudicated interest in the judgment rendered. St. P. M. & M. Ry. Co. v. Blakemore, 134.
6. The more adequate and speedy remedy which a suitor must possess to defeat his right to a mandamus is a legal remedy rather than a physical one. State v. Holmes, 286.

PRACTICE—Continued.

7. Mandamus is a proper remedy to compel a trial judge to settle a statement of the case when presented to him in accordance with the facts and in time, and he refuses to settle it. Tuttle v. Pollock, 308.

8. The discretion to be exercised in such cases is in reference to the diligence or delay with which parties have proceeded and other facts pertaining to the conduct of the parties in connection with the appeal. Tuttle v. Pollock, 308.

9. District judge, after appeal, retains full jurisdiction to settle statement of case or do any act in furtherance of the appeal. *Held*, motion to strike statement from the record is without merit. Rindlaub v. Rindlaub, 352.

10. If the facts constituting a cause of action are stated in the complaint or can be inferred by reasonable intendment from those set forth, although the allegations are imperfect, incomplete and defective as to form rather than substance, the remedy is not by demurrer but by motion to make more definite and certain by amendment. Weber v. Lewis, 473.

11. Courts favor trial upon the merits and where a trial court has refused to open a default and permit a defense, this court will not only inquire as to whether the discretion in denying the application has been soundly exercised, but will examine the facts to determine whether or not in the interest of justce and right, the default should not be set aside, and a defense permitted. Bank v. Branden, 489.

12. Where counsel of good reputation and large experience is employed, his neglect of matters necessary to the ordinary procedure of the case is a "surprise" to the party, under the statute entitling him to relief. Bank v. Branden, 489.

13. Upon application to vacate a judgment entered by default, where the answer presented discloses a good defense upon the merits, and a reasonable excuse for delay occasioning default is shown, and no substantial prejudice appears to have arisen from the delay, the court should open the default and bring the case to trial. Bank v. Branden, 489.

14. Where the circumstances shown upon an application to vacate a judgment entered by default are such as to lead a court to hesitate before it refuses to open the judgment, it is better, as a general rule, that the doubt should be solved in favor of the application. Bank v. Branden, 489.

15. In an action to ascertain the amount due the plaintiff and to satisfy the same out of property attached for its purchase price, a verdict in accordance with its issues and identifying the property attached for the purchase price, it being alleged in the complaint that the property attached was the identical property, and

for which debt in suit was incurred, and no motion having been made to strike out the complaint and the case having been tried on the theory that the identity of the property was in issue, an objection to a verdict containing such finding, made after it is ordered, and renewed after it is returned, comes too late. Mayer v. Ferguson, 496.

16. General objections to questions and to a verdict that fail to point out the specific grounds of the objections are inadequate. Mayer v. Ferguson, 496.

17. Trial courts have wide discretion over continuances and under the facts in the case, *held,* the denial of motion for continuance was not error. Webb v. Wegley, 606.

18. Certain counter affidavits were received and considered in opposition to plaintiff's motion for continuance. Such affidavits merely tended to show that the motion was not made in good faith. *Held,* that such counter affidavits were admissible for such purpose. Webb v. Wegley, 606.

19. One who buys property, upon which a judgment, void on its face for want of jurisdiction, is a cloud, cannot as a matter of right, vacate it on motion. Campbell v. Coulston, 645.

20. The court in which such motion is made may in its discretion entertain it, or direct a resort to the remedy by action. Campbell v. Coulston, 645.

21. City or village ordinances, although penal, are not "criminal laws." Prosecutions thereunder do not come under the constitutional provision: "All prosecution shall be in the name, and by the authority, of the state of North Dakota." Such prosecutions are in the name of the city or village. Village of Litchville v. Hanson, 672.

22. An order denying defendant's motion to dismiss the action, and granting plaintiff's counter motion for leave to amend the complaint, *held* not appealable. Strecker v. Railson, 677.

23. Bastardy proceedings are not strictly either civil or criminal, but partake of the nature of both. Hence, section 6829, Revised Codes 1905, providing for the trial of an action in the county, where the defendant or some of the defendants reside at its commencement, does not apply, and the court erred in granting a change of the place of trial to the county of the defendant's residence. State v. Lang, 679.

24. An affidavit for attachment in reciting the statutory grounds for nonresidence, etc., used "plaintiff" instead of "defendant." *Held,* a manifest clerical error, insufficient to dissolve such attachment; and should be disregarded pursuant to section 6886, Revised Codes 1905. Hilbish v. Asada, 684.

PRACTICE—Continued.

25. An irregularity curable by amendment in an affidavit for attachment, cannot be urged by an intervener in an attachment suit. Hilbish v. Asada, 684.

26. The writ of prohibition will not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. *Held*, under the facts presented, that relator does not bring himself within such rule, as he possesses such remedy by appeal. Selzer v. Bagley, 697.

27. The findings of the court in an action at law, where a jury is waived, have the same weight on appeal as the verdict of a jury, and will not be disturbed unless clearly against the preponderance of the evidence. Bank v. Weber, 702.

28. A motion for judgment notwithstanding the verdict should not be granted, unless it appears fairly that the defect in pleading or insufficiency of evidence cannot be supplied on another trial. Webster v. McLaren, 752.

29 "Drain commissioners" of any county are a department thereof, with power to draw warrants upon a special fund in the county treasury. An action will not lie against them on their contract; remedy is by mandamus. Reed v. Heglie, 801.

30. Relevant and material matter was stricken out of the answer and the issuance of a peremptory writ was directed. *Held*, (1) that such order "involved the merits and necessarily affected the judgment" within the meaning of section 7081, Revised Codes 1905. Hence it is a part of the judgment roll, and it may be reviewed by this court on appeal from the judgment. (2) Such order was prejudicial error. State v. Meyers, 805.

31. Stipulation of facts used on relator's motion to strike out matter from the answer may be considered on appeal in reviewing the correctness of the order upon such motion, although not incorporated in a statement of the case. State v. Meyers, 805.

32. After these defenses were stricken out of his answer, it was not incumbent on defendant to offer proof thereof. There was no issue left for trial, except the naked issue of a want of due notice of election, and by the order complained of defendant was wrongfully deprived of even the opportunity of showing such fact. State v. Meyers, 805.

PREJUDICE. See Appeal and Error, 582, 748; Judgments, 489.

1. In an action to foreclose a mechanic's lien for balance due under an express contract, the answer denies that plaintiff had substantially performed the contract, and pleads four counterclaims. Plaintiff moves to strike out certain of such counterclaims and portions of others, which motion the court granted in part and denied the remainder. *Held*, for reasons stated in the opinion, that such ruling was non-prejudicial. Marchand v. Perrin, 794.

PREROGATIVE WRITS. See Mandamus, 209.

1. An application to this court for the issuance of a writ of prohibition directed to a county judge, will not be entertained upon a showing merely of a refusal by the district judge to issue such writ. It is only in exceptional cases, involving questions of great public importance, that this court will exercise its prerogative powers in the issuance of writs to such inferior courts. Selzer v. Bagley, 697.

2. If the district judge, without cause, refuses to afford relief, or abuses his discretion in denying a writ of prohibition, relator is not without remedy. But such refusal or abuse of discretion affords no ground for the issuance of such writ by the supreme court. Selzer v. Bagley, 697.

PRESUMPTION. See Evidence, 268, 337, 688.

1. Whether the statutory presumption has been fully met and overcome is in the first instance a question of law. Corbett v. G. N. Ry. Co., 451.

2. Upon an appeal, where, as in this case, the findings and decree of the court respond to the allegations of the complaint and prayer for relief, but the evidence is not brought into the record by a properly authenticated statement of the case, it will be presumed that all material facts in the complaint are supported by competent proof. Whitney v. Akin, 638.

3. Where the court finds that during two years the crops grown upon land held under a contract of sale providing for payment of the purchase price by application each year of the proceeds of one-half the crop, have not been in any part delivered by the vendees to the vendors, and that thereafter there was due upon the contract a crtain sum, on an appeal based on the judgment roll alone, it will be presumed in support of the findings that the evidence showed the value of the crops for the two years in which they were not delivered was, at least, equivalent to the sum so found to be due on the contract. Whitney v. Akin, 638.

PRINCIPAL AND AGENT. See Insurance, 23; Master and Servant, 582, 599.

1. A land owner contracted with S. & Co., to sell his land on terms stated in the contract. Then S. & Co. dissolved, S. continuing business, contracted to sell plaintiff on different terms, signing the land owner's name by himself as agent. In an action for specific performance of the contract signed by S., *held*, that the contract with S. & Co., was terminated by the dissolution of the firm, and S. had no further power under the contract. Larson v. Newman, 153.

PRINCIPAL AND AGENT—Continued.

2. The sale by an agent on any other terms and conditions than those authorized by the principal is not binding on the latter. Larson v. Newman, 153.
3. Evidence insufficient to show a ratification by the principal of the contract of sale by S. to plaintiff. Larson v. Newman, 153.
4. The declarations of an agent, not made while acting within the scope of his agency, are not binding on the principal. Rounseville v. Paulson, 466.
5. Evidence considered, and *held* not to show that certain declarations by the agent were made while acting within the scope of the agency. Rounseville v. Paulson, 466.
6. Unless shown to possess authority from his principal to that effect, an expert, sent to repair an engine, cannot bind his principal by changing an existing contract. Houghton v. Vavrowski, 594.
7. It is error to exclude evidence of a conditional sale by an agent of a machine company with consent of the company, as such evidence has a bearing on the question of possession of the property in this case, and upon the question whether a return of the same to the company was waived. Houghton v. Vavrowski, 594.
8. An allegation in a complaint for the specific performance of a contract for the sale of real estate, that "O. A. Knudtson was the duly and authorized agent of the Knudtson Land Company," admitted to be true in answer, is sufficient, without proof, that such agent had authority to bind his principal by his contract to sell real estate. Mitchell v. Knudtson Land Co., 736.
9. A contract of a vendee for the purchase of real estate, made through his agent in his own name, without stating the name of his principal, may be enforced by an action for specific performance by such principal in his own name. Mitchell v. Knudtson Land Co., 736.
10. Evidene consisting of letters written by an agent on behalf of his principal, received in evidence without objections, in sufficient prima facie to establish an authorized agency. Mitchell v. Knudtson Land Co., 736.

PRINCIPAL AND GUARANTOR. See GUARANTY, 8, 509.

PRINCIPAL AND SURETY. See GUARANTY, 509.

1. Wife signed a note with husband as joint maker but as surety only; husband died leaving property in Clay county, Minnesota, which was duly probated there. Respondent requested appellant's attorney to file his claim against said estate, which he failed to do; *held*, such failure did not release respondent as surety. Yerxa v. Ruthruff, 13.

PROBATE LAW. See County Courts, 61; Fraud, 82.

1. Revised Codes 1905, section 8083, was not designed to enlarge the constitutional grant of power to county courts, nor did the legislature by its enactment intend to make the proceeds of such life insurance policies and beneficiary certificates, as are therein mentioned, a portion of the estate of the insured, but the intent was merely to exempt from the payment of these debts of the decedent all such proceeds as might become assets of such estate. Finn v. Walsh, 61.
2. A final decree of distribution of county courts is of equal rank with judgments of courts of record and a distributee named in a final decree can sue the executor or administrator, or the bondsmen of either or both, for the share assigned to him by such decree. Sjoli v. Hogenson, 82.
3. A "decree of distribution" is an instrument by virtue of which heirs receive the property of the deceased. It is the final determination of the rights of the parties to a proceeding, and, upon its entry, their rights are thereafter to be exercised by the terms of the decree. Sjoli v. Hogenson, 82.
4. Wife signed a note with husband as joint maker, but as surety only; husband died leaving property in Clay county, Minnesota, which was duly probated there. Respondent requested appellant's attorney to file his claim against said estate, which he failed to do; *held,* such failure did not release respondent as surety. Yerxa v. Ruthruff, 13.

PROCEDURE. See Practice, 209.

PROCESS. See Notice, 139.

1. The return of the service of the citation issued for the taxes of 1891, sufficiently shows service on John A. Johnson. The inserting of the name "John O. Fadden" in said return was a clerical mistake, and will not vitiate the judgment. Defects in the proof of service of a process must be taken advantage of in a direct proceeding, and will not furnish grounds for a collateral attack on the judgment. Hanson v. Franklin, 259.
2. Under the so-called "Wood Law" (Chapter 67, Laws 1897), Emmons county obtained a judgment for taxes in October, 1897. In December following the sheriff sold the lands to the county, to whom certificates were issued. Ninety days preceding the maturity of the certificates the treasurer assumed to give the owner the statutory notic of expiration of time for redemption. The notice was signed, "Emmons county, N. D., by H. W. Allen, County Treasurer," and service was attempted by registered mail, and also by copy left to an employee at the hotel where the owner resided. The owner had no family nor was he residing in the family of another within subdivision 7, section 6838, Revised Codes 1905. *Held,* service was void. McKenzie v. Boynton, 531.

PROCESS—Continued.

3. There being no legal service of the notice of expiration of time for redemption from sale, the county acquired no title through its certificate, but merely retained a lien on the land by virtue of such certificate. McKenzie v. Boynton, 531.

PROHIBITION.

1. An application to this court for the issuance of a writ of prohibition directed to a county judge, will not be entertained upon a showing merely of a refusal by the district judge to issue such writ. It is only in exceptional cases, involving question of great public importance, that this court will exercise its prerogative powers in the issuance of writs to such inferior courts. Selzer v. Bagley, 697.
2. If the district judge, without cause, refuses to afford relief, or abuses his discretion in denying a writ of prohibition, relator is not without remedy. But such refusal or abuse of discretion affords no ground for the issuance of such writ by the supreme court. Selzer v. Bagley, 697.
3. The writ of prohibition will not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. *Held,* under the facts presented, that relator does not bring himself within such rule, as he possesses such remedy by appeal. Selzer v. Bagley, 697.

PROXIMATE CAUSE. See Streets and Highways, 293.

PUBLIC LANDS.

1. A final receipt is not a contract between applicant and the United States, and he obtains no vested right to the land filed upon. Forman v. Healy, 116.
2. The land department had power to order a hearing as to the rights of the parties to the land in controversy, and it was not error for the local land officers to refuse to dismiss the hearing on the grounds of the insufficiency of the affidavit and notice of hearing, when both parties appeared and took part in the proceedings. Forman v. Healy, 116.
3. The commissioner of the general land office has power to cancel an entry. Forman v. Healy, 116.
4. The decision of the land department in the cancellation of an entry and awarding land to a party, is final and conclusive and binding on the courts as to parties heard or having an opportunity to be heard. Forman v. Healy, 116.
5. Disregard of rules, if any, which does not result in the denial of the right or in the loss of an opportunity to be heard, will not affect the decision. Forman v. Healy, 116.

QUIETING TITLE.

1. Under chapter 5, page 9, Laws 1901, an action to determine adverse claims and to quiet title may be brought by one in possession, or by one out of possession, and the right of possession may be determined in such action, and a restitution of the possession may be adjudged in the decree. Burke v. Scharf, 227.
2. In an action to determine adverse claims to a part of a lot in the city of Kenmare, and to recover damages for the withholding thereof, evidence examined, and *held*, sufficient to sustain the judgment for plaintiff. Cassedy v. Robertson, 574.

RAILROADS. See Common Carriers, 621; Constitutional Law, 45; Contributory Negligence, 438; Negligence, 450.

1. Plaintiff's horses were killed by defendant's train after escaping from a yard inclosed by fence, consisting on one side of only one wire and located near defendant's track. Defendant pleaded that leaving the horses in such yard and proximity to the track was contributory negligence, and the court charged the jury that it did not constitute contributory negligence. *Held*, error. Corbett v. G. N. Ry. Co., 450.
2. Section 4297, Revised Codes 1905, provides that killing or damaging any horses, cattle or other stock by the cars or locomotive along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation. In an action for killing or injuring stock, proof of ownership, killing or damaging, and its value, makes a prima facie case; but when the plaintiff relies solely upon the statutory presumption of negligence, and the testimony of those in charge of the running of the train is unequivocal that everything was done that could be done, after the discovery of the stock upon the track, to prevent its injury, and that the train was properly equipped and all appliances in good order, and no conflicting evidence is offered as to material questions, and the circumstances are not in conflict with such evidence, the prima facie case made under the statute is overcome, and the defendant is entitled on proper motion, to a directed verdict. Corbett v. G. N. Ry. Co., 450.
3. Following the previous decisions of this court, it is held, that as to trespassing stock, the duty of the railway company and its servants is to use ordinary care not to injure it after its discovery upon the track or right of way. Corbett v. G. N. Ry. Co., 450.

RAPE. See Criminal Law, 326.

RATIFICATION. See Frauds, 551.

REAL ESTATE. See Fixtures, 692; Principal and Agent, 736.

REAL PROPERTY. See Deeds, 337.

1. In making the partition, referees must divide the real property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered. Hammond v. N. W. C. & I. Co., 709.
2. Evidence examined, and held sufficient to sustain the judgment entered by the trial court partitioning the real property in controversy in this action. Hammond v. N. W. C. & I. Co., 709.

RECEIPTS.

1. A receipt obtained from a distributee through fraud and misrepresenation is invalid, and open to explanation and impeachment. Sjoli v. Hogenson, 82.

RECEIVER.

1. An action in claim and delivery in a state court will not lie to secure possession of property of which the receiver appointed by a bankruptcy court has taken either actual or constructive possession. Yegen v. N. P. Ry. Co., 70.

REDEMPTION. See Taxation, 531.

REMEDY. See Mandamus, 286.

REPUTATION. See Evidence, 131.

RES ADJUDICATA. See Mandamus, 209; Municipal Corporations, 293; Verdict, 606.

1. Questions fairly raised and decided on a former appeal in the same action are not open for consideration on a subsequent appeal, as such decision on the first appeal, whether right or wrong, became and is the law of the case. Schmidt v. Beiseker, 35.

RESCISSION. See Contracts, 18; Sales, 551.

1. The rule that impossibility of restitution is a defense to an action for a rescission does not apply when complete restitution to the statu quo has been rendered impossible by the act of the defendant. Liland v. Tweto, 551.
2. The burden of proving knowledge of facts giving rise to the right to rescind, and of the time of acquiring such knowledge, rests on the defendant. Liland v. Tweto, 551.
3. The plaintiff had some conversation with a third party regarding the purchase by the third party of stock held by the plaintiff after plaintiff acquired knowledge of his right to rescind. The third party made an offer to buy, which was not accepted. *Held*, that this did not work a ratification of the transfer complained of as fraudulent. Liland v. Tweto, 551.

RESIDENCE. See Venue, 679.

RULES OF COURT.

1. Under rule No. 36 (91 N. W .13), providing that the dismissal of an appeal is in effect an affirmance of the judgment appealed from, unless expressly made without prejudice to another appeal, an appeal from a whole divorce decree will be dismissed without prejudice, where appellant's right to appeal from a part of the decree only is not determined. Tuttle v. Tuttle, 748.

SALES. See Brokers, 153; Evidence, 496; Frauds, 551; Frauds, Statute of, 737.

1. K., a wholesale liquor and wine merchant in St. Paul, called on Y., a merchant at Bismarck, and procured him to indorse a draft for 350. Y. had previously indorsed for K. notes aggregating $500. It is not clear whether the notes were then due, or whether Y. had paid them if due. The draft was presented for acceptance in St. Paul on the 29th day of April, 1906, and accepted by K. in the name of the American Wine & Liquor Company, that being the style under which he did business. On the 2d day of May, 1905, the draft was protested for nonpayment. On the day Y. indorsed the draft, the evidence tending to show that it was after the act of indorsement, K. told Y. that if the draft was not paid, he would turn him over some "stuff." May 1, 1905, the day before the draft was protested, K. delivered to the railway company in St. Paul five barrels of whiskey addressed to Y. at Bismarck, and took a bill of lading therefor. May 2, 1905, a petition of creditors of K. was filed in the bankruptcy court in St. Paul to have him adjudicated a bankrupt, and on the same day the appellant was appointed receiver of the effects of K. He qualified on the following day, and immediately notified the railway company of the fact and that he claimed the whiskey, and to not deliver it to the consignee, but hold it subject to the order of the court. The railway company notified him, in response to this notice, that it held the whiskey subject to his disposition. No price was agreed upon or mentioned between K. and Y. The character of the "stuff" was not indicated. Neither the bill of lading nor any notice, invoice, or communication of any kind was transmitted to the consignee, and he did not know that anything had been shipped to him until after its arrival in Bismarck, when, on his demand for the whiskey being refused by the carrier, he brought this action in claim and delivery. The record does not disclose whether the whiskey was sent in payment of, or as a security for, a prospective indebtedness of K. to Y., or whether it was a sale. *Held,* that the whiskey, at the time this action was commenced, was in custodia legis. Yegen v. N. P. Ry. Co., 70.

SALES—Continued.

2. Under the evidence in this case it was a question for the jury to determine whether a waiver of the return of an engine on a breach of a warranty was intended or not. Houghton v. Vavrowski, 594.

3. Respondent purchased two mares from appellant, one of whom had glanders and knots on the head and neck at the time. In response to respondent's question as to what caused the knots, appellant Keim said she had a cold and that "for all that I know, she is just as sound as the other." The other was sound. *Held,* not warranty. *Held,* further, if respondent can recover under the complaint and evidence, it is for fraud and deceit. Sockman v. Keim, 317.

4. Fraud and deceit in the sale of personal property may be perpetrated either by false representations, or by concealment of soundness in the article sold. Sockman v. Keim, 317.

5. When relations of confidence exist between the parties to an exchange of property, one of whom has full knowledge of the character and condition of the property, and the other but slight knowledge, and no means of obtaining full knowledge, representations as to value which under most circumstances would only amount to expressions of opinion, if made knowing them to be false by the party making them, and with an intent to deceive the other party to the transaction, constitute such fraudulent misrepresentation as may warrant a rescission of the contract or transaction. Liland v. Tweto, 551.

6. In an action to rescind a conveyance of real estate brought by the grantor against the grantee, where the consideration received was stock in a corporation, the character, condition and value of whose assets were known only to the grantee, and cannot be ascertained by the grantor, the suggestion as a fact that the stock was of a certain value, such suggestion being made to induce the trade, and without which the transaction would not have been consummated,, and made by one who in the nature of things must have known it to be untrue, constitute fraud which may entitle the grantor to a rescission of the transfer. Liland v. Tweto, 551.

7. It is error to exclude evidence of conditional sale by an agent of a machine company with consent of the company, as such evidence has a bearing on the question of possession of the property in this case, and upon the question whether a return of same to the company was waived. Houghton v. Vavrowski, 594.

8. A defense to the effect that the engine involved in this suit was not purchased on the order set forth in the complaint and admitted by the answer cannot be raised under such pleading. Houghton v. Vavrowski, 594.

SETTLEMENT. See Evidence, 736.

SHERIFFS AND CONSTABLES. See Mortgages, 417.

1. Action against sheriff for failure to levy execution upon personal property attached by him. Court directed verdict for defendant on the theory that complaint failed to state, and proof to show, a cause of action, there being no allegation nor proof negativing facts justifying defendant's official acts. *Held*, error, as burden was on defendant to justify his failure and complaint was sufficient and testimony showed a prima facie case. Bank of Portal v. Lee, 10.

SIDEWALKS. See Municipal Corporations, 538.

SPECIFIC PERFORMANCE. See Equity, 736; Pleadings, 736.

1. In an action by vendors for specific performance by vendees to pay each year upon the purchase price a sum equivalent to one-half the crop grown upon the land sold, during that year, an allegation in the complaint, admitted by the answer, that the entire balance of the purchase price in a stated sum is due and unpaid, will support a judgment of the court requiring the defendants within a reasonable time to pay that sum to the plaintiffs and that they thereupon convey the land to the defendants. Whitney v. Akin, 638.
2. A construction company agreed with a bank to sell and the bank agreed to buy two town lots for $300 on the occurrence of certain events. The partnership conducting the bank was dissolved, and its assets, except such contract, were distributed. The events happened, but vendee never paid any taxes as agreed, nor the purchase price for the lots. The contract provided that no assignment of it or of the property, by the vendees would be recognized or binding unless the vendor consented in writing. It never was assigned to Hammond orally or in writing, and no consent by the vendor was ever given to any assignment; nor would the party in the bank consent that title be conveyed to Hammond by the construction company. Hammond's interest was one-third; he brought this action to compel specific performance by deed of the whole title in the lots to him alone. The other parties defended. *Held*, that Hammond cannot maintain such action. Hammond v. N. W. C. & I. Co., 699.

STATEMENT OF CASE. See Appeal and Error, 551, 722, 804; Limitation of Actions, 259.

1. Errors of law not appearing on the judgment roll cannot be reviewed on appeal without specifications duly settled in the statement of the case. McLaughlin v. Thompson, 34.

STATEMENT OF CASE—Continued.

2. A paper purporting to contain specifications of error, which is left with the trial judge after the settlement of the statement of the case, does not become a part of the statement unless so ordered by the judge, and such specifications must be disregarded on appeal. McLaughlin v. Thompson, 34.
3. Sufficiency of the evidence to sustain the verdict not considered, where (a) the record does not affirmatively show that it embraces all the evidence, (b) no proper specification of particulars is incorporated in the statement of the case. Schmidt v. Beiseker, 35.
4. Mandamus is the proper remedy to compel a trial judge to settle a statement of the case when presented to him in accordance with the facts and in time, and he refuses to settle it. Tuttle v. Pollock, 308.
5. The supreme court will settle a statement of the case when the trial judge refuses to settle it in accordance with the facts, under section 7960, Revised Codes 1905. Tuttle v. Pollock, 308.
6. Trial courts have wide discretion as to extension of time to settle statement of case, and their action will be disturbed only for abuse. Tuttle v. Pollock, 308.
7. The discretion to be exercised in such cases is in reference to the diligence or delay with which parties have proceeded, and other facts pertaining to the conduct of the parties in connection with the appeal. Tuttle v. Pollock, 308.
8. Such discretion is not to be controlled or made to depend on the fact that appellant's conduct has not been conformable to justice or equity or personal duty in respect to matters not connected with the appeal. Tuttle v. Pollock, 308.
9. On appeal by a husband from a decree of divorce against him whereby his property was assigned to the wife in lieu of permanent alimony, and he was also decreed to pay fixed sums as costs and attorney's fees on the trial in the district court, it is an abuse of discretion to settle a statement of the case until the husband makes provision for the support of his wife and children pending the appeal, in cases where the trial judge has lost jurisdiction to make an order for support money, pending the appeal, for the reason that the defendant in that action had perfected an appeal to the supreme court. Tuttle v. Pollock, 308.
10. District judge, after appeal, retains full jurisdiction to settle statement of case or do any act in furtherance of the appeal. *Held*, motion to strike statement from the record is without merit. Rindlaub v. Rindlaub, 352.
11. The statement of the case fails to conform to the statute and rules of court, contains no specifications of error, and even if specified, they are not available to appellant, as the record shows

STATEMENT OF CASE—Continued.

no timely objection and exceptions to the rulings complained of; the statement also fails to specify that appellant desires a review of the entire case, or of any particular question of fact as required in cases triable de novo in the supreme court. Hilde v. Nelson, 634.

12. Upon an appeal, where, as in this case, the findings and decree of the court respond to the allegations of the complaint and prayer for relief, but the evidence is not brought into the record by a properly authenticated statement of the case, it will be presumed that all material facts alleged in the complaint are supported by competent proof. Whitney v. Akin, 638.

STATE'S ATTORNEY. See Attorney General, 819; Constitutional Law, 249; Continuance, 249; Criminal Law, 326; Indictment and Information, 426; Venue, Change of, 756.

1. Where accused was bound over on a complaint that he kept and maintained a nuisance in "a one-story log and frame building on a certain farm upon which the said Thomas O'Neal then and there resided and near the east short of Lake Metigoshe, in Bottineau county, North Dakota," the state's attorney may file an information in the district court for the offense as having been committed in a building situated on a specifically described tract of land. State v. O'Neal, 426.

2. Where the state's attorney attempts to prove the maintenance of a liquor nuisance as a second offense, and fails to do so, and the jury is expressly cautioned to disregard such offer or evidence, it was not error nor misconduct for the state's attorney to offer such proof. State v. O'Neal, 426.

STATUTES.

1. Section 4698, Revised Codes 1905, makes officers, agents and stockholders of nonresident corporations, doing business in this state without complying with the law, "liable on any and all contracts of such corporations * * * made within this state." They are liable on such corporation's contract to return everything received by such corporation under an express contract with the party who has rescinded it. Chesley v. Soo Coal Co., 18.

2. Section 3954, Revised Codes 1905, providing that misrepresentations in applications or contracts for insurance shall not be deemed material, unless made 'with actual intent to deceive or unless the matter misrepresented increased the risk of loss," includes statements called warranties by law; such statutes are remedial, and are liberally construed. Soules v. Yeomen, 23.

STATUTES—Continued.

3. Errors in sustaining objections to questions to a party being cross-examined under section 7252, Revised Codes 1905, cannot be availed of when there is no offer or showing that the answer would be material under the pleadings. Soules v. Yeomen, 23.

4. Construing sections 7687, 7688, 7689, Revised Codes 1905, relative to death by wrongful act, *held*, that brothers and sisters of one so killed are included in the term "heirs at law," as used in section 7689, when no parent, wife or child survives. Satterberg v. Soo Ry. Co., 38.

5. Sections 7686 to 7691, Revised Codes 1905, inclusive give the right to recover for death by wrongful act to such heirs at law as are prevented by decedent's death from receiving pecuniary aid support or benefit which he was legally obligated to render, or which they were receiving, or had expectations of receiving as a duty, or through a sense of obligation. Satterberg v. Soo Ry. Co., 38.

6. Chapter 51, Laws 1907, amending section 4395, Revised Codes 1905 prescribing maximum coal rates within the state, is not violative of section 8, article 1, of the federal constitution, "to regulate commerce with foreign nations and among the several states and with the Indian tribes," nor of the fourteenth amendment thereof, nor section 13 of the constitution of North Dakota, providing for "due process of law." State v. N. P. Ry. Co., 45.

7. Section 8083, Revised Codes 1905, was not designed to enlarge the constituional grant of power to county courts. Finn v. Walsh, 61.

8. Under sections 6691, 9854, Revised Codes 1905, words in statutes are to be construed in their ordinary sense, and words in informations are to be construed according to their usual acceptance in common language. Mayville v. Rosing, 98.

9. Section 6824, Revised Codes 1905, does not authorize bringing in of additional parties after judgment; the judgment being a complete determination of the issues and rights of all parties, and there is neither warrant nor necessity for the presence of additional parties. St. P. M. & M. Ry. Co. v. Blakemore, 134.

10. Section 6265, Revised Codes 1905, authorizes intervention and interpleader only before trial of parties whose rights are undetermined, and an order will not be sustained permitting the intervention after judgment of a party who does not show a clear, unmistakable or unadjudicated interest in the judgment rendered. St. P. M. & M. Ry. Co. v. Blakemore, 134.

11. Tax sale certificates barred by the provisions of chapter 165, Laws 1901, are not liens on the land. Hodgson v. Finance Co., 139.

12. The purchaser of land at a tax sale, cannot avail himself of the ex parte remedy provided by section 7454, Revised Codes 1905, to enjoin the foreclosure of a mortgage. Hodgson v. Finance Co., 139.

STATUTES—Continued.

13. Section 7252, Revised Codes 1905, forbidding a party in a suit against the heirs or representatives of a decedent to testify to conversations or transactions with him, plaintiff's testimony in a suit for specific performance of a contract of sale of land with decedent, that the latter promised to go to town and fix up the deal on the terms of the contract. was inadmissible. Larson v. Newman, 153.

14. Section 8733, Revised Codes 1905, makes it a misdemeanor for one out of possession and not receiving the rents of the premises for one year, to convey a pretended title thereto. Deeds executed in violation thereof are void as to persons in possession, as to whom the title is in the grantor notwithstanding such deed. Burke v. Scharf, 227.

15. Under chapter 5, Laws 1901, an action to determine adverse claims may be brought by one whether in or out of possession, and the right of possession determined, and restitution of possession adjudged in the decree. Burke v. Scharf, 227.

16. Under section 9368, Revised Codes 1905, a state's attorney subpoenaed L. to testify before him relative to violations of the prohibition laws. L. appeared and testified in narrative form, and the testimony was subscribed and sworn to before the state's attorney. It tended to show that defendant had maintained a liquor nuisance, and the state's attorney filed the testimony with his formal information charging defendant therewith, with a police magistrate, upon whose warrant defendant was arrested, bound over to the district court, convicted and sentenced. It is contended that such section attempts to confer judicial powers upon the state's attorney in violation of section 85 of the constitution. *Held,* that such question was not properly before the court, as neither witness nor defendant raised it. State v. Stevens, 249.

17. Under section 9379, Revised Codes 1905, the limit of imprisonment for nonpayment of fine is six months. State v. Stevens, 249.

18. Tax judgments obtained under chapter 132, Laws 1890, are not money judgments, and do not expire by the statute of limitations. Hanson v. Franklin, 259.

19. Chapter 132, Laws 1890, is to be construed as applying to taxes levied prior to its passage as well as thereafter. Hanson v. Franklin, 259

20. Chapter 132, Laws 1890, with reference to filing tax lists with the auditor, its delivery to the board of county commissioners, and the filing of a copy with the clerk of the district court, is not mandatory, but directory. Hanson v. Franklin, 259.

21. A judgment for personal property taxes under chapter 132, Laws 1890, is a lien upon real property, which lien continues notwithstanding the repeal of the law under which it was acquired. Hanson v. Franklin, 259.

STATUTES—Continued.

22. A demurrer to an information under subdivision 2, section 9900, Revised Codes 1905, as follows, "that it does not substantially conform to the requirements of the code," is too indefinite. It should state wherein it fails to conform. State v. Longstreth, 268.

23. The strict rules of the common law as to criminal pleadings are abolished, and under section 9856, Revised Codes 1905, the information or indictment is sufficient, if the offense is clearly and distinctly set forth in ordinary and concise language to enable a person of common understanding to know its intent, and the act or omission is charged with sufficient certainty to enable the court to pronounce judgment. State v. Longstreth, 268.

24. Section 9891, Revised Codes 1905, enumerate the grounds upon which an information or indictment may be quashed, and is exclusive. State v. Longstreth, 268.

25. Chapter 139, Laws 1903, providing for a reward for the arrest and conviction of violators of the prohibition law, while creating an obligation of the state to pay such reward, is inadequate as an appropriation, and does not authorize payments from the state treasury for the same, as the act does not limit the total amount which may be paid in any year. State v. Holmes, 286.

26. The Supreme Court will settle a statement of the case when the trial judge refuses to in accordance with the facts under section 7060, Revised Codes 1905. Tuttle v. Pollock, 308.

27. Chapter 183, Laws 1909, imposing upon judges duties as to druggists' permits, is not unconstitutional, although their duties are administrative and not judicial. Kermott v. Bagley, 345.

28. Construing section 4049, Revised Codes 1905, providing for divorce for "extreme cruelty," and section 4051, defining extreme cruelty, *held*, that grievous mental suffering is sufficient to warrant a divorce, although not productive of perceptible bodily injury; but whether such grievous mental suffering was inflicted is to be determined in the light of the particular circumstances of each individual case. Rindlaub v. Rindlaub, 352.

29. Chapter 187, Laws 1909, amendatory of section 9366, Revised Codes 1905, and its construction comes within the provisions of section 8538, Revised Codes 1905, that "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 their terms, with a view to affect its object and promote justice. State v. American Bottling Ass'n, 396.

30. Chapter 187, Laws 1909, is not contradictory in its terms, nor ambiguous in the sense that it is susceptible of two or more meanings equally clear and reasonable. State v. American Bottling Ass'n., 396.

STATUTES—Continued.

31. Chapter 187, Laws 1909, containing the words, "any kind of beverage whatsoever, which retaining the alcoholic principle or other intoxicating qualities as a distinctive force, may be used as a beverage for the ordinary intoxicating drinks," is intended to describe a beverage containing alcohol or other drug having an intoxicating quality in a quantity reasonably appreciable, and in which said drug has not by chemical combination with other drugs, also contained in the liquor, lost its intoxicating principle; which liquor will be resorted to as a beverage upon a failure to procure the ordinary intoxicating drinks. In such liquor, alcohol or other drug of kindred quality preserving its native characteristic, must be present, but not necessarily sufficient for intoxication. State v. Fargo Bottling Works Co., 396.

32. Chapter 187, Laws 1909, is not unconstitutional for the reason that the subject of the act is not expressed in the title. Being an amendment to Chapter 110, Laws 1890, it complies with the constitutional requirements if the subject matter of such amendment is germane to the subject of the original act of which the amended section is a part, and is within the title of that act. State v. Fargo Bottling Works Co., 396.

33. A definition of intoxicating liquor including within its provisions a liquor containing the alcoholic principle, but which, it is admitted, will not produce intoxication in any degree, is germane to the general subject of Chapter 110, Laws 1890, and within the title, "an act to prescribe penalties for the unlawful manufacture, sale and keeping for sale of intoxicating liquors, and to regulate the sale, barter and giving away of such liquors for medical, scientific and mechanical purposes. State v. Fargo Bottling Works Co., 396.

34. Chapter 187, Laws 1909, is replete in itself, and does not purport to amend section 9353, Revised Codes 1905, providing a penalty for violations of the prohibitory law where it by implication affects and modifies section 9353, it is not for that reason repugnant to section 64 of the constitution, requiring all portions of the amended statute that are retained in the new enactment to be incorporated and published in the amended act. State v. Fargo Bottling Works Co., 396.

35. Section 4297, Revised Codes 1905, providing that damage to stock by railroad company's trains is prima facie evidence of negligence on the part of the corporation; and proof of ownership and damage, and value of stock injured makes a prima facie case; when reliance is had upon the statutory presumption of negligence and the testimony of those in charge of the train is unequivocal, and everything was done that could be done, after the discovery of the stock upon the track, to prevent its injury, and that the train was properly equipped, and all appliances were in good or-

STATUTES—Continued.

der and there is no conflict in such evidence or circumstances, the prima facie case under the statute is overcome, and defendant is entitled to a directed verdict. Corbett v. Ry. Co., 450.

36. Under section 1933, Revised Codes 1905, certain stock can run at large between November 1st and April 1st, except in counties voting otheriwse. *Held,* such statute during such months permits stock to feed upon commons and unfenced lands without liability for damage done thereon, and imposes upon the owners of such premises no greater care for or towards such stock than is required at other seasons. Corbett v. Ry. Co., 450.

37. Section 1933, Revised Codes 1905, only affects the remedy or measure of damages for injury by such animals, and is applicable to negligence to owners of such premises on to which such stock strays during the open season. Such stock is trespassing. Corbett v. Ry. Co., 450.

38. The terms "primarily liable," and "secondarily liable," as used in section 6494, Revised Codes 1905, refer to the enforcing of the obligation of a signer upon a negotiable instrument rather than to the character and limits of the obligation. The remedy against a guarantor is not primary and direct, but collateral and secondary. Bank v. Bellamy, 509.

39. A guarantor of a negotiable instrument is secondarily liable thereon; and an extension of time without his consent operates, under section 6422, Revised Codes 1905, to release him from liability. Bank v. Bellamy, 509.

40. Where counsel fees are included in a final decree denying divorce to the wife, who is plaintiff, and granting it to the husband, who is defendant, and the former appeals from the judgment demanding trial de novo under section 7229, Revised Codes 1905, and pending such appeal her attorneys unconditionally accept such counsel fees, such acceptance waives the appeal, and action will be dismissed. Boyle v. Boyle, 522.

41. Under chapter 67, Laws 1897, Emmons county obtained a judgment for taxes in October, 1897. In December following, the county bought in the lands included therein at sheriff's sale and took a certificate of sale. Ninety days before the maturity of such certificates, the county treasurer assumed to give M., the owner of the lands, the statutory notice of expiration of the time for redemption. It was signed, "Emmons County, North Dakota, by H. W. Allen, County Treasurer," and service thereof attempted by registered mail, and by leaving a copy with one F., an employee at the hotel where M. resided. M. had no family, and was not residing in the family of another, within the meaning of subdivision 7, section 6838, Revised Codes 1905. *Held,* for reasons stated, that such attempted service was void. McKenzie v. Boynton, 531.

STATUTES—Continued.

42. Under section 8105, Revised Codes 1905, requiring a claimant within three months after the claim has been rejected, to sue it or it will be barred. *Held,* that plaintiff's claim is barred. Singer v. Austin, 546.

43. Such statute is operative as to claims presented and constructively rejected by nonaction for ten days, as provided in section 8103, Revised Codes 1905, although notice to creditors, as provided in section 8097, Revised Codes 1905, has not been given. Singer v. Austin, 546.

44. Section 8097, Revised Codes 1905, requiring publication of notice to creditors, is independent of section 8105, requiring suit within three months after the claim is rejected. Publication of notice under the former is not necessary to the enforcement of the latter. Singer v. Austin, 546.

45. Under section 5054, Revised Codes 1905, all remedies possessed by a mortgagor against the mortgagee were barred January 1, 1906, and the foreclosure proceedings after that date were unassailable by J., and appellant acquired, by lapse of time, perfect title to the premises as against him and those claiming under him, and plaintiff's action should be dismissed. Justice v. Souder, 613.

46. Costs under section 7179, Revised Codes 1905, are in the discretion of the court, and unless abuse is shown, its refusal of certain costs will not be disturbed. Whitney v. Akin, 638.

47. Costs or attorney's fees, under section 7176, Revised Codes 1905, apply only to actions which are indisputably for the foreclosure of a mortgage upon real or personal property. Whitney v. Akin, 638.

48. Proceedings under chapter 5, of Code of Criminal Procedure, Revised Codes 1905, relating to bastardy, are neither civil nor criminal, but partake of the nature of both. Hence section 6829, Revised Codes 1905, providing for trial in the county where the defendant, or some of the defendants reside, does not apply, and it was error to change place of trial to the county of defendant's residence. State v. Lang, 679.

49. An affidavit for attachment contained the word "plaintiff" instead of "defendant," which was a manifest clerical error, *held,* no ground for dissolving the attachment, but a mere trivial defect to be disregarded under section 6886, Revised Codes 1905. Hilbish v. Asada, 684.

50. Section 5119, Revised Codes 1905, provides: "When a testator omits to provide in his will for any of his children, or the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he died intestate, and succeeds thereto as provided in the preceding section. *Held,*

STATUTES—Continued.

that parol testimony is admissible to show that a child was intentionally omitted from the will. Schultz v. Schultz, 688.

51. Section 8294, Revised Codes 1905, requiring county courts of increased jurisdiction to certify cases to the district court when "it shall appear to the court by affidavit, or if the court shall so order, upon other testimony, that a fair and impartial trial cannot be had in such court, by reason of the bias or prejudice of the judge, or otherwise," construed, and *held*, that the affidavit must set forth facts, not conclusions of the affiant, that the county judge is so prejudiced that he cannot have a fair and impartial trial. Waterloo Engine Co. v. O'Neal, 784.

52. It is sought by mandamus to compel the secretary of state to make his certificate as prescribed by chapter 62, Laws 1907, relative to the division and organization of counties. Alternative writ issued, to the sufficiency of which defendant objects. *Held*, for reasons stated in the opinion, objection is without merit; the court having struck out most of defendant's answer embracing new matter of a relevant and material character, and by same order, and on motion of relator, the issuance of a peremptory writ was directed. *Held*, that such order involved the merits, and necessarily affected the judgment within the meaning of section 7081, Revised Codes 1905. Hence, it is a part of the judgment roll, and may be reviewed on appeal from the judgment. State v. Meyers, 804.

53. Section 9372, Revised Codes 1905, relating to the prohibition law, provides, among other things, as follows: "Whenever the state's attorney shall be unable, or shall neglect or refuse to enforce the provisions of this chapter in his county, or for any reason whatever the provisions of this chapter shall not be enforced in any county, it shall be the duty of the attorney general to enforce the same in such county, and for that purpose he may appoint as many assistants as he shall see fit, and he and his assistants shall be authorized to sign, verify or file all such complaints, informations, petitions and papers as the state's attorney is authorized to sign, verify or file, and to do and to perform any act that the state's attorney might lawfully do or perform * * *" *Held*, attorney general and assistants can appear before the grand jury. State v. District Court, 819.

54. Section 2494, Revised Codes of 1905, provides, among other things, as follows: "The attorney general or his assistants are authorized to institute and prosecute any cases in which the state is a party, whenever in their judgment it would be to the best interests of the state so to do." *Held*, attorney general and assistants can appear before the grand jury when they deem it for the best interests of the state so to do. State v. District Court, 819.

## STATUTES—Continued.

55. The right of the attorney general and his assistants to go before the grand jury is not affected by section 9829, Revised Codes of 1905, allowing only the state's attorney to appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable before them, and to interrogate witnesses before them whenever he thinks it necessary, and permitting no other person to be present during the sessions of the grand jury except the members and a witness actually under examination. State v. District Court, 819.

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STATUTORY CONSTRUCTION. See Intoxicating Liquors, 396; Judgments, 489; Municipal Corporations, 98.

1. To be unlawful, an act must be brought within the terms of the ordinance, or synonymous terms, or terms included within the terms of the ordinance. Mayville v. Rosing, 98.
2. If the terms of such an ordinance be liberally construed, there can be no conviction thereunder based solely on the fact that the acts are within the spirit or purpose of the ordinance. Mayville v. Rosing, 98.
3. Facts stated in the opinion, *held* not to show a violation of an ordinance declaring it unlawful to construct a wooden building within the fire limits of the city. Mayville v. Rosing, 98.
4. Revised Codes 1905, section 8083, was not designed to enlarge the constitutional grant of power to county courts, nor did the legislature by its enactment intend to make the proceeds of such life insurance policies and beneficiary certificates as are therein mentioned a portion of the estate of the insured, but the intent was merely to exempt from the payment of the debts of the decedent all such proceeds as might become assets of such estate. Finn v. Walsh, 61.
5. Under section 4698, Revised Codes 1905, making officers, agents and stockholders of nonresident corporations doing business within this state without complying with the statutes thereof, "liable on any and all contracts of such corporation * * * made within this state," these officers, agents and stockholders are liable on the implied contracts or obligations of such corporations to return everything which was received by the corporation under an

STATUTORY CONSTRUCTION—Continued.

express contract with it by a party who has rescinded the express contract. Chesley v. Soo Coal Co., 18.

6. Section 5934, Revised Codes 1905, providing that misrepresentations in applications or contracts for insurance shall not be deemed material unless made "with actual intent to deceive, or unless the matter misrepresented increased the risk of loss," includes statements in applications called warranties by the laws of insurance. Such statutes are remedial and liberally construed. Soules v. Yeomen, 23.

7. Errors, if any, in sustaining objections to questions put to a party who is under cross-examination as an adverse party, under section 7252, Revised Codes 1905, cannot be taken advantage of when there is no offer showing that the answer would be material under the issue formed by the pleading. Soules v. Yeomen, 23.

8. Section 6824, Revised Codes 1895, does not authorize bringing in, by order of court, additional parties after entry of judgment. St. P. M. & M. Ry. Co. v. Blakemore, 134.

9 Section 6825, Revised Codes 1905, authorizes intervention and interpleader in a pending action, only before the trial, of parties, whose rights are undetermined, and will not permit intervention after judgment of an intervener, whose petition does not show a clear, unmistakable or adjudicated interest in the judgment rendered. St. P. M. & M. Ry. Co. v. Blakemore, 134.

10. Statutes providing for the recovery of damages for death by wrongful act, construed, and *held*, that brothers and sisters of one killed by wrongful act are included in the term "heirs at law," as used in section 7689, Revised Codes 1905, when no parent, wife or child survive the person killed. Satterberg v. Soo Ry. Co., 38.

11. The statutes, providing rignt of action for damages caused by death by wrongful act, do not contemplate a legal obligation of deceased towards surviving heirs to entitle them to sue for the injury sustained by them through the death of the person of whom they are heirs. Satterberg v. Soo Ry. Co., 38.

12. Sections 7686, 7691, Revised Codes 1905, provide recovery for the death of one by wrongful act by such heirs at law of the deceased who are deprived of pecuniary aid, support or benefit, which he was obligated to render, or which they were receiving, or had expectation of receiving, as a duty or recognized sense of obligation. Satterberg v. Soo Ry. Co., 38.

13. Chapter 51, page 73, Laws 1907, amending and re-enacting section 4395, Revised Codes 1905, prescribing maximum coal rates for the transportation by common carriers of coal in carload lots within the state, is not violative of section 8, article 1 of the constitution of the United States, known as the "commerce clause," which confers upon congress the power "to regulate commerce

STATUTORY CONSTRUCTION—Continued.

with foreign nations, and among the several states, and with the Indian tribes;" nor does it violate the fourteenth amendment of the federal constitution, nor section 13 of the constitution of North Dakota, providing, in effect, that no person shall be deprived of life, liberty or property without due process of law. State v. N. P. Ry. Co., 45.

14. The legislative assembly possesses the undoubted power, under section 142 of the constitution of North Dakota, to prescribe maximum rates for the transportation by common carriers of commodities between points within the state, provided the rates thus prescribed are reasonable. State v. N. P. Ry. Co., 45.

15. Chapter 51, page 73, Laws 1907, amending and re-enacting section 4395, Revised Codes 1905, prescribing maximum coal rates for coal in carload lots within the state, is presumptively valid and the burden is upon the carrier to prove that the rates therein prescribed are clearly unreasonable. State v. N. P. Ry. Co., 45.

16. The purchaser of land at a tax sale cannot avail himself of the ex parte remedy provided by section 7454, of the Revised Codes 1905, to enjoin the foreclosure of a mortgage. Hodgson v. State Finance Co., 134.

17. Under Revised Codes 1905, section 7252, forbidding a party to an action against the heirs or representatives of a decedent to testify to conversations or transactions with decedent; testimony by plaintiff, in an action to specifically enforce an alleged contract of sale of land with a decedent, that decedent promised to go to a certain town the next day, and fix up the deal on the terms of the contract of sale, was inadmissible. Larson v. Newman, 153.

18. Under the terms of a certain will and the facts of the case, *held*, (1) That the direction to sell the real property described operated to convert the same into personalty. (2) That the mere creation of the trust therein mentioned does not, ipso facto, suspend the power of alienation. That such power of alienation is only suspended by such trust, where a trust term is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the nonaction of the trustee, or in consequence of a discretion reposed in him by the creator of the trust. The statute of perpetuities is pointed only to the suspension of the power of alienation, and not at all to the time of its actual existence. The statute against perpetuities is not violated by directions in the will which may involve some delay in the actual conversion of the property arising from any cause; nor does the fact that the trustee is vested with a discretion to delay the sale of the real estate, not exceeding a cer-

STATUTORY CONSTRUCTION—Continued.

tain priod mentioned, involve an unlawful suspension of the power of alienation. Hagen v. Sacrison, 160.

19. Under chater 5, page 9, Laws 1901, an action to determine adverse claims and to quiet title may be brought by one in possession or by one out of possession, and the right of possession may be determined in such action, and a restitution of the possession may be adjudged in the decree. Burke v. Scharf, 227.

20. The judgment provided a jail sentence and fine and costs amounting to $587.95, and adjudged that in default of payment thereof, defendant be imprisoned an additional period of 294 days. Under section 9379, Revised Codes 1905, the limit of imprisonment for fine and costs is six months. Judgment is modified accordingly. State v. Stevens, 249.

21. Tax judgment obtained under the provisions of section 57, chapter 132, page 398, Laws 1890, are not ordinary money judgments, and do not expire by the statute of limitations. Hanson v. Franklin, 259.

22. Section 57, chapter 132, page 398, Laws 1890, being purely remedial, and merely giving a remedy to enforce existing rights and obligations, is to be construed as applying to taxes levied (but not collected) prior to its passage as well as to those levied thereafter. Hanson v. Franklin, 259.

23. The provision of chapter 132, Laws 1890, with reference to the filing of the tax list with the county auditor, the delivery of such list to the board of county commissioners, and the filing of a copy thereof with the clerk of the district court, are not mandatory, but directory. Hanson v. Franklin, 259.

24. Where the judgment was obtained and docketed for personal property taxes pursuant to the provisions of chapter 132, page 376, laws 1890, and became liens upon the real property in question, such liens continued notwithstanding the repeal of the law under which the liens were acquired. Hanson v. Franklin, 259.

25. The supreme court will settle a statement of the case when the trial judge refuses to settle it in accordance with the facts, under section 7060, Revised Codes 1905. Tuttle v. Pollock, 308.

26. A demurrer to an information in a criminal action upon the ground stated in subdivision 2, section 9900, Revised Codes 1905, as follows: "That it does not substantially conform to the requirements of the code," is too indefinite. The pleader should specify wherein such information fails to conform to the requirements of the code of criminal procedure, so as to apprize the court of the precise point of the objection. State v. Longstreth, 268.

27. The strict rules of the common law regarding criminal pleading are abolished by statute, and under section 9856, Revised Codes 1905, an information or indictment is sufficient if the offense is

STATUTORY CONSTRUCTION—Continued.

clearly and distinctly set forth in ordinary and concise language without repetition, to enable one of common understanding to know what is intended; it is sufficient if the offense is charged with sufficient certainty to enable the court to pronounce judgment upon a conviction. State v. Longstreth, 268.

28. Section 9891, Revised Codes 1905, enumerates the grounds upon which a motion to quash an information or indictment may be made, and it is exclusive. State v. Longstreth, 268.

29. Chapter 183, page 266, Laws 1909, which imposes upon district judges certain duties relative to the issuance of druggist's permits, is not unconstitutional, although such duties are held to be administrative and not judicial in character. Kermott v. Bagley, 345.

30. Such statute is not repugnant to section 109 of the constitution of this state in depriving applicants for such permits of the right of appeal. Said section 109 is *held* not mandatory, but merely permissive, and furthermore, it has no application to decisions in matters of a nonjudicial character. Kermott v. Bagley, 345.

31. Under section 4049, Revised Codes 1905, "extreme cruelty," is a ground for divorce, and by section 4051, it is defined as: "The infliction by one party to the marriage of grievous bodily injury or grievous mental suffering upon the other.' *Held*, that mental suffering may be sufficient to warrant a divorce under the statute, although not productive of perceptible bodily injury; but whether grievous mental suffering has been inflicted by one party upon the other is purely a question of fact, to be determined in the light of the particular circumstances surrounding each individual case. Rindlaub v. Rindlaub, 352.

32. Chapter 187, page 277, Laws 1909, amending as it does section 9866, Revised Codes 1905, is a part of the Penal Code of this state, and its construction comes within the provisions of section 8538, Revised Codes 1905, that "the rule of the common law, that penal statutes are to be strictly construed according to the fair import of their terms, with a view to effect its objects and to promote justice. State v. Fargo Bottling Works Co., 396.

33. If a penal statute containing a patent ambiguity, and admits of two equally reasonable and contradictory constructions, that which favors the accused is to be preferred. If the meaning is simply obscure, the legislative intent will be considered to assist the court to arrive more acurately at its meaning. Courts will adopt that sense of the words which harmonizes best with the context and promotes in the fullest manner the policy and objects of the legislature. State v. Fargo Bottling Works Co., 296.

34. Chapter 187, page 277, Laws 1909, construed in the light of these principles, is not contradictory in its terms, and is not ambiguous

STATUTORY CONSTRUCTION—Continued.

in the sense that it is susceptible of two or more meanings equally clear and reasonable. State v. Fargo Bottling Works Co., 396.

35. Considered with its context, under a fair, reasonable and ordinary interpretation of the wording, the clause contained in chapter 187, page 277, Laws 1909, in the words, "any kind of beverage whatsoever, which, retaining the alcoholic principle or other intoxicating qualities as a distinctive force, may be used as a beverage, and become a substitute for the ordinary intoxicating drinks," is intended to describe a beverage which contains alcohol or other drug having an intoxicating quality, in a quantity reasonably appreciable, and in which said drug has not by chemical combination with other drugs also contained in the liquor, lost its intoxicating principle, which liquor according to common experience and observation, will be resorted to by those accustomed to use intoxicating drinks in the usual way. In such liquor, alcohol or other drug of kindred quality, preserving its native characteristics, must be present, but not necessarily in such quantity as to produce intoxication. State v. Fargo Bottling Works Co., 396.

36 Chapter 187, page 277, Laws 1909, is not in any of its parts repugnant to section 61 of the state constitution, for the reason that the subject of the act is not expressed in the title. Being an amendment to chapter 110, page 309, Laws 1890, it is a sufficient compliance with the constitutional requirement if the subject matter of such amendment is germane to the subject of the original act of which this amended section is a part and is within the title of that act. State v. Fargo Bottling Works Co., 396.

37. Any liquor containing alcohol or the alcoholic principle or other intoxicating quality when declared by the legislature to be an intoxicating liquor, will be so regarded by the courts whether or not its ordinary use will produce intoxication in the average man. A definition of intoxicating liquor including within its provisions a liquor containing the alcoholic principle, but which it is admitted will not produce intoxication in any degree, is germane to the general subject of chapter 110, page 309, Laws 1890, and within the title, "An act to prescribe penalties for the unlawful manufacture, sale and keeping for sale of intoxicating liquors, and to regulate the sale, barter and giving away of such liquors for medical, scientific and mechanical purposes." State v. Fargo Bottling Works Co., 396.

38. Chapter 187, page 277, Laws 1909, is replete in itself, and does not purport to amend section 9353, Revised Codes 1905, providing a penalty for violation of the prohibitory law, and while it by implication affects and modifies somewhat the meaning of said section 9353, as well as many other sections of the general statute, it is not for that reason repugnant to section 64 of the state con-

STATUTORY CONSTRUCTION—Continued.

stitution, requiring that all portions of the amended statute that are retained in the new enactment be incorporated and published in the amended act. State v. Fargo Bottling Works Co., 396.

39. A malt liquor retaining the alcoholic principle as a distinctive force which it is admitted is "used throughout the state of North Dakota as a substitute for beer," cannot be regarded as an innocent, harmless and healthful beverage. It is a matter of common knowledge that a liquor of this description may be harmful in the sense that its use cultivates and stimulates an appetite for intoxicants which may become seriously detrimental to the general welfare. A liquor with these characteristics and used in this manner is a convenient vehicle of subterfuge and fraud and a means of evading the penalties of the prohibitory law. For this reason, a statute prohibiting the sale of such liquor within the state is a legitimate exercise of the police power of the state, and is not repugnant to the provisions of sections 1 and 13 of the state constitution. State v. Fargo Bottling Works Co., 396.

40. Where a complaint in justice court, on which the accused is held to answer in the district court, does not allege the keeping and maintenance of the nuisance as of a second offense, the state's attorney may, under section 9792, Revised Codes 1905, file an information in the district court for the alleged offense, charging it as a second offense. State v. O'Neal, 426

41. Under the mechanic's lien law (chapter 79, Revised Codes 1905), a subcontractor is entitled to a direct lien for work done, or material furnished, irrespective of the state of the accounts on the contract between the owner and the contractor, or the amount due or unpaid upon their contract. Langworthy Lbr. Co. v. Hunt, 433.

42. Section 4297, Revised Codes 1905, provides that killing or damaging any horses, cattle or other stock by the cars or locomotives along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation. In an action for killing or injuring stock, proof of ownership, killing or damaging, and its value, makes a prima facie case; but when the plaintiff relies solely upon the statutory presumption of negligence, and the testimony of those in charge of the running of the train is unequivocal that everything was done that could be done, after the discovery of the stock upon the track, to prevent its injury, and that the train was properly equipped and all appliances in good order, and no conflicting evidence is offered as to material questions, and the circumstances are not in conflict with such evidence, the prima facie case made under the statute is overcome, and the defendant is entitled on proper motion, to a directed verdict. Corbett v. G. N. Ry. Co., 450.

STATUTORY CONSTRUCTION—Continued.

43. Under section 1933, Revised Codes 1905, it is lawful for certain stock to run at large between the 1st day of November, and the 1st day of April, except in counties where the electors vote otherwise. *Held,* the object of the statute permitting stock to run at large during the months named is to permit it to feed upon commons and unfenced lands without liability of owners for damages done on such lands, and not to impose upon the owners of such premises any greater degree of care for or towards such stock than is required at other seasons of the year. Corbett v. G. N. Ry. Co., 450.

44. The statute quoted only affects the remedy or measure of damages in case of injury by such animals, and as applicable to acts of negligence by the owner of the premises on to which stock strays during the open season, such stock is trespassing. Corbett v. G. N. Ry. Co., 450.

45. The neglect of an attorney regularly retained to prepare and serve an answer in a case before the time for answering expires, when occasioned by intense absorption of mind in the conduct of the trial of another case, involving a charge of murder in the first degree, is "excusable neglect," within the meaning of the statute providing for the opening of a judgment entered on default of answer. Bank v. Branden, 489.

46. Under the law in force prior to the enactment of chapter 113, Laws 1899, relating to negotiable instruments, an extension of time of payment made by the holder of a promissory note to the principal debtor for a valuable consideration and without the knowledge and consent of a guarantor of said note, operated to release the guarantor from liability. This principal is still in force, unless it is changed by the adoption, as part of the law of 1899, of section 6422, Revised Codes 1905, providing the terms upon which a person secondarily liable upon a negotiable instrument is discharged. Bank v. Bellamy, 509.

47. The liability of a guarantor of payment is predicated wholly upon the terms of his contract of guaranty, which is separated and distinct from the terms of the instrument on which it is indorsed. He is not a joint contractor with the principal debtor, and does not agree to make the debt his own, but only to answer for the consequences of his principal's default. His contract, while it may result in requiring him to pay the note, is secondary, within the meaning of section 6494, Revised Codes 1905. Bank v. Bellamy, 509.

48. The terms "primarily liable," and "secondarily liable," as used in section 6494, Revised Codes 1905, have reference to the remedy provided by law for indorsing the obligation of one signing a negotiable instrument, rather than to the character and limits of the obligation itself. The remedy against a guarantor, depending

as it does upon his separate contract of guaranty, and not upon the terms of the instrument, is not primary and direct, but collateral and secondary. Bank v. Bellamy, 509.

49. A guarantor of payment of a negotiable instrument, not being by the terms of the instrument absolutely required to pay the same, is secondarily liable thereon; and an extension of time to the principal debtor without his consent, operates, under section 6422, Revised Codes 1905, as under the law formerly in force, to release him from liability. Bank v. Bellamy, 509.

50. Under the so-called "Wood Law" (Chapter 67, Laws 1897), Emmons county obtained a judgment for taxes in October, 1897. In December following the sheriff sold the lands to the county, to whom certificates were issued. Ninety days preceding the maturity of the certificates, the treasurer assumed to give the owner the statutory notice of expiration of time for redemption. The notice was signed, "Emmons County, N. D., by H. W. Allen, County Treasurer," and service was attempted by registered mail, and also by copy left to an employee at the hotel where the owner resided. The owner had no family nor was he residing in the family of another, within subdivision 7, section 6838, Revised Codes 1905. *Held*, service was void. McKenzie v. Boynton, 531.

51. Under section 8105, Revised Codes 1905, requiring a claimant within three months after his claim has been rejected to bring suit thereon, otherwise the same will be barred forever, *held*, that plaintiff's claim is barred. Singer & Co. v. Austin, 546.

52. Such statute is operative as to claims presented and constructively rejected by nonaction for ten days as provided in section 8103, Revised Codes 1905, although notice to creditors as provided in section 8097, Revised Codes 1905, has not been given. Singer & Co. v. Austin, 546.

53. Section 8097, supra, requiring the publication of notice to creditors being independent of section 8105, requiring suit to be brought within three months after the claim is rejected, the publication of notice under the former is an unnecessary condition to the enforcement of the latter. Singer & Co. v. Austin, 546.

54. By operation of section 5054, Revised Codes 1905, all remedies possessed by J. against such mortgage became barred on January 1, 1906, and as a necessary result the mortgage and the foreclosure proceedings thereunder becoming, after January 1, 1906, unassailable by J., appellant acquired, by lapse of time, a perfect title to the premises as against him, and those claiming under him, and plaintiff's action should be dismissed. Justice v. Souder, 613.

55. Costs allowed under section 7179, Revised Codes 1905, are in the discretion of the court, and, unless the facts show an abuse of the court's discretion, its rulings refusing certain costs will not be disturbed. Whitney v. Akin, 638.

STATUTORY CONSTRUCTION—Continued.

56. The costs or attorney's fee which may be allowed by the provisions of section 7176, Revised Codes 1905, apply only to actions which are indisputably for the foreclosure of a mortgage upon real or personal property. The fact that the parties in equity stand in a relation that is practically that of mortgagor and mortgagee, does not itself require or authorize an allowance of costs under this section. Whitney v. Akin, 638

57. Bastardy proceedings are not strictly either civil or criminal, but partake of the nature of both. Hence, section 6829, Revised Codes 1905, providing for the trial of an action in the county where the defendant or some of the defendants reside at its commencement, does not apply, and the court erred in granting a change of the place of trial to the county of the defendant's residence. State v. Lang, 679.

58. An affidavit for attachment in reciting the statutory grounds of nonresidence, etc., used "plaintiff" instead of "defendant." *Held,* a manifest clerical error insufficient to dissolve such attachment; and should be disregarded pursuant to section 6886, Revised Codes 1905. Hilbish v. Asada, 684.

59. Section 5119, Revised Codes 1905, provides: "When a testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section." *Held,* construing such section, that parol testimony is admissible to establish the fact that a child omitted from the will, was intentionally thus omitted. Schultz v. Schultz, 688.

60. Construing section 9931, Revised Codes 1905, providing that the state may apply for change of venue in a criminal action, and that the court may order such change, *held,* that the granting or denying of such change on the application of the attorney general, on the ground that an impartial trial cannot be had in the county where the action is pending, is within the sound discretion of the trial court, and its ruling will only be disturbed for abuse. State v. Winchester, 756.

61. Section 8294, Revised Codes 1905, which requires county courts of increased jurisdiction to certify cases to the district court when "it shall appear to the court by affidavit, or if the court shall so order, upon other testimony, that a fair and impartial trial cannot be had in such court by reason of the bias or prejudice of the judge or otherwise," construed, and *held,* not to require a certification of the case to the district court upon an affidavit setting forth no facts, but merely the conclusion that the moving party has reason to, and does believe, that the county judge is so prejudiced against him that he cannot obtain a fair and impartial trial. Waterloo Engine Co. v. O'Neal, 784.

STATUTORY CONSTRUCTION—Continued.

62. Proceedings for the division of a county and for the organization of new counties are strictly statutory, and no intendment can be indulged in their favor. State v. Meyers, 804.

63. Statutes relating to county division are liberally construed to give effect to the legislative intent; but such intent being reasonably apparent, those seeking to interfere with existing counties by the creation of new ones, must substantially conform to the requirements of the statute. State v. Meyers, 804.

64. Relevant and material matter was stricken out of the answer and the issuance of a peremptory writ was directed. *Held*, (1) that such order "involved the merits and necessarily affected the judgment," within the meaning of section 7081, Revised Codes 1905. Hence it is a part of the judgment roll, and it may be reviewed by this court on appeal from the judgment. (2) Such order was prejudicial error. State v. Meyers, 804.

STREETS AND HIGHWAYS. See MUNICIPAL CORPORATIONS, 538, 672.

1. One who for his own benefit, or under license from the city, places upon the street a structure which from its nature or failure to guard and keep in repair is or may become dangerous, is under implied contract with the city that while such structure is maintained upon the street, he will exercise ordinary care to protect the public from danger and the city from loss, and if one using a street is injured by reason of such structure or the way in which it is kept, the one who thus rendered the street unsafe is the real wrongdoer, and if the city is subjected to damages to the person injured, he will be held to be an indemnitor of the city. Grand Forks v. Paulsness, 293.

2. Where a city paid a judgment to a person injured upon its streets in an action for failure to keep its streets safe, sues a party, who, under license express or implied from the city, places obstructions in the street which caused the injury, the defendant, if given notice to defendant of the original action, is concluded as to all matters of fact establishing the liability of the city to the persons injured, and as to any defense of the city to such liability. Unless it appears that the evidence of the indemnitor's liability was necessarily involved in the original action and passed upon by the court rendering the judgment, the defendant is not concluded upon the point that notwithstanding his liability to the city, he was not in fault, and has failed in no duty owing to the city or the persons injured, and may plead such defense upon the trial. Grand Forks v. Paulsness, 293.

3. One placing obstructions on a street for his own benefit or convenience, under an implied contract to protect the public and the city from danger and loss, must maintain such structure in a

STREETS AND HIGHWAYS—Continued.

safe condition, keep it in repair and free from changes or additions which with reasonable care may be anticipated; such supervision does not extend to changes and additions which the original structure from its nature or cause does not invite, or which were not in the reasonable contemplation when the party placed it there. Grand Forks v. Paulsness, 293.

4. A party under license from the city, placed in a street a one-inch waterpipe, fastened to the pavement on either side of a two-inch plank to protect the pipe from injury, and from being shifted from its place in the street. Later, without his knowledge, by an unknown agency, and for an unknown purpose, manure was placed upon the pipe and planks, and a third plank upon the manure. This third plank was not attached to the pavement or the planks guarding the water pipe, but was loose and movable. It was so placed that pedestrians stepping on one end caused the other to raise five or ten inches from the street. While in this position a passer stepping over the loose end, caught his foot upon it and fell to the pavement, sustaining injuries, for which he sued the city, recovering a judgment which the city paid. City then sued the party placing the waterpipe and the planks guarding it as an indemnitor, alleging failure on his part to keep safe the structure so placed by him. *Held* that the party placing the waterpipe, and the planks guarding it, could not be said to have contemplated that some other person would change or add to the structure placed by him by putting manure on it, and a loose plank on top of the manure, that would rise when stepped upon, and cause an accident, and that the accident did not result proximately from such act of the defendant, or the failure to perform any duty imposed upon him thereby to keep the structure safe. Grand Forks v. Paulsness, 293.

STENOGRAPHERS.

1. A court stenographer may refer to, and read, from a transcript of his notes, after foundation laid, by showing them correctly taken and subscribed. State v. Longstreth, 268.

SUBROGATION. See EQUITY, 531.

SUPREME COURT. See APPEAL AND ERROR, 308, 522, 551, 630, 634.

1. The supreme court will settle a statement of the case when the trial judge refuses to settle it in accordance with the facts, under section 7060, Revised Codes 1905. Tuttle v. Pollock, 308.
2. An application to this court for the issuance of a writ of prohibition directed to a county judge, will not be entertained upon a showing merely of a refusal by the district judge to issue such writ. It is only in exceptional cases, involving questions of great

SUPREME COURT—Continued.

public importance, that this court will exercise its prerogative powers in the issuance of writs to such inferior courts. Selzer v. Bagley, 697.

3. If the district judge, without cause, refuses to afford relief, or abuses his discretion in denying a writ of prohibition, relator is not without remedy. But such refusal or abuse of discretion affords no ground for the issuance of such writ by the supreme court. Selzer v. Bagley, 697.
4. It is only in exceptional cases involving questions of great importance that the supreme court will exercise its prerogative powers in issuing its writ to inferior courts. Selzer v. Bagley, 697.

TAXATION. See Appropriation, 286.

1. A sufficient description of the property intended to be assessed and taxed is essential to a valid tax. Hodgson v. State Finance Co., 139.
2. Service of the notice of the time when the period of redemption from a tax sale will expire on the holder of a void tax deed as owner, is not effectual for any purpose. Hodgson v. State Finance Co., 139.
3. Service of the notice of the time when the period for redemption from a tax sale will expire must be made upon the owner of the land personally, if known to be a resident of the state; but if the owner be a nonresident, service shall be made by registered letter, addressed to the owner's last known post office address, and must also be served personally on the person in possession. Hodgson v. State Finance Co., 139.
4. Tax sale certificates, barred by the provisions of chapter 165, page 220, Laws 1901, are not liens on the land. Hodgson v. State Finance Co., 139.
5. The purchaser of land at a tax sale cannot avail himself of the ex parte remedy provided by section 7454, of the Revised Codes of 1905, to enjoin the foreclosure of a mortgage. Hodgson v. State Finance Co., 139.
6. Tax judgments obtained under the provisions of section 57, chapter 132, page 398, Laws 1890, are not ordinary money judgments, and do not expire by the statute of limitations. Hanson v. Franklin, 259.
7. Section 57, chapter 132, page 398, Laws 1890, being purely remedial and merely giving a remedy to enforce existing rights and obligations, is to be construed as applying to taxes levied (but not collected), prior to its passage as well as those levied thereafter. Hanson v. Franklin, 259.
8. The provisions of chapter 132, page 376, Laws 1890, with reference to the filing of the tax list with the county auditor, the delivery of such list to the board of county commissioners, and

TAXATION—Continued.

the filing of a copy thereof with the clerk of the district court, are not mandatory, but directory. Hanson v. Franklin, 259.

9. The judgment and the taxes on which they were rendered, were liens on the real estate in controversy. Hence appellant was not prejudiced by the allowance of the amended answer, setting up the taxes as additional liens on the said real estate. Hanson v. Franklin, 259.

10. Citations issued for the taxes of each year were introduced in evidence and were prima facie evidence of the legality of the taxes assessed for these years. Hanson v. Franklin, 259.

11. Where judgment was obtained and docketed for personal property taxes pursuant to the provisions of chapter 132, page 376, Laws 1890, and became liens upon the real property in question, such liens continued, notwithstanding the repeal of the law under which the liens were acquired. Hanson v. Franklin, 259.

12. Under the so-called "Wood Law" (Chapter 67, Laws 1897), Emmons county obtained a judgment for taxes in October, 1897. In December following the sheriff sold the lands to the county, to whom certificates were issued. Ninety days preceding the maturity of the certificates, the treasurer assumed to give the owner the statutory notice of expiration of the time for redemption. The notice was signed, "Emmons County, N. D., by H. W. Allen, County Treasurer," and service was attempted by registered mail and also by copy left with an employee at the hotel where the owner resided. The owner had no family, nor was he residing in the family of another, within subdivision 7, section 6838, Revised Codes 1905. *Held*, service was void. McKenzie v. Boynton, 531.

13. There being no legal service of the notice of expiration of time for redemption from the sale, the county acquired no title through its certificate, but merely retained a lien on the land by virtue of such certificates. McKenzie v. Boynton, 531.

14. Subsequently the county auditor by authority of the county commissioners, attempted to convey the land by deed to H. B. L. Co., and the latter to the defendant. *Held*, that the county having no title, none was conveyed. McKenzie v. Boynton, 531.

15. In addition to the sum paid by H. B. L. Co. to the county for such deed, the company paid to the county certain taxes for subsequent years on the land, and defendant for certain other years. *Held*, that in equity defendant is subrogated to the lien of the county for all taxes, interest and penalty paid by him or his grantor to the county, and that plaintiff will be granted relief only on condition that he reimburse defendant for all sums thus paid, as he who seeks equity must do equity. McKenzie v. Boynton, 531.

TAXATION—Continued.

16. Municipal corporations may tax dogs; such tax is not assessed by valuation, but is a specific assessment in the nature of a license under police regulation, and is a constitutional exercise under police power. Village of Litchville v. Hanson, 672.

TAX DEEDS. See Taxation, 531.

TELEGRAPH. See Contracts, 736; Eminent Domain, 771.

TELEPHONE. See Eminent Domain, 771.

TERRITORIAL COURTS. See Courts, 645.

TIME. See Practice, 23; Notice, 433.

TRESPASS. See Animals, 450.

TRIAL. See Criminal Law, 268; Evidence, 45, 131, 736; Venue, 445; Verdict, 594.

1. Errors, if any, in sustaining objections to questions put to a party who is under cross-examination as an adverse party, under section 7252, Revised Codes 1905, cannot be taken advantage of when there is no offer showing that the answer would be material under the issue formed by the pleading. Soules v. Yeomen, 23.
2. Whether the alleged fault or failure of a defendant to perform a legal duty was the proximate cause of the injury, was for the court to determine upon the material facts presented, and with such inferences as might be drawn therefrom. Grand Forks v. Paulsness, 293.
3. On a trial on a charge of rape, the making and enforcement of an order excluding all persons from the courtroom except "all jurors, officers of the court, including attorneys, litigants and their attorneys, witnesses for both parties, and any other person or persons whom the several parties to the action may request to remain," does not deprive the defendant of a public trial, within the statutory and constitutional provisions giving persons accused of crime the right to "speedy and public trial." State v. Nyhus, 326.
4. On a trial for the offense of rape, it is beyond the limits of proper cross-examination to permit the accused to be asked as to former arrests for other offenses, without the opportunity being given by the questions to answer as to whether he was guilty of the offense for which such former arrest or arrests were made. State v. Nyhus, 326.
5. On a trial for the offense of rape, it is prejudicial misconduct for the attorney for the prosecution in addressing the jury, to urge a conviction "in view of the fact that you have before you two girls whose lives have been ruined by this defendant," etc. State v. Nyhus, 326

TRIAL—Continued.

6. Such statement to the jury is not rendered harmless or not prejudicial by a general caution in the instructions to the jury that misstatment of evidence by the attorneys should be disregarded, and the issue determined from the evidence alone. State v. Nyhus, 326.

7. Where the state's attorney attempts to prove the maintenance of a liquor nuisance as a second offense, and fails to do so, and the jury is expressly cautioned to disregard such offer, or evidence, it was not error nor misconduct for the state's attorney to offer such proof. State v. O'Neal, 426.

8. In answer to a question as to the condition of right of way with reference to snow and other things thereon, witness testified that oats were sprinkled upon the track. Answer was stricken out and the jury cautioned to disregard it. No reference was made to it in the court's charge. From the pleadings, issues and purpose of the question, *held*, that striking of the answer did not cure the error, although not declared reversible error. Corbett v. G. N. Ry. Co., 450.

9. General objections to questions and to a verdict that fail to point out the specific grounds of the objections are inadequate. Mayer v. Ferguson, 496.

10. Where the evidence is undisputed as to the cause for a discharge from service under an existing contract, it is a question of law for the court as to the sufficiency of such cause. McGregor v. Harm, 599.

11. Question as to whether it was error to refuse to strike out the answer of a witness on the ground that it was not the best evidence, considered, and *held*, not to be prejudicially erroneous. Mcgregor v. Harm, 599.

12. Plaintiff refused to offer evidence in support of his complaint and defendant's counsel moved for nonsuit, and the court directed verdict in his favor, and judgment was entered thereon. *Held*, error without prejudice, as the judgment shows upon its face no testimony was introduced, and no issue of fact or law tried and adjudicated, hence such judgment is no bar to another action. Webb v. Wegley, 606.

13. Regardless of the nature of the issues, the district court possessed the requisite jurisdiction to try and decide the same without a jury, where the parties impliedly consented thereto. DeLaney v. Western Stock Co., 630.

14. Evidence examined and *held*, that the findings and conclusions of the trial court are substantially correct, and amply supported by the testimony. DeLaney v. Western Stock Co., 630.

15. The latitude in cross-examination is largely discretionary with the court, and its rulings will be disturbed only for abuse. Mathews v. Hanson, 692.

TRIAL—Continued.

16. A motion for judgment notwithstanding the verdict should not be granted, unless it appears fairly that the defect in pleading or insufficiency of evidence cannot be supplied on another trial. Webster v. McLaren, 752.
17. Whether conversion will lie for certain oats and speltz, depends upon the contract under which they are raised, and the fact being disputed, the case should have gone to the jury. Simmons v. McConville, 787.
18. In an action to foreclose a mechanic's lien for balance due under an express contract, the answer denies that plaintiff had substantially performed the contract, and pleads four counterclaims. Plaintiff moves to strike out certain of such counterclaims, and portions of others; which motion the court granted in part, and denied the remainder. *Held*, for reasons stated in the opinion, that such ruling was non-prejudicial. Marchand v. Perrin, 794.

TROVER AND CONVERSION.

1. In conversion for one-half of the flax raised by plaintiff on defendant's land under a written contract, and for three-fourths of the oats and speltz raised on defendant's land under an oral contract; the written contract provided that the title and possession should remain in the landowner until division, and until the plaintiff's covenants and agreements were fulfilled; *held*, until the grain raised under the written contract was divided, neither the legal title, nor right of possession, was in the plaintiff, and he could not maintain an action for conversion. Simmons v. McConville, 787.
2. Whether conversion will lie for the oats and speltz, depends upon the contract under which they are raised, and the fact being disputed, the case should have gone to the jury. Simmons v. McConville, 787.

TRUSTS. See Wills, 160.

1. Charitable trusts, and such is the character of the trust in the case at bar, are highly favored, and a liberal construction will be adopted in order to render them effectual. Hagen v. Sacrison, 160.
2. Where a charitable bequest is made to trustees in a foreign country, the court will not assume that, should such trustees refuse to act, a foreign court will permit the trust to fail, and will assume that it will appoint a trustee. The general rule is that a trust shall never fail for want of a trustee. Hagen v. Sacrison, 160.
3. Until the real property is actually converted into money by the exercise of the power in trust conferred upon the executor, the legal title thereto rests in the executor as trustee by necessary implication, or in the heir at law for want of the designation of a trustee in the will. If in the latter, it is not by virtue of the

TRUSTS—Continued.

will, but by operation of law on account of the failure of the testator to designate such trustee in his will. Hagen v. Sacrison, 160.

4. Such will confers upon the executor a power in trust to sell and convert such real property into money, and such power may be executed without any act on the part of the heir, even though he be held, by operation of law, to be the trustee of the legal title to these lands. Hagen v. Sacrison, 160.
5. Construing the language of the will, *held*, that such will is not void for uncertainty as to the beneficiaries. The intention of the testator apparently was to restrict such charity to the poor and destitute children in Torrskogen sogn, and the class of persons intended as the objects of his bounty is sufficiently designated. The general class designated may or may not include the pauper poor. This was a matter which he had a legal right to and did impliedly delegate to the trustees of the fund to be administered; such trustees being impliedly clother with the incidental power to select the individuals, within the general class, who are to partake of his bounty. Hagen v. Sacrison, 160.

VENDOR AND PURCHASER. See Contracts, 736; Equity, 736.

1. While the contract remains in force, and the vendee remains in possession thereunder, he is estopped from buying an outstanding title, and thereby repudiate the vendor's contract, and at the same time retain the possession secured by him by virtue of the contract. Burke v. Scharf, 227.
2. Where an action is brought by one out of possession against the vendor and vendee in such contract, and the plaintiff in that action has legal title to the land and conveys such legal title to the vendee, and the action is afterwards dismissed, this does not constitute a constructive eviction of the vendee, entitling him to retain possession under the title thus purchased against the vendor on the contract, as such deed to him is void and champertous as against the vendor in possession. Burke v. Scharf, 227.
3. A mechanic's lien will not attach to the interest of the vendor under an executory contract of sale whose vendee is in possession, and who makes improvements by erecting buildings on the real estate covered by such executory contract. Johnson v. Soliday, 463.
4. Where the vende in an executory contract for the purchase of real estate is in possession and erects buildings thereon, in which the vendor has no interest, except by reason of his holding the legal title as security for the purchase price, and when such vendor is not a party to the purchase of the material or the construction of the improvements, the question of his knowledge of or consent to the furnishing of material or the making of the improvements, is immaterial. Johnson v. Soliday, 463.

## VENDOR AND PURCHASER—Continued.

5. In an action by vendors for specific performance by vendees to pay each year upon the purchase price the sum equivalent to one-half the crop grown upon the land sold, during that year, an allegation in the complaint, admitted by the answer, that the entire balance of the purchase price, in a stated sum, is due and unpaid, will support a judgment of the court requiring that defendants, within a reasonable time to pay the sum to the plaintiffs, and that they thereupon convey the land to the defendants. Whitney v. Akin, 638.
6. Where the court finds that during two years the crops grown upon land held under a contract of sale providing for payment of the purchase price by application each year of the proceeds of one-half the crop, have not been in any part delivered by the vendees to the vendors, and that thereafter there was due upon the contract a certain sum, on an appeal, based on the judgment roll alone, it will be presumed, in support of the findings, that the evidence showed the value of the crops for the two years in which they were not delivered, was, at least, equivalent to the sum so found to be due on the contract. Whitney v. Akin, 638.
7. A contract of a vendee for the purchase of real estate, made through his agent in his own name, without stating the name of his principal, may be enforced by an action for specific performance by such principal in his own name. Mitchell v. Knudtson Land Co., 736.
8. In an action for the specific performance of a contract to convey real estate, where the facts show a failure and refusal to specifically perform the contract, the court may retain jurisdiction of the action, and award damages, and thus determine the controversy without putting plaintiff to the expense and delay of another action. Mitchell v. Knudtson Land Co., 736.
9. Evidence considered, and *held,* not to show that plaintiff knew, when contract was entered into, or when suit was begun, that defendants were unable to convey by a sufficient deed. Mitchell v. Knudtson Land Co., 736.

## VENUE.

1. In determining place of trial of a civil action under chapter 6, Code Civil Procedure, defendant need not examine the complaint critically and with technical exactness, but may assume that the action is what is purports upon the face of the complaint to be, and plaintiff having chosen the form and substance of his pleading, cannot claim that the action, through deficiency and material allegations, is other than on the face of the complaint it appears to be. Viets v. Silver, 445.
2. Where the complaint states a cause of action for the foreclosure of a real estate mortgage, the action must, on due demand of

## VENUE—Continued.

defendant, be tried in the county where the land is situated, and motion to change to such county will be sustained, even if a critical examination of the complaint reveals that it does not state a cause of action for foreclosure of a mortgage, but merely one for the recovery of money only. Viets v. Silver, 445.

3. Change of venue must be determined before trial and often before issue. A district court in acting on the motion may assume that the character of the action is as the complaint purports to state, and refuse to examine the same, as it would upon general demurrer for the purpose of determining the exact character of the cause of action stated. Viets v. Silver, 445.

4. Bastardy proceedings are not strictly either civil or criminal, but partake the nature of both. Hence, section 6829, Revised Codes 1905, providing for the trial of an action in the county where the defendant or some of the defendants reside at its commencement, does not apply, and the court erred in granting a change of the place of trial to the county of the defendant's residence. State v. Lang, 679.

## VENUE, CHANGE OF.

1. Construing section 9931, Revised Codes 1905, providing that the state may apply for change of venue in a criminal action, and that the court may order such change. *Held,* that the granting or denying of such change on the application of the attorney general, on the ground that an impartial trial cannot be had in the county where the action is pending, is within the discretion of the trial court, and its ruling will only be disturbed wor abuse. State v. Winchester, 756.

2. The fact that the defendant, as sheriff, subpoenaed the jury, might be sufficient cause for a challenge to the panel, but is not cause for a change of venue. State v. Winchester, 756.

3. Upon the showing in this case, this court is not prepared to say that there was an abuse of discretion in denying the motion of the attorney general for a change of venue. State v. Winchester, 756.

4. Section 8294, Revised Codes 1905, which requires county courts of increased jurisdiction to certify cases to the district court when "it shall appear to the court by affidavit, or if the court shall so order, upon other testimony, that a fair and impartial trial cannot be had in such court, by reason of the bias and prejudice of the judge, or otherwise," construed, and held not to require a certification of a case to the district court upon an affidavit setting forth no facts, but merely the conclusion that the moving party has reason to, and does believe, that the county judge is so prejudiced against him that he cannot obtain a fair and impartial trial. Waterloo Engine Co. v. O'Neal, 784.

VERDICT. See Evidence, 268; Findings, 702.

1. In an action for money had and received, it was error to direct a verdict for defendant where plaintiff's proof showed that he had a prior lien on certain personalty sold by defendant under chattel mortgage foreclosure, the proof disclosing that defendants promised, for consideration, to pay plaintiff the proceeds of the sale, and a breach of such agreement. Hyde v. Thompson, 1.
2. Evidence examined, and *held* amply sufficient to sustain the allegations of the complaint, both as to the existence of plaintiff's lien, and the promise aforesaid; hence the direction of a verdict in defendant's favor constitutes reversible error. Hyde v. Thompson, 1.
3. Action against sheriff for failure to levy execution upon personal property attached by him. Court directed verdict for defendant on the theory that complaint failed to state, and proof to show, a cause of action, there being no allegation nor proof negativing facts justifying defendant's official acts. *Held*, error, as burden was on defendant to justify his failure, and complaint was sufficient, and testimony showed a prima facie case. Bank of Portal v. Lee, 10.
4. Sufficiency of the evidence to sustain the verdict not considered, where, (a) the record does not affirmatively show that it embraces all the evidence; (b) no proper specification of particulars is incorporated in the statement of the case. Schmidt v. Beiseker, 35.
5. Granting or refusing a new trial for insufficiency of the evidence sustaining a verdict, is within the discretion of the court, and its decision will only be disturbed for abuse. Nilson v. Horton, 187.
6. Where the evidence is conflicting, and there is evidence legally sufficient to sustain the verdict under the instructions given, the verdict cannot be said to be contrary to such instructions. Nilson v. Horton, 187.
7. Section 4297, Revised Codes 1905, provides that killing or damaging any horses, cattle or other stock by the cars or locomotives along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation. In an action for killing or injuring stock, proof of ownership, killing or damaging, and its value, makes a prima facie case; but when the plaintiff relies solely upon the statutory presumption of negligence, and the testimony of those in charge of the running of the train is unequivocal that everything was done that could be done, after the discovery of the stock upon the track, to prevent its injury, and that the train was properly equipped and all appliances in good order, and no conflicting evidence is offered as to material questions, and the circumstances are not in conflict with such evidence, the prima facie case made under the statute is overcome, and the defendant is entitled, on proper motion, to a directed verdict. Corbett v. G. N. Ry. Co., 450.

VERDICT—Continued.

8. In an action to ascertain the amount due to plaintiff and to satisfy the same out of property attached for its purchase price, a verdict in accordance with its issues and identifying the property attached for the purchase price, it being alleged in the complaint that the property attached was the identical property and for which debt in suit was incurred, and no motion having been made to strike out the complaint and the case having been tried on the theory that the identity of the property was in issue, an objection to a verdict containing such finding, made after it is ordered, and renewed after it is returned, comes too late. Mayer v. Ferguson, 496.
9. General objections to questions and to a verdict that fails to point out the specific grounds of the objections are inadequate. Mayer v. Ferguson, 496.
10. An order denying a motion for a new trial or for judgment notwithstanding the verdict, which is based upon the insufficiency of the evidence to justify the verdict, will not be disturbed where it appears that there is a substantial conflict in the evidence. Lang v. Bailes, 582.
11. It was error to direct a verdict for the plaintiff, as the evidence as to such waiver was not undisputed, or, at least, was such that reasonable persons might draw opposite conclusions therefrom. Houghton v. Vavrowski, 594.
12. Plaintiff refused to offer evidence in support of his complaint, and defendant's counsel moved for nonsuit, and the court directed a verdict in his favor, and judgment was entered thereon. *Held,* error, without prejudice, as the judgment shows upon its face no testimony was introduced, and no issue of fact or law tried and adjudicated, hence such judgment is no bar to another action. Webb v. Wegley, 606.

VILLAGES. See Municipal Corporations, 672.

VOTERS AND ELECTIONS. See Mandamus, 209.

1. In the light of the facts stipulated, it is held that the statute requiring the publication for four successive weeks of a notice of election on such county division proposition was not substantially complied with. This being true, it was prejudicial error to deprive defendant of an opportunity to establish the facts pleaded in his answer, and tending to show that actual prejudice in fact resulted on account of a lack of due notice of election. The notice merely consisted of the insertion in the notice of the general election at the foot of the list of candidates the words: "Three petitions for county division." By the order in question, defendant was deprived of the right to show the invalidity of the special election on such proposition, by showing that there was not a

VOTERS AND ELECTIONS—Continued.

full, fair and intelligent expression of the electors upon such proposition. State v. Meyers, 804.

2. After these defenses were stricken out of his answer, it was not incumbent on defendant to offer proof thereof. There was no issue left for trial, except the naked issue of a want of due notice of election, and by the order complained of, defendant was wrongfully deprived of even the opportunity of showing such fact. State v. Meyers, 804.

WAIVER. See Executors and Administrators, 104, 546.

1. Where the district court allows counsel fees in a judgment denying a divorce to the wife, the plaintiff, and granting it to the husband, and the wife appeals from the judgment and demands review of the entire case in the supreme court, under section 7292, Revised Codes 1905, and pending the appeal the wife's attorneys unconditionally accept such counsel fees and costs, the appeal is waived, and the respondent is entitled to dismissal. Boyle v. Boyle, 522.
2. Under the evidence in this case, it was a question for the jury to determine whether a waiver of the return of an engine on a breach of a warranty was intended or not. Houghton v. Vavrowski, 594.
3. It is error to exclude evidence of a conditional sale by an agent of a machine company with consent of the company, as such evidence has a bearing on the question of possession of the property in this case, and upon the question whether a return of same to the company was waived. Houghton v. Vavrowski, 594.
4. Plaintiff, having failed to prove a substantial performance of the contract on his part, cannot recover anything under the contract where defendant is not shown to have waived such performance. Marchand v. Perrin, 794.
5. Evidence examined and *held* insufficient to show such waiver. Marchand v. Perrin, 794.
6. Making payments, taking possession of, and occupying a building, does not of itself amount to waiver, nor estop defendant from urging non-performance of the contract for its erection. Marchand v. Perrin, 794.

WARRANTY. See Insurance, 23; Sales, 317, 594.

1. A covenant against incumbrances and one of warranty are separate and independent and of materially different import, and directed to different objects, and there is no presumption that language qualifying one, is to be transferred or included in the other. Smith v. Gaub, 337.
2. An express exception of a mortgage upon the land in the covenant against incumbrances, in the absence of qualifying words making the deed subject to such incumbrances, or the restriction of the

WARRANTY—Continued.

covenant against incumbranes, apply also to that of warranty or to all the covenants of the deed, does not except such mortgage from the covenant of warranty. Such covenant may be regarded as full and general and an action may lie for failure of the grantor to protect the grantee in quiet enjoyment of the title as against the mortgagee mentioned in the covenant against incumbrances as well as any other paramount title. Smith v. Gaub, 337.

3. The purchase by a warrantor of title to real property, of an incumbrance covered by his warranty for any purpose other than the protection of the title conveyed by him, and the assertion by him adversely to the title of his warrantee of paramount title based on such incumbrance, is a breach of the covenant of warranty. In equity the title so purchased by him inures wholly to the benefit of the warrantee, and a court of equity will not permit him to assert the same adversely to the title so warranted by him to such warrantee. Smith v. Gaub, 337.

4. Plaintiff in his deed warranted as follows: "Well seized in fee of the lands and premises aforesaid and had good right to sell and convey the same in manner and form aforesaid, that the same are free from incumbrances, except a certain mortgage amounting to $400, in favor of W., and the above bargained and granted lands and premises in the quiet and peacable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming, or to claim the whole or any part thereof, the said party of the first part will warrant and defend." After the delivery of this deed and the payment of the consideration named therein to plaintiff, he purchased from W. the mortgage for $400, mentioned in the covenant against incumbrances, and brought action to foreclose the same. *Held,* that such mortgage was not excepted from the covenant of warranty or assumed by defendant, that such purchase inured to the benefit of the defendant, and plaintiff could not foreclose. Smith v. Gaub, 337.

WILLS.

1. W. held beneficiary certificates, one from each of two fraternal societies, both payable to "his legal heirs," and in his will bequeathed all his property, real and personal, to appellants F. and C., specially mentioning all life insurance. The societies paid W's testamentary administrator the amount due under the certificates. Respondents, sole heirs of the testator, resisted the administrator's petition for distribution, claiming the fund received under such certificates; the county court awarded the fund to appellants. On appeal the district court reversed such decree and ordered one awarding fund to respondents. *Held,* that the county court had no jurisdiction to try the right and title to such funds, and

WILLS—Continued.

the district court on such appeal acquired no jurisdiction and its judgment directing the county court to distribute such fund to respondents was erroneous. Finn v. Walsh, 61.

2. Under the facts, decedent's estate has no interest in the proceeds of such life benefit certificates. Finn v. Walsh, 61.
3. Under the terms of a certain will and the facts of the case, *held,* (1) that the direction to sell the real property described operated to convert the same into personalty. (2) That the mere creation of the trust therein mentioned, does not, ipso facto, suspend the power of alienation. That such power of alienation is only suspended by such trust, where a trust is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust. Where the trustee is empowered to sell the land, without restriction as as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the creator of the trust. The statute of perpetuities is pointed only to the suspension of the power of alienation, and not at all to the time of its actual existence. The statute against perpetuities is not violated by directions in the will which may involve some delay in the actual conversion of the property arising from any cause; nor does the fact, that the trustee is vested with a discretion to delay the sale of the real estate, not exceeding a certain period mentioned, involve an unlawful suspension of the power of alienation. Hagen v. Sacrison, 160.
4. Charitable trusts, and such is the character of the trust in the case at bar, are highly favored, and a liberal construction will be adopted in order to render them effectual. Hagen v. Sacrison, 160.
5. The provisoins of the bequest directing the executor to make certain arrangements, if possible, with the authorities in Torrskog sogn regarding the establishment and maintenance of such home, are construed as mere recommendations of the testator, and not as conditions precedent to the carrying out of such bequest. Hagen v. Sacrison, 160.
6. The provisions of the will relating to such charitable bequests are not too vague, indefinite and uncertain to be legally enforceable. The owner of the property may do as he pleases with it, provided the disposition be not to unlawful purposes, and what he may do himself he may do by agent while living, or by his executor after death. It is, accordingly, *held,* that the testator had a legal right to vest in his executor the widest possible latitude for the exercise of his judgment in carrying out such bequest. The provisions of the will, which, it is contended, render the same indefinite and uncertain, are, as above stated, merely recommendations and not conditions precedent. Furthermore the record discloses that the municipality known as "Torrskog sogn" is ready

WILLS—Continued.

and willing to accept and carry out the terms of the trust, and, in any event, these are questions which do not affect the validity of the bequest. Hagen v. Sacrison, 160.

7. The fact that the will fails to expressly designate a trustee by name to hold such trust and to administer the trust, does not operate to defeat the trust, when by the language of the will, aided by extrinsic evidence for the purpose of identification, it can be determined whom the testator intended. The fundamental maxim applies that, "That is certain which is capable of being made certain." *Held,* construing the will in the light of the foregoing rule, that the testator manifestly intended to designate as trustee of this fund such officers, and their successors in office, as have, under the laws of Sweden, supervision of the poor in Torrskog sogn. Whether such designation operates in law as a designation of the municipality of Torrskog sogn as such trustee, not determined. Hagen v. Sacrison, 160.

8. Where a charitable bequest is made to trustees in a foreign country, the court will not asume that, should such trustees refuse to act, a foreign court will permit the trust to fail, and will assume that it will appoint a trustee. The general rule is that a trust shall never fail for want of a trustee. Hagen v. Sacrison, 160.

9. Until the real property is actually converted into money by the exercise of the power in trust conferred upon the executor, the legal title thereto rests in the executor as trustee by necessary implication, or in the heir at law, for want of the designation of a trustee in the will. If in the latter, it is not by virtue of the will, but by operation of law on account of the failure of the testator to designate such trustee in his will. Hagen v. Sacrison, 160.

10. Such will confers upon the executor a power in trust to sell and convert such real property into money, and such power may be executed without any act on the part of the heir, even though he be held, by operation of law, to be the trustee of the legal title to these lands. Hagen v. Sacrison, 160.

11. An executor may sell and assign a sheriff's certificate of foreclosure held by him as executor, and a sale legally and regularly so made, conveys all the interest therein of the devisees under the will of which he is executor. Winterberg v. Van De Vorste, 417.

12. Construing the language of the will, held, that such will is not void for uncertainty as to the beneficiaries. The intention of the testator apparently was to restrict such charity to the poor and destitute children in Torrskog sogn, and the class of persons intended as the objects of his bounty is sufficiently designated. The general class designated may or may not include the pauper poor. This was a matter which he had a legal right to, and did impliedly delegate to, the trustee of the fund, to be administered; such trustees being impliedly clothed with the incidental power to

WILLS—Continued.

select the individuals, within the general class, who are to partake of his bounty. Hagen v. Sacrison, 160.

13. Section 5119, Revised Codes 1905, provides: "When a testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section." *Held,* construing such section, that parol testimony is admissible to establish the fact that a child omitted from the will was intentionally omitted. Schultz v. Schultz, 688.

14. The fact of an omission by a testator to provide in his will for any of his children, or for the issue of any deceased child, merely raises a prima facie presumption that such issue was unintentionally omitted, and such presumption is rebuttable by evidence extrinsic the will. Schultz v. Schultz, 688.

WITNESS. See Appeal and Error, 551; Constitutional Law, 249; Continuance, 249; Evidence, 268, 496, 771; Intoxicating Liquors, 249; Trial, 268.

1. That the complaining witness before the committee magistrate, did not possess actual personal knowledge of the facts constituting the offense is not sufficient ground for quashing the information based upon the preliminary examination before such magistrate, where the allegations are positive and not on information and belief, and the complaint is sworn to positively. Hence, it was improper practice to permit defendant to examine the complaining witness to prove lack of personal knowledge of the facts set forth in such complaint, and the motion to quash the information was properly overruled, not only for the foregoing reasons, but because the record shows that such complaining witness did not act on hearsay evidence in making the complaint, as the defendant had made full admissions of the facts tending to show his guilt. State v. Longstreth, 268.

WOOD LAW. See Taxation, 531.

WORDS AND PHRASES. See Wills, 160.

1. An ordinance to the effect that it should be unlawful to construct any wooden building within the fire limits of a city, is not violated by the repairing or remodelling of it, unless there is a substantial erection of a "new building" as that word is commonly understood. Mayville v. Rosing, 98.

2. A "payment" means a payment in money. If paid by promissory note, or anything else than cash, it must be accepted by the payee as payment. *Held,* under the evidence in this case, that the so-

WORDS AND PHRASES—Continued.

called promissory note, given by the administrator to plaintiff's husband, did not constitute a payment. Sjoli v. Hogenson, 82.

3. A "decree of distribution" is an instrument, by virtue of which heirs receive the property of the deceased. Sjoli v. Hogenson, 82.

4. Statutes providing for the recovery of damages for death by wrongful act, construed, and *held*, that brothers and sisters of one killed by wrongful act, are included in the term "heirs at law," as used in section 7689, Revised Codes 1905, when no parent, wife or child survives the person killed. Satterberg v. Soo Ry. Co., 38.

5. Under the provisions of the mechanic's lien law, the "owner" of real estate on whose interest a mechanic's lien will attach, is the person for whose immediate use and benefit the building, erection or improvement is made. Johnson v. Soliday, 463.

6. Where counsel of good reputation and large experience is employed, his neglect of matters necessary to the ordinary procedure of the cas is a "surprise" to the party, under the statute entitling him to relief. Bank v. Branden, 489.

7. The neglect of an attorney regularly retained to prepare and serve an answer in a case before the time for answering expires, when occasioned by intense absorption of mind in the conduct of the trial of another case, involving a charge of murder in the first degree, is "excusable neglect," within the meaning of the statute providing for the opening of a judgment entered on default of answer. Bank v. Branden, 489.

8. The terms "primarily liable," and "secondarily liable," as used in section 6494, Revised Codes 1905, have reference to the remedy provided by law for indorsing the obligation of one signing a negotiable instrument, rather than to the character and limits of the obligation itself. The remedy against a guarantor, depending, as it does, upon his separate contract of guaranty, and not upon the terms of the instrument, is not primary and direct, but collateral and secondary. Bank v. Bellamy, 504.

9. While no exact definition of the terms "confidential relations," and "relations of confidence," applicable in all cases can be given, such relations exist when the parties to a transaction do not meet upon an equality, one having a full knowledge of the subject of traffic, and the other but slight knowledge, and no ability to acquire full knowledge, and the innocent person relies on, and places confidence in the representations made by the other party to the transaction. Liland v. Tweto, 551.

WRIT OF PROHIBITION. SEE PROHIBITION, 697.