REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

JOSEPH COGHLAN
REPORTER

VOLUME 46

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

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

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

PRESENT JUDGES OF THE DISTRICT COURTS.

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

District No. Three,
HON. FRANK P. ALLEN.
HON. FRED J. GRAHAM.

District No. Five,
HON. FRANK FISK.
HON. K. E. LEIGHTON.

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HON. THEODORE KOFFEL, President, Bismarck, N. D.
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HON. JOHN E. GREENE, Secretary and Treasurer, Minot, N. D.

CASES REPORTED IN THIS VOLUME.

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

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TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

ANDREW NYGAARD, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, a Foreign Corporation, Appellant.

(178 N. W. 961.)

Trial — questions submitted for special verdict should contain ultimate facts.

1. Questions submitted to a jury for a special verdict should contain only the ultimate conclusions of fact in controversy. The questions should be plain, single, and direct. They should not comprehend issues of law except as issues of law and fact are necessarily intermingled.

New trial — on motion court may consider its own error in submitting special verdict.

2. In the preparation and submission of questions for a special verdict, the trial court exercises its discretion. When it errs, in this discretion, both in the preparation and submission of such questions to a jury, it may exercise its discretion concerning its own error upon motion for a new trial.

New trial — court has discretion to grant for error in submission of questions for special verdict.

3. In an action for personal injuries, where a special verdict was returned by the jury upon questions proposed that involved questions of fact, questions of law and of fact intermingled, and conclusions of law without any instructions to the jury concerning some of the questions of law involved, and where thereafter the trial court upon motion therefor made its order granting a new trial, it is *held* that the trial court did not abuse its discretion in so doing.

Opinion filed June 17, 1920. Rehearing denied September 10, 1920.

Action for personal injuries in District Court, Stutsman County, *Coffey, J.*

The defendant has appealed from an order granting a new trial.

Affirmed.

Young, Conmy & Young, for appellant.

Complaint cannot be made of failure to instruct unless there is a request for further instruction made. State v. Glass, 29 N. D. 620; North Star Lumber Co. v. Rosenquist, 29 N. D. 567; State ex rel. People v. Banik, 21 N. D. 425; Chrestenson v. Harms, 161 N. W. 346; Huber v. Seiszler, 37 N. D. 556.

A finding that plaintiff was negligent or defendant negligent, or that plaintiff had or had not assumed the risk of injury, would be a legal conclusion on the part of the jury, and not permissible. P. C. & St. L. R. Co. v. Burger, 124 Ind. 275, 24 N. E. 981; L. N. A. & C. R. Co. v. Miller, 141 Ind. 533, 37 N. E. 343; Walkup v. May, 9 Ind. App 409, 36 N. E. 917; E. & T. H. R. Co. v. Taft, 2 Ind. App. 237, 28 N. E. 442; C. C. C. & St. L. R. Co. v. Hadley, 12 Ind. App. 516, 40 N. E. 760; Gaston v. Bailey, 14 Ind. App. 581, 43 N. E. 254; Lee v. C. St. P. M. & O. R. Co. 101 Wis. 352, 77 N. W. 714; Morrison v. Lee, 13 N. D. 600.

Assuming that additional instructions should have been given without request, the error in this regard was not prejudicial. Boulger v. N. P. R. Co. (N. D.) 171 N. W. 635; Guild v. Moore, 32 N. D. 432.

Knauf & Knauf, for respondent.

At defendant's request, the instructions as to the law were omitted and error created. Louisville etc. v. Frawley, 9 N. E. 594; Louisville etc. v. Hart, 4 L.R.A. 549; Ward v. Cochran, 18 C. C. A. 7; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; North Star Lbr. Co. v. Rosenquist, 29 N. D. 566.

All of the issues formed were not submitted. Crick v. Ins. Co. 48 N. W. 198.

The special interrogatory or verdict failing to cover the issues in the entire case cannot control the right of the plaintiff to a general verdict. Reed v. Lammel, 42 N. W. 202; Freidman v. R. R. Co. 71 Atl. 901; Pint v. Bauer, 16 N. W. 84; Crich v. Ins. Co. 48 N. W. 199; Morbey v. R. R. Co. 89 N. W. 105; Hall v. Ratcliff, 24 S. E. 1011; McDougall v. Ashland, etc., 73 N. W. 330; Baxter v. R. R. Co. 8 N. W.

645; Bank v. Peck, 8 Kan. 660; Clemenston, Special Verdicts, p. 204.

To entitle one, submitting special inquiries to a jury, to a verdict on answers thereto, the inquiries must cover all of the issues involved in the case. Morbey v. Ry. Co. 89 N. W. 108.

BRONSON, J. *Statement.*—This is an action to recover personal injuries. The plaintiff, while employed by the defendant upon a pile driver, as a signal man, was injured on May 18th, 1917, by the breaking of a rope which permitted a heavy iron bar to fall upon his back. This rope was used to hold certain iron braces or arms in place in connection with the work of the pile driver.

The complaint, as amended, alleges that the parties were then engaged in interstate commerce; that this rope, so used in connection with the pile driver, was negligently permitted by the defendant to become old, worn, frazzled and frayed. That it negligently failed to properly inspect and repair such rope, although warned of and knowing its dilapidated or frayed condition, for one or more days; that it negligently failed to provide for the plaintiff a safe place to work.

The answer denies negligence on the part of the defendant and alleges that the plaintiff's injury was received because of the ordinary and usual risks of the work in which he was engaged, which he understood and appreciated, and also because of his own contributing negligence.

At the close of the testimony a request for a special verdict was made. The court submitted the case accordingly to the jury for a special verdict upon seventeen questions. No general verdict was returned. The court gave no instructions to the jury whatever, excepting brief definitions of the terms, "negligence," "proximate cause," and "ordinary risk."

These questions and answers are as follows:

1. Was the rope in question here, in a worn and frayed condition before the accident? A. No. The rope was old.

2. If you answer question No. 1 in the affirmative, state whether or not the danger of accident at that time, in continuing to use it in that condition was apparent and known to the plaintiff. A. Yes.

3. Did the plaintiff notify Albert Berg the afternoon before the accident, that the rope in question was in a worn and frayed condition? A. Yes.

4. Did Albert Berg tell plaintiff he would repair or get a new rope by the next afternoon and that the rope in use would be all right till then? A. No.

5. If you answer question No. 4 "Yes," then did plaintiff continue to use the rope in question because of that promise? A.———.

6. If your answer to No. 5 is "Yes," then did plaintiff exercise reasonable care in continuing to use the rope in question, in relying upon that promise? A. No.

7. Was the rope in question cut and the accident caused on account of the manner in which the pile line or steel cable was placed, rather than because of the rope being in a worn and frayed condition? A. Yes.

8. After the operation of straightening the pile was commenced, and just before the accident happened, did Kebsgaard call to plaintiff and say "The block is pulling out" or words to that effect, and did plaintiff look at Kebsgaard and at the block and laugh? A. Yes. He was warned.

9. If your answer to the preceding question is "Yes" (if answer is "no" no answer is necessary) then would the accident have happened if plaintiff had heeded the warning and stopped the operation? A. No.

10. Was the accident in question one arising under the ordinary risks of the kind of work which was being done at that time? A. Yes.

11. Did defendant company furnish the plaintiff with reasonably safe appliances with which to work at time in question? A. Yes.

12. Was the rope in a worn and frayed condition at the time of accident, or immediately before accident? A. No. The rope was old.

13. If you answer question No. 12, "Yes," then was the worn and frayed condition of the rope in question the proximate cause of plaintiff's injury? A. No.

14. Has plaintiff sustained permanent injuries by reason of accident in question? A. Yes.

15. What damage in dollars and cents, if any, has plaintiff sustained and is reasonably certain to sustain because of injuries, pain, suffering, loss of time on account of inability to work, and expense for medical attention growing out of accident in question? A. $7,862.

16. Was the plaintiff himself negligent in the conduct of his work here? A. Yes.

17. If you find plaintiff was negligent state in what sum the amount of his damage should be reduced because of that negligence? A. $500.

Upon such special verdict, the trial court ordered judgment in favor of the defendant. Pursuant thereto, judgment of dismissal with costs was entered. Thereafter, plaintiff made a motion for a new trial upon grounds of error at law, occurring during the trial and for failure of the court to give to the jury instructions as to the law involved. The trial court vacated the judgment and ordered a new trial. The defendant has appealed from such order.

Opinion.—The trial court granted a new trial: The final question therefor is involved whether the trial court in so doing, possessed a discretion, and whether it abused its discretion.

The jury by their special verdict have found strongly against the plaintiff. Among the questions submitted to the jury were questions upon the facts, upon propositions involving mixed questions of law and fact, and upon law issues alone, or mere conclusions of law. For instance, the questions which required the jury to answer whether the plaintiff himself was negligent called for a conclusion of law. Its consideration involved the consideration of a mixed question of law and fact. See note in 24 L.R.A.(N.S.) 62.

In general effect, the jury found that the defendant was free from negligence, and that the plaintiff had assumed the risk and was guilty of contributory negligence, both upon the questions of law and of fact as submitted.

Under the law, § 7633, Comp. Laws 1913, the duty is imposed upon the trial court to both prepare and submit the questions for a special verdict. It possesses a discretion concerning the manner and form of such questions.

The cause at bar was a jury case. The issues of law therein were for the court, and the issues of fact for the jury. Comp. Laws 1913, § 7608. The submission of this case for a special verdict, instead of a general verdict, did not transfer to the jury the issues of law committed by law to the court.

By statute, the special verdict must present conclusions of evidence

as established by the evidence and not the evidence to prove it and these conclusions must be so presented that nothing shall remain for the court except to draw therefrom conclusions of law. Comp. Laws 1913, § 7632. This court has held that the questions for a special verdict should be plain, single, and direct. That they should contain only the ultimate conclusions of fact in controversy. Russell v. Meyer, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262; Lathrop v. Fargo-Moorhead Street R. Co. 23 N. D. 251, 136 N. W. 88; Swallow v. First State Bank, 35 N. D. 608, 161 N. W. 207.

Plainly, questions should not be submitted upon issues of law or that call for conclusions of law. See note in 24 L.R.A.(N.S.) 30.

In such cases, this court has held that it is not proper for the court to give general instructions upon the law, as in the case of a general verdict. Morrison v. Lee, 13 N. D. 591, 598, 102 N. W. 223. That the court should not charge the jury further than is necessary to assist in answering the questions submitted. Lathrop v. Fargo-Moorhead Street R. Co. 23 N. D. 251, 136 N. W. 88. That the jury are not required to find upon a fact established by the undisputed evidence. Swallow v. First State Bank, supra.

These holdings, however, do not mean that the trial court may not instruct, within its discretion, as the circumstances require, concerning the issues upon the pleadings, the burden of proof, the legal rules for weighing and reconciling testimony, and also the law involved in material issues of fact submitted. See note in 24 L.R.A.(N.S.) 62.

In this case the trial court gave no instructions whatever excepting definitions of the terms, "negligence," "proximate cause," and "ordinary risk." In its memorandum opinion, the trial court has justified its order granting a new trial solely upon the ground that the instructions, as given, were insufficient for the jury to intelligently answer the questions propounded.

The appellant contends, however, that the particular questions of fact have been so completely and well answered by the jury upon which no instructions were or should have been given, that, in any event, further instructions would have been of no avail to the plaintiff.

To what extent the answer of the jury upon the particular questions of fact were in any manner influenced or guided by the particular questions calling for conclusions of law or issues of mixed law and fact, or,

to what extent, the finding of the jury that the rope involved was old, and not in a worn and frayed condition, is affected by the findings of the jury to the general effect that the plaintiff was negligent and assumed risks and that the defendant furnished reasonably safe appliances, were matters for the consideration of the trial court in its order for judgment and its order upon the motion for a new trial. This applies where the trial court has submitted questions for a special verdict not in accordance with the statutory requirements. If the trial court has discretion in submitting such questions, it likewise has discretion to review its own error in the exercise of such discretion.

The trial court has determined that it erred. Although, separately considered, it may not have erred in its instructions concerning the particular questions of fact submitted, and in submitting questions calling for conclusions of law beyond the statutory requirements, and in failing to instruct sufficiently thereupon, nevertheless, it may not be said that the trial court has no discretion in reviewing its action, where it has submitted questions to the jury calling for conclusions of law, and where it finds that, upon material law matters necessary for the jury to answer intelligently such questions, it has failed to instruct.

The appellant further maintains that the plaintiff cannot be heard to question the lack of instruction by reason of his failure to request the trial court in such respects; this failure, however, may not control the discretion of the trial court when it deems it proper to exercise its discretion upon the double problem of having submitted to the jury more than ultimate questions of fact and in having failed to instruct the jury upon material law matters necessary for the jury to intelligently answer such questions.

The appellant further maintains that the trial court had no jurisdiction to pass upon the motion for a new trial by reason of the failure of the plaintiff to particularly specify the items upon which the court failed to instruct. Although the plaintiff should technically have so specified, the favorable action of the trial court in recognizing the motion and the specific grounds that might have been specified has cured the error.

If upon all these matters the trial court should have denied the motion for a new trial, the contentions of the appellant might be consid-

ered well taken and the order of the trial court, in such event, should probably not be disturbed.

The further specification of the appellant that upon the undisputed testimony the defendant was entitled to a judgment of dismissal is without merit.

We are of the opinion that the trial court, upon this record, exercised a discretionary right in granting a new trial and did not abuse its discretion in so doing.

The order is affirmed with costs to the respondent.

ROBINSON, J., concurs.

GRACE, J. (concurring specially). This is an appeal from an order granting a new trial.

It has been repeatedly held by this court that the trial court has a wide discretion which it may exercise in granting a new trial; and that where it does exercise that discretion, and does grant a new trial, its order in that respect will not be disturbed, unless it appears it was a clear abuse of discretion to have granted and made it.

The only real question presented in this appeal is whether or not the trial court clearly abused its discretion in granting a new trial. We are unable to say in this case that it has, and, for this reason, its order granting a new trial should be affirmed.

BIRDZELL, J. (dissenting). I dissent. It seems to me to be clear, from a reading of the instructions given and the special verdict of the jury, that the jury has disposed of every issue of fact in the case upon which the liability of the defendant could be based, and that whatever error there might have been incident to the failure to give more adequate instructions was error favorable to the plaintiff, of which he cannot, of course, complain. It is inconceivable that the failure to tell the jury that the plaintiff sustained the burden of proof was in any way detrimental to him. The same is true with regard to the absence of instructions relating to the credibility of the witnesses and the duty of the jury to weigh their testimony, for apparently the jury resolved these questions against the plaintiff. It doubtless would have done so

all the more readily had it been instructed that it was within its province so to do.

The brief instructions with reference to the meaning of the terms "negligence," "proximate cause" and "ordinary risks" are, it seems to me, rather commendable than otherwise. As is indicated in the majority opinion, these terms were properly defined. I fail to see wherein their meaning might have been made more clear by additional exposition. We must assume that the jury was composed of intelligent persons capable of understanding the simple language employed by the court in defining these terms. Since a special verdict was requested, it was incumbent on the court to avoid, as far as possible, the giving of instructions that would indicate to the jury the probable effect of their answers upon the outcome of the litigation. Morrison v. Lee, 13 N. D. 591, 102 N. W. 223; Lathrop v. Fargo-Moorhead Street R. Co. 23 N. D. 246, 136 N. W. 88.

In addition to what has been said, and without attempting a statement as to the form of question to be submitted for a special verdict, I respectfully dissent from that part of the majority opinion which considers the question of negligence or contributory negligence for the purpose of a special verdict as a "mixed question of law and fact." I understand the question of negligence to be a question of fact, and it is none the less so because the law has undertaken to define what shall constitute negligence. It is an inference ordinarily to be drawn from facts proved, but it is an inference of fact. This inference must be drawn by the jury except in those instances where the facts are consistent only with the absence of reasonable care or prudence. The nature of the question is in no wise changed where a special verdict is asked for. A special verdict does not authorize a court to draw this inference of fact in every case. Whenever we say, as we sometimes do, that there is negligence or contributory negligence as a matter of law, or that there is no negligence or no contributory negligence as a matter of law, we adopt the expression as a means of saying that the facts disclosed by the evidence are such as to leave no room for an inference of fact to the contrary.

In the instant case the jury has found ultimate facts to exist from which it is clear that the defendant is not liable for the injury which the plaintiff sustained.

It further appears in this record, and particularly in the memorandum opinion, that the trial court did not base the order for a new trial upon any discretionary grounds, but solely on the ground that it erred in a matter of law. It seems clear to me, for the reasons stated above, that no error of law had been committed and that there is in fact no substantial foundation for a new trial. For these reasons I am of the opinion that it was error to grant it, and that the order appealed from should be reversed.

I am authorized to say that Mr. Chief Justice CHRISTIANSON concurs in this dissent.

MARTHA STEINKE, Appellant, v. H. J. HALVORSON, Northern Telephone Company, a Corporation, and Northwestern Telephone Exchange Company, a Corporation, Respondents.

(178 N. W. 964.)

Negligence — complaint for injury from fall into basement stairway held to state cause of action.

1. In an action to recover damages for personal injuries the complaint alleges that upon a cold day when the air was so filled with flying snow as to obscure plaintiff's vision and distract her attention more or less, she approached a meat market situated in a building owned by one of the defendants and in part occupied by the other; that there were two doors abutting the street, similar in appearance and adjacent to each other, but some 30 feet apart, one leading to the meat market and the other to a stairway leading to the basement of said building. The plaintiff, mistaking the stairway door for the meat market door, opened it and, stepping inside, was precipitated to the basement, sustaining injuries. It is *held*, for reasons stated in the opinion, that the complaint states a cause of action.

Negligence — facts pleaded held to warrant finding of violation of ordinance against unguarded subterranean passage.

2. Where a city ordinance renders it unlawful to leave open, unguarded, or uncovered any subterranean passage, or to suffer any opening or place of like nature to remain in an insecure or other unsafe condition so that persons may fall into or be otherwise injured by the same, it is *held*, under the facts pleaded

in the complaint, that a jury would be warranted in finding that the ordinance was violated.

Opinion filed June 24, 1920. Rehearing denied September 10, 1920.

Appeal from District Court of Ward County, *Leighton,* J.

Reversed and remanded.

McGee & Goss, for appellant.

"The owner of a building holds it subject to the right of the public to prescribe reasonable safeguards and regulations for its protection and the interests of the individual must in such case give in to the requirements necessary for public safety." Russell v. Fargo, 28 N. D. 300.

"Every person has a right to assume that every other person is obeying ordinances in force in the municipality in which they are staying and may regulate his conduct accordingly, and he cannot be charged with contributory negligence for failing to anticipate that the ordinance might be violated." 19 R. C. L. 883.

A violation of the ordinance is negligence per se. Pittsburg R. Co. v. Hood, 36 C. C. A. 423; Cooley, Torts, §§ 736, 737; 2 Dill. Mun. Corp. 4th ed. § 1032; Hayes v. Mich. Central, 111 U. S. 410.

Even an excavation entirely outside the street line, but so near thereto as to endanger the traveling public, is held to be a nuisance and the continuance or maintenance thereof actionable. Rowel v. Williams, 29 Iowa, 210; Smith v. Leavenworth, 15 Kan. 81; Abilene v. Cowperthwait, 52 Kan. 324, 34 Pac. 795; Niblett v. Nashville, 12 Heisk. 684, 27 Am. Rep. 755; City Council v. Hafers, 59 Ga. 151; Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; Grove v. Kansas City, 75 Mo. 672; Fitzgerald v. Berlin, 51 Wis. 81, 37 Am. Rep. 814, 7 N. W. 836; Woods v. Groton, 111 Mass. 357; Boucher v. New Haven, 40 Conn. 456.

Had the city been joined as defendant in this action in proper season it could have been held. 19 L.R.A.(N.S.) 516 and cases there cited; Elam v. Mt. Sterling (Ky.) 117 S. W. 250, 20 L.R.A.(N.S.) 513 and extensive note at page 634 to 637, and cases cited in the note; Smith v. Milwaukee Builders Exch. (Wis.) 30 L.R.A. 504.

"Violation of ordinance in itself gives ground for private right of

recovery as between private persons." See exhaustive note in 5 L.R.A. (N.S.) 186; Sluder v. St. Louis Transit Co.; Stringer v. Ala. R. Co. 99 Ala. 397, 13 So. 75; Alabama R. Co. v. Anderson, 109 Ala. 299, 19 So. 516.

"A railroad company owes to trespassers the same as to others upon its track the duty of obeying a municipal ordinance." Erb v. Morasch, 8 Kan. App. 61, 54 Pac. 323; Alabama R. Co. v. Carter, 77 Miss. 511.

L. M. Ellithorpe, for respondent H. J. Halvorson.

"Where a descending stairway was parallel to the sidewalk, and there was sufficient barrier on the side thereof, the defendant was not bound to cause a barrier or gate to be maintained at the entrance; and it was error to submit to the jury the question whether it was negligent in failing to do so." Fitzgerald v. Berlin, 7 N. W. 836.

"To bolt headlong into a place little known, and where the senses cannot take note of it, is not the act of a prudent man and there is no chance for any other inference or deduction concerning it." Massey v. Seller, 45 Or. 267, 77 Pac. 397; cited and quoted with approval in Costello v. Bank, 34 N. D. 141.

Bangs, Hamilton, & Bangs (*E. A. Prendergast,* of counsel), for respondents Northern Telephone Company and Northwestern Telephone Exchange Company.

BIRDZELL, J. This is an appeal from an order sustaining a demurrer to the complaint. The action is one to recover damages for personal injury alleged to have been sustained as follows: During the month of February, 1917, the plaintiff had occasion to go to a meat market situated on First Avenue Southwest, in the city of Minot, in a building owned and controlled by the defendants, the defendant Northwestern Telephone Exchange Company being lessee. The day was very cold and the air was so filled with flying snow as to obscure the plaintiff's vision and to distract her attention more or less. As the plaintiff approached the public entrance to the meat market, she opened a door on the south side of the building, believing this door to be the one opening into the meat market, but instead it was another door in the same building adjacent thereto but some 30 feet from the meat market door and similar to it in appearance. The door which the plaintiff opened led to a stairway running down to the basement of the build-

ing, and as the plaintiff opened it and stepped in she fell down the stairway and was injured. It is charged that maintaining this stairway entrance, abutting as it did upon the street and characterized by a similarity of appearance to the public entrance to the meat market, was dangerous and unsafe as to all who, being unfamiliar with the premises, might enter it by mistake; and that it was negligence on the part of the defendants to so maintain this entrance.

It is further charged that the maintenance of this basement stairway entrance in the manner stated was a violation of § 21 of the municipal ordinances of the city of Minot, reading as follows:

"It shall be unlawful for any person in the city of Minot to leave or keep open, uncovered, or unguarded any cellar door, pit, grating, vault, or subterranean passage opening from, into, or upon any street, alley, sidewalk, or public ground within the city of Minot; nor shall it be lawful for any person to suffer any such door or vault, grating, or other opening or place of like nature connected with the premises owned or occupied by him to remain in an insecure or other unsafe condition so that persons may fall into or be otherwise injured by the same."

The first and decisive question presented upon this appeal is whether or not the complaint states facts which, if proved, would sustain a finding by the jury of negligence on the part of the defendants. Regardless of the decision upon this question, from a common-law standpoint, it might also be proper to consider whether or not the ordinance applies. For if it applies, it may have such a bearing upon the duty of the defendant as either to enlarge the common-law liability or raise a presumption of negligence, and if it does not apply it is proper to so determine for the purpose of settling the law of the case for submission to the jury in case the complaint is otherwise sufficient.

In disposing of the questions raised on this appeal, we find it convenient to notice the contentions of the respondent, as these represent the attack on the complaint.

Attention is given to the allegation that the plaintiff was an "invitee" of the Valley Meat Market as this allegation apparently represents an attempt on the part of the plaintiff to give color to her presence upon the premises which might differ somewhat from that of a trespasser, even though unintentionally or merely technically such. Conceding that if the plaintiff were a licensee upon the defendants' premises the

defendants would owe her a greater duty to protect her from injury than if she were technically a trespasser, liability is not necessarily dependent upon the distinction. This will more fully appear from the discussion to follow. Suffice it to say here that we find it unnecessary to discuss liability from the standpoint of whether or not the plaintiff was technically a trespasser.

The respondent relies upon a general rule which may be stated in substance as follows (quoting from Gibson v. Leonard, 143 Ill. 182–189, 32 N. W. 183, 36 Am. St. Rep. 376, 17 L.R.A. 588:

"Actionable negligence, or negligence which constitutes a good cause of action, grows out of a want of ordinary care and skill in respect to a person to whom the defendant is under an obligation or duty to use ordinary care and skill. The owner of land and of buildings assumes no duty to one who is on his premises by permission only, and is a mere licensee, except that he will refrain from wilful or affirmative acts which are injurious."

That this general rule finds proper application in cases where licensees or trespassers enter upon premises which are so situated with reference to the public and the avenues of public travel as to involve no special duty toward those who come upon them out of curiosity or to subserve some private convenience, there is no room to doubt. Cusick v. Adams, 115 N. Y. 55, 12 Am. St. Rep. 772, 21 N. E. 673; Moffatt v. Kenny, 174 Mass. 311, 54 N. E. 851, 6 Am. Neg. Rep. 564. This principle may also negative liability in cases like the Illinois case of Gibson v. Leonard, supra, where a licensee is injured through using an instrumentality such as an elevator that is in an unsafe condition but toward whom there was no duty to maintain it in a safe condition. But where a building situated upon a busy public street is devoted wholly or in part to retail commercial use and is especially designed with a view to resort thereto by the public, we are of the opinion that there is a duty with respect to its construction and the manner of its maintenance that does not attach to premises designed purely for convenience in carrying on some private business that is not dependent upon the freedom of public ingress and egress.

We do not consider the general rule above stated and the adjudicated cases in which the rule has been applied to be in point under the facts in the instant case, nor has our attention been called to any authority

which does seem to be in point. Yet we think the distinction suggested above, based upon location and use, finds support in the cases relied upon by respondent and even in the English cases where the rule of nonliability finds its broadest application. In Hardcastle v. South Yorkshire R. & River Dun Co. 4 Hurlst. & N. 67, 157 Eng. Reprint, 761, 28 L. J. Exch. N. S. 139, 5 Jur. N. S. 150, 7 Week. Rep. 326, it was held that the defendant was not liable where the plaintiff's intestate in the night time had mistakenly deviated from an ancient footpath and fallen into an unguarded reservoir and drowned—the reservoir being some 20 feet from the footpath. The court, in rendering the opinion (Pollock, C. B.) drew a distinction based upon the degree of proximity of the reservoir to the footpath, saying: "We think the proper and true test of legal liability is whether the excavation be substantially adjoining the way." This can only be the test of liability provided some other consideration than the fact of the plaintiff's being a trespasser is decisive. The true principle, then, would seem to be that the duty is in proportion to the likelihood of injury to those who, at the time, are making proper use of a public highway and are injured as a consequence of the dangerous character of a construction or excavation adjacent thereto. That the test under the English authorities is not dependent upon the fact that the excavation is wholly on the land of the defendant is further illustrated by the case of Hadley v. Taylor, L.R. 1 C. P. 53, 11 Jur. N. S. 979, 13 L.T.N.S. 368, 14 Week. Rep. 59, where the hole into which the plaintiff fell was separated from the highway by 14 inches. These authorities are commented upon in Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175, and in Sanders v. Reister, 1 Dak. 151, 46 N. W. 680, and the principle recognized. The later New York case of Cusick v. Adams, supra, seems to give further recognition to the principle in holding that the defendant was not liable for an injury occasioned to the plaintiff by using an unsafe bridge which was a private bridge and not adjacent to the public highway, the last fact being emphasized. See also 3 Shearm. & Redf. Neg. 6th ed. § 703.

We are unable to perceive any distinction between the liability to technical trespassers or licensees who are injured by reason of falling into an unguarded excavation situated in close proximity to an avenue of public travel and a liability for so guarding an entrance to an excavation that it is apt to be mistaken for an entrance to a public market.

It is therefore our opinion that if the facts pleaded are proved, the jury would be warranted in inferring that the defendant was negligent in the manner in which it guarded the entrance to the basement where the alleged injury took place. 3 Shearm. & Redf. Neg. 6th ed. § 704

We have had some difficulty in arriving at a conclusion as to whether or not, under the facts pleaded, the defendants might be found to have violated the city ordinance above referred to. It will be noted that the ordinance purports to render it unlawful to leave open, unguarded, or uncovered any subterranean passage or to suffer any opening or place of like nature to remain in an insecure or other unsafe condition so that persons may fall into or be otherwise injured by the same. Being of the opinion that the jury would be warranted in finding the entrance to the basement to have been improperly guarded and the premises to this extent to have been in an insecure and unsafe condition, it would seem to follow that they would likewise be justified in concluding that the ordinance was violated. We therefore think it would be proper for the trial court to instruct the jury that if they should find conditions to exist such as are proscribed in the ordinance, and that the ordinance was violated thereby, the defendants would be prima facie negligent.

It follows from what has been said that the complaint states a cause of action. The order appealed from is reversed and the case remanded for further proceedings.

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

GRACE, J. (specially concurring). This action, as appears from the amended complaint, is brought to recover damages for $13,150 for personal injuries claimed to have been sustained by plaintiff, through the negligence of the defendants, $3,150 of the damages claimed was for loss of time, for bills of expenses incurred, such as for hospital, drug, physicians' and surgeons' bills, and other necessary services, fees, and expenses paid and occasioned by the injuries hereinafter set forth. Of this amount $920 had been paid by defendant Halvorson.

Though the case was presented to this court on demurrer, it will not be necessary to set forth the entire amended complaint, to which the demurrer is interposed; but, it will suffice to set forth the material facts and matters alleged and relied upon.

From the amended complaint, it appears that defendant Halvorson, now and during all the times mentioned, is a resident and citizen of Minot, North Dakota, and is, and on the 19th of February, 1917, was, the owner in fee simple of lot twelve (12), Block three (3) of the original townsite of the city of Minot; that there was on said lot a brick building, approximately 140 feet in length, fully covering it, and beneath it there was a basement.

That the Northern Telephone Company, on the day of the injury, and for the year prior thereto, was a tenant in said building, and, as such, did jointly, with the Northwestern Telephone Exchange Company, and the owner of the premises, occupy and have possession of the entire basement underneath the building, and of the door, entrance and stairway leading into the basement, from the south side of the building; that, on January 1, 1916, the Northwestern Telephone Exchange Company purchased all of the corporate stock, corporation assets, and property at Minot, North Dakota, of the Northern Telephone Company, including its lease of the said building and basement, and of the joint rights of occupancy of the Northern Telephone Company, of and to said building and basement, and thereby became the owner of the Northern Telephone Company, defendant, and from and after January 1, 1916, did operate and conduct all of the business done at Minot, North Dakota, of the Northwestern Telephone Exchange Company, in the name of, and under and by and through the Northern Telephone Company, for the use and benefit of the Northwestern Telephone Exchange Company, which was controlled, operated, and owned by the Northern Telephone Company, and as a part thereof, did have the control, jointly, with said Halvorson, the owner of the building and the leasehold premises, and the entrance into the stairway and basement of the building.

That the side of the building, 140 feet in length, extends along First avenue; that there are two entrances on that side of the building, the one where plaintiff was injured, which leads directly to the basement, and another, 30 feet distant therefrom, which leads into the Valley Meat Market. Each of the entrances had doors thereon.

On about noon of February 19, 1917, plaintiff went from her place of employment in Minot, on Main street, toward the Valley Meat Mar-

ket, to purchase meats, and intended to enter the meat market, and opened the door believed by her to be the door opening into the meat market, but which was not, but was one of the same exterior appearance, which was the entrance to the basement.

Extending from this door to the basement was a stairway; it was about 12 feet from the entrance down the stairway to the floor of the basement.

At the time plaintiff opened the door and stepped into the entrance leading to the basement, thinking she was entering the meat market, she was precipitated, with great force and violence down the stairway to the bottom of the basement, a distance of about 12 feet, and thereby sustained serious bodily injuries, alleged to be permanent.

Her right arm is alleged to have been broken or fractured in three places, the elbow joint stiffened, her back and backbone and spinal cord injured to such an extent as to permanently injure her nervous system, and to cause her to be permanently hysterical, nervous, and debilitated; that the injuries so received have caused in her abdomen a permanent burning sensation, very painful and disagreeable; that from said fall and the shock thereof, she has received a nervous disease or nervous malady of permanent and incurable nature; and that thereby she has suffered great mental and bodily suffering, pain, anguish and agony, and that she will be permanently incapacitated from work and labor; that she was confined to bed in the hospital continuously for two months, and obliged to employ physicians and surgeons, and pay expenses of travel to hospitals at Minneapolis from Minot, North Dakota, and to pay physicians' and surgeons' fees and drug and hospital bills and expenses, to the amount of approximately $750.

It is further alleged that she will be permanently incapacitated from working, and that she has lost thirty months from labor to the date of bringing this action, when otherwise she would have been working at a monthly wage of $80 per month; and that she is damaged by her loss of time in the sum of $2,400.

It appears that, at the time of the injury, she was thirty-two years of age; that prior thereto she was sound in mind and body, and in perfect health, and that she was then, and for years had been employed at her trade as an expert saleswoman, in dry goods and department stores,

and earning and receiving, for such services, an average wage of $80 per month.

That the entrance of the Valley Meat Market was a public entrance; that, on the day of the injury, it was very cold, and the air filled with flying snow, obscuring the vision and preventing her from seeing ahead of her, and that her attention was more or less distracted.

The complaint further charges, "that the said door and doorway, entrance, and stairway and basement, as so kept and maintained, was dangerous and unsafe to all who, unfamiliar therewith, might enter it, and was a dangerous pitfall and dangerous trap for the plaintiff, and for any person unfamiliar therewith, as was the plaintiff; and who might, believing the said doorway and entrance to be the doorway and entrance into said meat market, in attempting to enter through it into said meat market, but, instead, enter said door, and fall down said stairway into said basement, as did plaintiff, on February 19, 1917.

"And that the defendant, Halvorson, as owner of the said premises, and the Northern Telephone Company, the Northwestern Telephone Exchange Company, tenants thereof, carelessly, negligently, and in violation of an ordinance of the city of Minot, as hereinafter stated, and in disregard of the rights of the plaintiff, and all other such persons as might enter said door and doorway, did jointly, negligently, and unlawfully keep and maintain the said door, doorway, entrance, and stairway, and such portion of said premises as was immediately adjacent thereto, in its open and unguarded condition, as a dangerous pitfall and place, dangerous to the safety of the public and the plaintiff, and all of which was well known to be such to said owner and tenants.

"That it was then and there the duty of the defendants, Halvorson and the Northern Telephone Company, and the Northwestern Telephone Exchange Company, and each and all of them, well knowing that said Valley Meat Market was an occupant and tenant of said building of the defendant, Halvorson, and that its customers and invitees might easily and readily thus enter said doorway and be precipitated down said stair into said basement, to their great injury, through mistake or inadvertence, while going to, and in attempting to enter, and under the belief that they were entering, said Valley Meat Market,—to know the dangers of said dangerous place threatening such invitees and persons at, and long prior to the time that the plaintiff entered the same and was

thereby injured, and to discontinue and abolish said dangerous place and wholly remove its dangers and safeguard plaintiff from said dangers, instead of negligently and unlawfully permitting the same to remain as such dangerous place and pitfall, to entrap this plaintiff and others; that the defendants had, for a long time prior thereto, as plaintiff has subsequently been informed and believes, negligently and carelessly and in violation of said ordinance, permitted said danger and dangerous place to exist."

The ordinance pleaded, provides: "It shall be unlawful for any person in the city of Minot, to leave or keep open, uncovered, or unguarded, any cellar, door, pit, grating, or any vault or subterranean passage, opening from, into, or upon any street, alley, sidewalk, or public ground, within the city of Minot; nor shall it be lawful for any person to suffer any such cellar, door, or vault, grating, or other opening or place of like nature, connected with the premises, owned or occupied by him, to remain in an insecure or other unsafe condition, so that persons may fall into, or be otherwise injured by the same."

It is alleged that the defendants, each and all of them, did, on February 19, 1917, unlawfully and in violation of said city ordinance, keep and maintain said premises in the aforesaid condition, with the cellar door, doorway entrance and stairway, in an insecure and unsafe condition, so that the plaintiff did fall into the cellar, through the door entrance and down the stairway.

The foregoing substantially sets forth the substance of the complaint. The question presented is (assuming the truth of all that is stated in the complaint), Has plaintiff a cause of action? Our answer to this question must be in the affirmative. We are fully convinced the complaint stated a cause of action, and that the district court erred in sustaining the demurrer to it.

Leaving the ordinance aside for the present, we will first determine whether the complaint states a cause of action, exclusive of it; in other words, Does the complaint state a cause of action against plaintiff, at common law? We think it does. We think the allegations of the complaint were sufficient to show a cause of action against the defendants for negligence. In other words, that the negligence of the defendants, as alleged in the complaint, is actionable.

We think it was the duty of the defendants to use ordinary care to

keep the premises in question in such proper condition of safety, and to keep it free from the existence thereon of any dangerous condition, so that anyone, rightfully entering or being thereon, and while using ordinary care, would be reasonably safe in person.

The complaint shows there are two doors on the south side of the building, about 30 feet apart. The doors are similar in exterior appearance, so that one desiring to enter the meat market might easily assume the door opening into the basement was the one opening into the meat market.

The door of the basement opened to a place of great and immediate danger, while, for the purposes of this appeal, the door to the meat market must be presumed to have opened to a place of safety. To maintain these entrances in this way, and so that the entrance to the dangerous place might readily be taken as the entrance to the place of safety, constituted actionable negligence.

It was the duty of the owner of the premises, if he were to maintain an entrance to the basement, to have it in such condition that it was not a constant source of danger to any person, or the public, who might inadvertently make the reasonable mistake of assuming the entrance into the basement was that into the meat market.

The stairway leading into the basement was adjacent to the door. The owner must have known, or must be held to have known, that, if anyone inadvertently opened that door and stepped forward, as if to enter the meat market, where the door was similar in appearance, that he would be precipitated, with great force and violence, down such stairway of the basement.

The danger was hidden, so that any person, inadvertently entering, could not know the danger. The door was an invitation to enter; it was not locked, nor was there any sign thereon, giving any warning of danger.

If there had been no stairway, or, if the door opened into an elevator shaft, it would hardly be contended that defendant was not guilty of negligence; yet, if either of those conditions existed, it would scarcely be more dangerous than that which actually existed.

It appears plain that it was the duty of the defendants to keep and maintain the entrance in question in such safe condition as to protect

anyone from injury who might inadvertently enter, in the circumstances in which plaintiff therein entered.

The meat market was a place of business where anyone, and the public in general, might make purchases and transact the kind of business that was carried on there, and the plaintiff, as well as others, had a lawful right, in common with others, to enter the meat market and make such purchases as she desired; and while entering there, she was in no sense a trespasser, for she did not go on the premises to do an unlawful act, nor to do a lawful act in an unlawful manner; but she was lawfully on the premises to do a lawful act; she was not a mere licensee, as she had a lawful right to enter and be upon the premises, for the purpose of doing such business as was conducted on it, and which she, in common with the general public, were invited to do.

The premises were in part used for the conducting of the meat market thereon; it was conducted with the knowledge and consent of the owner of the property; he intended that business to be conducted there. The conducting of it was an implied invitation to the plaintiff, and all others who might desire to transact business there, to enter upon the premises. In such case, the owner is under obligation to use ordinary care to effect the reasonable security of those who do enter for the purposes of the invitation, and for the transaction of the business to which the invitation related.

In such case, it was the duty of the owner to use ordinary care to keep the premises in a safe condition, in order that no injury might be suffered by those invited, while they were on the premises.

The plaintiff had a lawful right to enter upon the premises, the same as she had a right to enter any other place of business open to the public; and she intended to enter the meat market when she inadvertently entered the door to the basement.

Taking up now the consideration of the question of whether or not plaintiff has a cause of action, by reason of the violation of the ordinance above set forth, resulting in injury, on the theory that such is negligence of the owner and occupants, under that part of the ordinance which provides: "Nor shall it be lawful for any person to suffer any such cellar, door or vault, grating or other opening or place of like nature, connected with the premises, owned or occupied by him, to remain in an insecure or other unsafe condition, so that persons may fall into,

or be otherwise injured by the same," we think she has a cause of action.

We think the complaint sufficiently shows that the door at the entrance of the basement was in an insecure and unsafe condition, so that persons might fall into, or be otherwise injured by the same, for there was nothing to prevent anyone from inadvertently opening this door and stepping into the basement, while their thought would be, they were entering the meat market.

There is nothing to show there was any notice on the door, such as "Not for public use" or "Keep out," such as might be some notice to the public, but we must assume that the doors were entirely unprotected and unguarded, and that the public had no notice of the dangerous condition existing.

It is apparent that the door itself was no protection, for if the door had not been there, the danger would have been apparent. It would seem that the entrance was more dangerous with than without the door, for with the door the danger was hidden.

We are of the opinion that the maintaining of the entrance to the basement, in the dangerous condition that it was maintained, was a violation of that part of the ordinance particularly referred to, and, as such, constitutional actionable negligence; and that the complaint, in this regard, states a cause of action.

For the foregoing reasons, we think, the demurrer should have been overruled.

ROBINSON, J. (dissenting). This is an action peculiar to the city of Minot. The plaintiff appeals from an order sustaining a demurrer to the complaint. As she avers, on a cold day in February, 1917, when the flying snow obscured her vision and distracted her attention, she went along First avenue to her meat market, which was in a building owned or occupied by the defendants. As she went along the side of the building she came to a door within 30 feet of her market, and mistaking it for the market door, which it resembled, she opened the same, entered the building, fell down a stairway into the basement and was seriously injured. The basement stairway she avers was unguarded and open and unprotected, and it had no railing. She says not a word concerning the width of the stairway, the manner of its construction or

as to how it came to be dangerous. Aside from the lack of a railing, it may have been a perfect and ideal stairway. She says not a word concerning the door which she opened and entered only that it was similar to the door of the meat market, with a similar entrance and on the same street.

She avers that at the time of the accident there was in force a city ordinance which made it unlawful to leave or keep open, uncovered, or unguarded any cellar door, pit, grating from, into or upon any street. But manifestly the ordinance has no bearing on this case. The ordinance does not forbid the construction of a basement stairway with a good door, nor does it require the door to be kept locked, barred, or bolted. In the opinion of Justice Grace it is said: "The door was an invitation to a person to enter and there was no sign on it giving a warning of danger." But that is error. The complaint does not contain a word concerning a sign on the door, and it is not true that a door is an invitation to enter it. On the contrary, it is a warning for strangers to keep away unless it be the door of a bank or business house, with a sign inviting entrance for business purposes.

As it appears, the plaintiff opened the door and entered. She did not use her eyes and look around and notice the difference between a small basement entrance and the big meat market. As usual, the door must have opened inward, but she did not hold onto the knob or the latch of the door and make sure of her footing. She just stepped forward or onto the first landing of the stairway and tumbled or rolled to the bottom.

Now the questions are: How have the defendants failed to observe any obligation to the plaintiff? And, if her injury was the result of her own negligence or the want of ordinary care, on what principle of law may she recover damages?

"An obligation is a legal duty by which a person is bound to do or not to do a certain thing." Comp. Laws, § 5763.

"Every person is bound without contract to abstain from injury to the person or property of another, or infringe upon any of his rights. Section 5942.

"Every person is responsible for, not only the result of his wilful act, but also for an injury occasioned to another by his want of ordinary care in the management of his property or person, except so far as the

latter has wilfully or by want of ordinary care brought the injury upon himself." Section 5948.

That is the law of the case. Now the question is, Does the complaint state facts showing an injury occasioned to the plaintiff by the want of ordinary care in the construction of the basement way or the door to it; or does it appear that by the want of ordinary care the plaintiff brought the injury upon herself. "Negligence is the lack of ordinary care. It imports a want of such attention to the nature and probable consequences of an act or omission as a prudent man ordinarily bestows on his own concerns." Section 10358. Does it appear that in the act of opening the basement door and advancing onto the stairway the plaintiff used the care that a prudent man or woman ordinarily uses? As an excuse, she avers that the day was very cold and the air was filled with flying snow, obscuring her vision and engaging and distracting her attention. But that was her own misfortune, and not the fault of defendants. It shows that she should have been doubly careful. It was at noonday that she went out from the place of her employment into the cold and snow. She took the risks of the storm and the risk of her distracted attention, and the chances are that she took the risk of fashionable high heeled shoes with narrow pointed toes. To a person of ordinary prudence and presence of mind, neither the basement stairway nor its closed door presented a trap, a pitfall, or a place of danger. Certain it is the complaint does not state facts showing any defect in the construction of the door or the stairway, and whether defective or not, the plaintiff had no right, license, or occasion to use the same.

In the brief of counsel for defendant this proposition is stated and well sustained by authorities: "In order to constitute actionable negligence, there must exist two essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, and a failure to discharge the duty." Means v. Southern California R. Co. 144 Cal. 473, 77 Pac. 1002, 17 Am. Neg. Rep. 1, 1 Ann. Cas. 206; Kennedy v. Chase, 119 Cal. 642, 63 Am. St. Rep. 153, 52 Pac. 33, 3 Am. Neg. Rep. 520; Gibson v. Leonard, 143 Ill. 189, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182; Cusick v. Adams, 115 N. Y. 59, 12 Am. St. Rep. 772, 21 N. E. 673; Moffatt v. Kenny, 174 Mass. 315, 54 N. E. 850, 6 Am. Neg. Rep. 564; Rooney v. Woolworth, 74 Conn. 720, 52 Atl. 411.

The correctness of the above rule is conceded by Mr. Justice Birdzell, but without any averment of the complaint he assumes that there was some defect in the construction of the building, the door, or the stairway. He says: "But when a building situated upon a public street is devoted wholly or in part to retail commercial use and is especially designed with resort thereto by the public, that a duty with respect to its construction and maintenance does attach to the premises." No attempt is made to show any specified defect in the construction of the building, the door, or the stairway or to show that plaintiff had any leave or license right to open the door or enter upon the stairway. The conclusion of the learned justice is that the jury would be warranted in finding that the entrance to the basement to have been improperly guarded and the premises, to this extent, to have been in an unsafe and insecure condition. But that refers the decision of the demurrer to the jury, whereas the question is on the averments of the complaint. Wherein, by what words, does the complaint allege facts showing that the entrance to the building was unsafe or insecure? Does it not show affirmatively that in opening and entering the door the plaintiff was a trespasser and that she failed to observe ordinary care and prudence? Surely on a demurrer we may not refer the question to a jury.

T. B. HUGHES, Plaintiff, Appellant, v. FARGO LOAN AGENCY, a Corporation; Citizens Bank of Lisbon, a Corporation; and The First National Bank of Fargo, a Corporation, Defendants, Respondents, and J. C. VINCENT, Interpleaded Defendant and Respondent.

(178 N. W. 993.)

Judgment — fatal defect in affidavit for publication rendered default judgment a nullity.

1. In an action to declare a conveyance a trust deed and for an accounting, where the defendants were not residents of the state, and where an affidavit

NOTE.—May jurisdiction of suit to quiet title or remove cloud on title of land within the territorial jurisdiction rest upon constructive service of process against a nonresident, see note in 29 L.R.A.(N.S.) 625.

for publication of the summons was filed which may be construed to state that defendants were nonresidents, "as affiant is informed and believes," and which states the "present postoffice address" of the defendants "as affiant is informed and believes," and where the summons and complaint were personally served upon such defendants in the state of Washington, and thereafter judgment, upon default was rendered, it is *held* that such affidavit was fatally defective and the judgment rendered a nullity.

Process — on service by publication court is confined to proceeding in rem.

2. In such action, the jurisdiction of the court extends only to an equitable proceeding in rem concerning the title of the land involved.

Estoppel — quieting title — on issue of estoppel and laches, parties in action to determine adverse claims to realty held affected with notice of former void judgment.

3. In a subsequent action, to determine adverse claims to the real estate involved, in the alleged trust deed, where the defendants and intervener, through such void judgment, and the plaintiff, as the grantee of the vendee in such trust deed, claim title or liens upon the land, it is *held* that all parties are affected with notice of the void judgment and of the unsettled and undetermined nature and administration of the alleged trusteeship, upon which the equities of the parties, or their successors in interest, and the questions of laches and of estoppel, must depend.

Opinion filed July 3, 1920. Rehearing denied September 10. 1920.

Action to determine adverse claims in Ransom county, *Cole,* J.

The plaintiff has appealed from a judgment in favor of the defendants and has demanded a trial *de novo.*

Reversed and remanded for a new trial with directions.

Kvello & Adams, for appellants.

Any deficiency in any of the jurisdictional proceedings is not a mere defect or technicality; it goes to the very foundation of the power of the court to act at all. Roberts v. Enderlin Inv. Co. 21 N. D. 594; Johnson v. Englehard (N. D.) 176 N. W. 134; Dallas v. Luster, 27 N. D. 453.

And exactly the same principal is held in the following cases: Simensen v. Simensen, 13 N. D. 305; Jablonski v. Piesik, 30 N. D.

547; Atwood v. Tucker, 26 N. D. 622; Beach v. Beach, 6 Dak. 371, 43 N. W. 701.

Where the proceedings leading up to substituted service, such as the affidavit for publication of summons, are directly attacked—as was done here—no presumptions can be indulged to sustain them. Atwood v. Tucker, 26 N. D. 622; Coughran v. Markley (S. D.) 81 N. W. 2; Bathell v. Hoellworth (S. D.) 74 N. W. 231.

It is the general rule, not only in this state but elsewhere, that affidavits for publication of summons made on information and belief are insufficient. Dallas v. Luster, 27 N. D. 450; Simensen v. Simensen, 13 N. D. 305; Gibson v. Wagner (Colo.) 36 Pac. 93; Ronig v. Gillett (Okla.) 62 Pac. 805; 32 Cyc. 480 (39) (41).

Judgments entered without jurisdiction are wholly void and of no force and effect. Krumenacker v. Andis, 38 N. D. 508; Roberts v. Enderlin Inv. Co. 21 N. D. 594; Atwood v. Tucker, 26 N. D. 622; Jablonski v. Piesik, 30 N. D. 543; Simensen v. Simensen, 13 N. D. 310; Dallas v. Luster, 27 N. D. 450; Johnson v. Englehard (N. D.) 176 N. W. 134.

W. J. Clapp, for J. C. Vincent.

A court cannot vacate a judgment or grant a new trial, under § 7660 of the Compiled Laws, when more than six months has expired after the entry of the judgment. Higgins v. Rudd, 30 N. D. 551.

Appellant's counsel, Kvello & Adams, are estopped to question defendant's and respondent's title, because Kvello was a tenant of Rollo Curtis, maker of the Fargo Loan Agency mortgage, and under whom Vincent had deed which was made, delivered, and recorded while Kvello was in possession under such lease. Mpls. Iron Store Co. v. Branum, 36 N. D. 355; 24 Cyc. 934; 18 Am. & Eng. Enc. Law, 411; Balch v. Radford (Mich.) 148 N. W. 707; Beck v. Minnesota & W. Grain Co. (Iowa) 7 L.R.A.(N.S.) 930, 107 N. W. 1032; 16 R. C. L. 649.

Possession by landlord is not essential to the validity of a lease, and tenant in such case cannot question the title, and all persons claiming under him are also estopped. McManus v. Malloy (S. D.) 138 N. W. 963.

One partner being the tenant, the partnership is estopped. 2 R. C. L. 963; McFadden v. Jenkins (N. D.) 169 N. W. 151.

Jno. D. Farrand, for respondent Fargo Loan Agency.

The proper procedure to obtain relief from a default judgment is by motion to vacate the judgment, based on affidavit of merits and a proposed verified answer. Racine-Satley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228.

The order vacating was an abuse of discretion. Mougey v. Miller (N. D.) 169 N. W. 735; 15 R. C. L. § 178, p. 724, and cases cited; Colton v. Rupert, 27 N. W. 520.

Whereunder a judgment rendered on constructive service, certain lands were found to belong to the debtor, and were subjected to the payment of the judgment, and a sale was had and the lands sold to a bona fide purchaser, held that he was entitled to protection, although afterwards the judgment was vacated and set aside. Keene v. Sallenback, 18 N. W. 75; Hollister v. Mann, 58 N. W. 1126; Citizens State Bank v. Haymes, 76 N. W. 867; Comp. Laws 1913, § 7768.

BRONSON, J. *Statement.*—This is an action to determine adverse claims to a quarter section of land in Ransom county. The trial court rendered judgment quieting title in the intervener subject to the liens of defendants' mortgages. The plaintiff has appealed and has demanded a trial *de novo* in this court.

For the consideration of the questions involved, it is necessary to set forth somewhat in detail the facts appearing in the record. All parties claim title from Gottlieb Grounitz. In 1891 the land was deeded to him for a stated consideration of $1,520. In 1899 he deeded this land to his daughter, Clara. This deed was not recorded. Later, in 1900, this deed was surrendered and canceled. On July 31, 1902, he gave a warranty deed, conveying in fee this land and also a house and lot in Lisbon, North Dakota, owned by him, to his son, Elmer. The father then had three living children, Elmer, Emil, and Clara, and a granddaughter, the child of a deceased son.

In accordance with the testimony of Emil, who contested this deed to Elmer, his father, shortly after the deed to the daughter, Clara, was surrendered and canceled, told him that he would leave this land in the hands of either Elmer or himself, to be divided between the three children. Concerning the Lisbon property, he testified that his father was then living there with his sister, and he supposed that he intended that for her. He does not know what agreement the father had with Elmer,

nor what the father had in his mind when he deeded the land to Elmer. Another witness, one Summerfield, testified that he was a next-door neighbor of the Grounitz family when they lived in Lisbon. That on one occasion the father told him that Clara wanted to get possession of all the property, but he did not think it was right. That the two boys had in a lot of money and hard work and they ought to have their share. (This apparently was during the time of the deed to the daughter.) He testified that later the father told him that he was going to give to Clara the house and lot, and to deed the farm to one of the boys and then they can settle it up between them. In another action between the children concerning the nature of this deed to Elmer (to be considered hereafter) the district court found that this land and the property in Lisbon were deeded to Elmer upon the agreement that Elmer would pay the net proceeds thereof to the father during his lifetime for his maintenance and support, and that, upon his death, the property was to be equally divided among the three children.

The father died about May 1, 1913. From July 31, 1902, to the time of the father's death, Elmer operated or rented this land (as the court found in such action) as the agent of the father.

In 1915, an action (mentioned above) was commenced by Emil against his brother Elmer, and his sister Clara, in the district court of Ransom county. The complaint is dated April 20, 1915. It alleges in substance that the deed from the father to Elmer was a deed in trust upon the understanding that Elmer would pay to the father the net proceeds thereof, for his maintenance and support during his lifetime, and, after his death, would divide the property equally among his three children; that, until the death of the father on or about May 1, 1913, the father had full control and supervision of the property and received the rents and profits pursuant to such understanding. That since May 1, 1913, Elmer has been in the possession of such property. That since May 1, 1913, the reasonable value of the use of the land is $400 annually, and, of the city property, $20 per month. That the plaintiff Emil has demanded his undivided one-third interest in the real estate and in the proceeds. The prayer of such complaint is that this deed be declared a trust deed; that an accounting be had and the amount found to be due be declared in trust, pursuant to the trust arrangement, for division between the parties equally.

On May 25, 1915, a *lis pendens* was recorded in the office of the register of deeds, to the effect that the object of such action was to declare the deed to Elmer a trust deed and for an accounting between the parties. On the same date an affidavit for the publication of the summons was made. It reads as follows:

State of North Dakota } ss.
County of Ransom }

T. A. Curtis, being first duly sworn, deposes and says: that he is a member of the firm of Curtis & Curtis, the attorneys for the plaintiff in the above-entitled action; that the defendants are nonresidents of the state of North Dakota and that the present postoffice address of Elmer Edward Grounitz is Colbert, Washington, and the present postoffice address of Clara Hall is Spokane, Washington, as affiant is informed and believes.

(Signed)

T. A. Curtis.

Subscribed and sworn to before me this 25th, day of May, 1915.

Walter G. Curtis.
Notary Public.

On June 1, 1915, the summons and complaint were served upon Elmer and Clara in the county of Spokane, Washington, by a deputy sheriff.

On June 14, 1915, Elmer wrote a letter to Emil, stating, in part, to the effect that, to his surprise, the summons and complaint were served upon him by the sheriff; that the trip of his father to Germany and his last sickness was expensive; that he had advanced other moneys to his father; that he was perfectly willing that Emil should have anything that was coming to him; that he would try and make out an itemized statement of all expense and mail it to him; that he could advertise the land or Emil could look up a cash buyer; that he advised him to cancel the summons. He requested Emil to write him at once. Emil testified that he received this letter. He did not testify that he answered this letter. No other correspondence appears in the record, between them. On August 18, 1915, this action, as upon a default of the defendants Elmer and Clara, was heard by the district court and findings made.

In these findings, the court determined that the deed to Elmer was a trust deed made upon the agreement hereinbefore stated; that the father died about May 1, 1913; that from July 31, 1902 to May 1, 1913, Elmer, as agent of the father, operated or rented the land, but did not pay over the net proceeds to the father; that, when the deed was made, the property in Lisbon was worth $1,500; that since July 31, 1902, Elmer sold such city property for $800; that Elmer and Clara were working together, and divided among themselves the proceeds of the sale of the city property and of the farm; that the reasonable value of the use of the land for each year since July 31, 1902, was $400; that the reasonable value of the land was $5,000; that, considering the reasonable value of the land and the city property plus the interest thereupon, the defendants have received $10,620, or $3,620 more than the reasonable value of the entire property; that the defendants have received more than their undivided two-thirds interest. The court, as conclusions of law, found that the defendants had no interest in the land. That Emil was the owner; and that the defendants should be restrained and enjoined from asserting any interest or lien upon such land. Pursuant to such findings, on August 19, 1915, judgment was entered.

On February 21, 1916, Emil conveyed the land by warranty deed to Rolla A. Curtis, a son of one of his attorneys. This deed was recorded March 24, 1916. On March 15, 1916, Rolla A. Curtis gave a mortgage for $3,000 to the defendant Fargo Loan Agency. This mortgage was recorded March 17, 1916. Likewise, on March 15, 1916, he gave another mortgage to such agency for $75. This mortgage was recorded March 24, 1916. Likewise, on March 15, 1916, he gave another mortgage to the defendant Citizens Bank for $500. This mortgage was recorded April 14, 1916. Likewise, on March 15, 1916, he gave another mortgage to such Citizens Bank for $150. This mortgage was recorded April 14, 1916. On July 24, 1916, Rolla A. Curtis conveyed the land by warranty deed to one Voisin. This deed was recorded July 28, 1916.

On July 29, 1916, notice of a motion to vacate the judgment above mentioned was made by Elmer and Clara, the defendants therein. It was served upon the attorneys for Emil. It was returnable August 8, 1916. It was heard by the court on August 12, 1916. The attorneys for Emil in such action appeared. Emil testified that he did not authorize such attorneys to appear for him in the vacation proceedings.

The motion, entered as a special appearance, attacked the jurisdiction of the court to render the judgment by reason of the affidavit for publication being void through noncompliance with § 7428, Comp. Laws 1913. On September 14, 1916, the court, pursuant to such motion, entered an order vacating such judgment.

Prior to such vacation, on August 5, 1916, said Voisin reconveyed by quitclaim deed the land to Rolla A. Curtis, who, on the same date, conveyed the same again to J. C. Vincent, the intervener herein. Both of such last-named deeds were recorded on August 9, 1916. On the same day, August 5, 1916, Elmer conveyed the land by warranty deed to the plaintiff, Hughes. This deed was recorded August 14, 1916.

Concerning the deed to Curtis, Emil testified that he was informed by his attorney that it was necessary to make a transfer in order to place a loan on the land. That he received $3,500 for this transfer; that he should judge the land was worth about $8,000; that he was led to believe that Curtis was going to place a $3,500 loan on the land; that this was understood before the deed was made to said Curtis; that this was the only way he paid his attorneys for fees earned in the lawsuit.

Evidence was given in behalf of the Fargo Loan Agency, that two mortgages were placed on this land, for which it had loaned and paid, in cash $3,000. The loan came in the form of an application through the defendant Citizens Bank. That the title was referred to their attorney for examination. The attorney for the agency testified that he had personal knowledge of this loan made to Rolla A. Curtis; that he examined the title and all the papers in connection with the Emil action, from the summons and complaint or copies of them to the judgment and, particularly, the findings and conclusions. That he procured the copies of the papers and judgment roll which were offered as evidence in this record. He concluded after such examination, that the title was good.

Vincent, the intervener, testified that in purchasing this land he examined it; that he traded for it two houses and lots in Lisbon and $1,600 in notes. That the total consideration was $4,700 for the land, in addition to the $3,500 mortgage then upon it. He had the abstract and someone examined it; that it was pronounced O. K.; that he assumed that the title down to the time the mortgage was placed on the land was

beyond question by reason of the loan being placed by the Fargo Loan Agency. He had no notice of the vacation of the judgment; no person was authorized to appear for him in the proceedings to so vacate; that he examined this land the latter part of July or the fore part of August. He relied on one Mr. Clow concerning the possession of the land. He never has been in possession of the land. That he understood that there was a mutual agreement that the land should be rented, and the rent held up during the pendency of this action.

One Clow testified that he represented Vincent in the sale of this land to Vincent; that he dealt with T. A. Curtis and Voisin; that an agreement was made to rent the land and hold the rent until the real owner of it was determined. There is no testimony in the record by the plaintiff; neither Elmer nor Clara testified. One of the attorneys for the plaintiff testified that he and another party rented the land from Elmer in 1915 and also in 1916. That they made a sort of conditional arrangement with Curtis,—a sort of a lease so as to play safe.

This action herein was instituted on March 10, 1917, against the Fargo Loan Agency, the Citizens Bank, and also the First National Bank of Fargo, as defendants. This National Bank had received a deed, as the record discloses, from Vincent to secure an indebtedness, or as collateral thereto, but the same was paid and a reconveyance made to Vincent. Answer was made by the defendants, asserting their lease and their title through Emil. In February, 1918, by leave of the court, Vincent filed his complaint in intervention, wherein he set up his title through Emil. The action was tried July 15, 1919. The Citizens Bank did not appear, and the trial court did not specifically find concerning its mortgages. Findings were made by the trial court on October 17, 1919. The trial court found that the deed to Elmer was a trust deed made solely to secure the maintenance of the father, and for the benefit of Emil, Elmer, and Clara: that on July 31, 1902, Elmer received, for the benefit of himself and his sister, the rents and profits from the land and city property conveyed. That he sold such city property and applied to the use of himself and his sister, Clara, such city property. That Emil never received from Elmer any of the proceeds from the sale of the lot, or the use of the land; that seventy-eight days after this process was served on Elmer and Clara, the action brought by Emil was heard by another district judge. The proceedings had in that court and

the transfers heretofore recited are found. That eleven months *after the* entry of the judgment of Emil, Elmer and Clara commenced proceedings to vacate the judgment; that the notice thereof was served only on the attorneys who appeared for the plaintiff in that action; that no notice was served on Emil or the defendants and intervener, or in this action, although their deed and mortgages were of record. That Rolla A. Curtis made a written lease with one of the attorneys for the plaintiff herein and another for the season of 1916. That in 1917 the plaintiff or his grantor made an agreement with Vincent for farming and renting the premises during the pendency of this action. The court found, as conclusions of law, that the plaintiff was estopped to dispute the title and liens of the intervener and defendants because of the great laches of himself and his vendor in permitting the defendants and intervener to invest their money and property, and for failure of plaintiff to offer or do equity. That the judgment of Emil against Elmer and Clara has never been vacated as to any of the defendants, including the intervener, in this action; that as to these defendants and intervener, the court acquired jurisdiction to hear and determine the action of Emil against Elmer and Clara. That the mortgages of the Fargo Loan Agency are valid and subsisting liens upon the land, and the intervener is the owner thereof, subject to such mortgages. Pursuant to such findings, judgment was entered on October 20, 1919.

Opinion.—The record has been carefully examined. The record facts have been quite fully set forth. This extensive recital of the record facts has been deemed necessary in order to demonstrate the error of two trial courts that have considered the title of this land. These record facts, when fully set forth, speak more effectively and forcibly than any argument.

There are three paramount legal questions presented upon this record, *viz.:* (1) The nature of the deed from the father to Elmer. (2) The jurisdiction of the court in the action of Emil against his brother Elmer, and his sister, Clara. (3) The laches and estoppel of the plaintiff or his grantor, Elmer.

Nature of the Deed.—This record discloses that the deed from the father to the son Elmer was in the nature of a trust deed, so far, at least, as this land involved is concerned. As alleged in Emil's action against Elmer and Clara, and not denied in the letter of Elmer to

Emil, and as found by the trial court in that action and in this action, the trust was the understanding that the father, during his lifetime, should receive the net proceeds from such land, and thereafter that the son Elmer should divide such land equally among his three children. This understanding, apparently a parol understanding, did not create an express trust. Comp. Laws 1913, § 5364; Cardiff v. Marquis, 17 N. D. 110, 117, 114 N. W. 1088. It did impose, however, by reason of the confidential relations existing and imposed, a constructive trust, upon these record facts, which was enforceable in equity. Cardiff v. Marquis, supra; Hanson v. Svarerud, 18 N. D. 550, 120 N. W. 550. In equity, upon these record facts, after the death of the father, the children each possessed a beneficial interest in this land, the legal title to which Elmer was holding as a trustee.

Jurisdiction of the Court.—The action instituted by Emil against his brother Elmer and his sister Clara was a suit to declare this deed a trust deed upon the understanding hereinbefore stated, to have an accounting between the parties and a distribution between them equally. The action was not one to determine adverse claims. Its scope, as is very evident, extended beyond a mere proceeding *in rem* to determine the title to this land. It involved, beyond the consideration of the respective titles of the parties in this land, the consideration in equity and *in personam* of the moneys or property received by Elmer in operating this land during the lifetime of his father, and, thereafter, as well as the moneys received either from the sale or the rent of the city property. It involved the consideration of the personal obligation of Elmer to the plaintiff Emil, as well as to his sister, and the personal judgment that might be rendered against him by reason of any failure on his part to fully account for his administration of the trust. The judgment as rendered by the trial court in that action discloses that, beyond determining the question of the title in the land involved as a proceeding *in rem,* it also determined the personal obligation of Elmer, as a trustee, and adjudicated the amount thereof. Through its final adjudication, the court in effect rendered judgment against Elmer for this personal obligation, offset it against his equitable interest in the land, and bodily transferred the real estate title to Emil in this land in exchange for the personal obligation owing from Elmer to Emil. Furthermore the judgment perpetually enjoined the defendants Elmer and

Clara from claiming any interest, lien, or encumbrance upon such land. Without further discussion, it is plainly evident that the pleading as filed and the judgment as made comprehended a procedure both *in rem* and *in personam*. See 8 Cyc. 1096; 23 Cyc. 683; 12 C. J. 1226; note in 29 L.R.A.(N.S.) 625. The court did not have jurisdiction over the persons of Elmer and Clara. They were nonresidents. The plaintiff sought to secure jurisdiction by publication of the summons. In lieu of publication, he personally served the summons and complaint upon Elmer and Clara. It is elemental that upon such procedure the trial court had no jurisdiction to render a personal judgment or to consider matters purely *in personam*. Its right to exercise jurisdiction was entirely based upon its jurisdiction over the land involved and its right to proceed thereby in an action *in rem* to determine the rights and titles of such land. See note in 29 L.R.A.(N.S.) 625; Fenton v. Minnesota Title Ins. & T. Co. 15 N. D. 365, 372, 125 Am. St. Rep. 599, 109 N. W. 363. The service of the summons and the complaint upon the defendant in a foreign state did not confer jurisdiction *in personam*. Furthermore, in such action upon the pleadings and the *lis pendens*, as filed, the affidavit for publication was fatally defective, and conferred no jurisdiction to hear and determine such action. The affidavit is susceptible of a construction that the clause "as affiant is informed and believes" refers to the statement therein that the defendants are nonresidents. The statute providing for service by publication is a permissive statute. It does not prescribe that the affidavit may state that the defendant is not a resident of such state upon information and belief. The statute further prescribes that the affidavit of publication shall state the place of defendants' residence, if known to the affiant, and, if not known, that fact must be stated. The statute does not prescribe that it is sufficient to state the present postoffice address of the defendants. The place of the residence of a party and his present postoffice address may be identical, and they may equally well refer to two different places. The present postoffice address of a United States Senator may be Washington, District of Columbia; his residence at the same time may be in Wahpeton, North Dakota. The present postoffice address of a person may be in San Diego, California, during three months in the winter, when at the same time his legal residence is at Grand Forks, North Dakota. The personal service of

the summons and complaint without the state does not cure the defects in the affidavit for publication. The statutory provision permitting personal service instead of the publication is an alternative in place of such publication. Comp. Laws 1913, § 7431. It is not an alternative for the requisite affidavit of publication. The rule of strict compliance concerning such affidavits for publication has been followed in this state for years. Roberts v. Enderlin Invest. Co. 21 N. D. 594, 132 N. W. 145; Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587; Dallas v. Luster, 27 N. D. 450, 147 N. W. 95; Jablonski v. Piesik, 30 N. D. 543, 153 N. W. 274; Krumenacker v. Andis, 38 N. D. 500, 165 N. W. 524; Johnson v. Engelhard, 45 N. D. 11, 176 N. W. 134. The judgment as entered in such action was void, and the trial court properly vacated the same upon motion made therefor.

Laches or Estoppel.—When the defendant Fargo Loan Agency negotiated mortgages upon this property, it then had both constructive and actual notice of the state of the title. It is true that at that time the judgment of Emil had not been vacated, and no notice to vacate the same had yet been served. However, such Loan Agency fully investigated, as its attorney testified, the proceedings in the Emil judgment from the summons and complaint down to the judgment. It then had full actual notice that the legal title to such land was in Elmer, excepting as affected by this judgment of Emil. It is further to be noted as a circumstance that the first mortgage of $3,000 was made on March 15, 1917, nine days before the deed of Emil Grounitz to Rolla A. Curtis was recorded. It negotiated this loan with Rolla A. Curtis as mortgagor, the son of one of the attorneys for Emil. It is apparent that it had full notice concerning this title. The intervener Vincent was negotiating for the purchase of this land when there was then pending a motion to vacate the judgment in the Emil action. His representative negotiated with one of the attorneys for Emil for this land. His deed from Rolla Curtis is dated August 5, 1916. On the same date Elmer deeded the land to the plaintiff. At that time Emil was claiming the land and had leased it for the year 1916, and under the circumstances of this pending motion, the lease of Emil, and the proximity of the time when the deeds were made, in connection with the fact that Vincent never took possession and made or permitted to be made an arrange-

ment for the holding up of the rent during the pendency of this action, there are strong circumstances which show both his actual and constructive knowledge of the state of this title. The fact that the Fargo Loan Agency and this intervener were not served with notice of the vacation of the judgment is immaterial. As far as this record is concerned it was void on its face. It did not even require a motion to vacate such judgment except for record purposes. No laches is shown in this record which is not equally applicable to both the plaintiff and his predecessors and the defendants and their predecessors. It might as well be said that the failure of the intervener and the other defendants to bring an action concerning this title when Elmer had leased the land both for 1916 and 1917 and had conveyed the same was laches as to apply, likewise, upon such ground, laches to the plaintiff.

The question of whether the plaintiff or his predecessor has done equity or has offered to do equity is entirely a matter that rests upon the real nature and administration of the trusteeship, and the extent thereof.

Accordingly, the judgment in the Emil action being void, and the parties to this action not being chargeable with laches, it follows that the trusteeship of Elmer with respect to its full scope is still undetermined and remains unadjudicated. Upon the present record this court is unable, therefore, to render final judgment. It is proper, therefore, for a new trial to be granted so that the three children, Emil, Elmer, and Clara, may be joined as parties and a full hearing had for considering and determining the nature and the administration of the trusteeship and the rights of all the parties, by reason thereof, as successors in interest, or otherwise, to the land involved. The judgment is reversed and the case is remanded for a new trial, consonant with this opinion, with costs to the appellant.

ROBINSON and GRACE, JJ., concur.

BIRDZELL, J., did not participate.

CHRISTIANSON, Ch. J. (concurring specially). The property involved in this controversy originally belonged to one Gottlieb Grounitz. He was a widower with three children,—Emil Grounitz, Elmer Ed-

ward Grounitz, and Clara (Hall). In July, 1902, Gottlieb Grounitz deeded the land in controversy and a house and lot in the city of Lisbon to his son, Elmer Edward. Gottlieb Grounitz died on or about May 1, 1913, leaving said three children as his only heirs at law. In April, 1915, Emil Grounitz brought an action in the district court of Ransom county against his brother and sister as defendants. In such action he averred that such property had been deeded to said Elmer Edward Grounitz with the understanding that he "would pay the net proceeds derived from the operation of said lands and premises to the said Gottlieb Grounitz for his maintenance and support during his lifetime, and after his death to divide the said lands and premises equally among the three children of said Gottlieb Grounitz." The complaint averred that the reasonable value for the use of said farm property was $400 per year, and $20 per month for said city property; and that demand had been *made* upon said Elmer Edward Grounitz for a deed conveying a one-third interest in said real property, and the payment of one third of the proceeds received from said property, and that such demand had been refused. The prayer for judgment was "that said conveyance from the said Gottlieb Grounitz be declared a trust deed in conformance with the facts hereinbefore stated, and that an accounting be had between the defendants Elmer Edward Grounitz and Clara Hall and the plaintiff, and that the amount so found to be due on said accounting be declared to be held in trust for the uses and purposes aforesaid, and be distributed between this plaintiff and defendants share and share alike, and for the costs and disbursements of this action, and for such other and further relief as may to the court seem just and meet in the premises."

Summons and complaint in such action were served upon the defendants in the manner set forth in the opinion prepared by Mr. Justice Bronson. Judgment was entered by default:

(a) "That the defendants Elmer Edward Grounitz and Clara Hall have no interest in or title to the premises involved in said action.

(b) "That the plaintiff Emil Grounitz is the owner in fee simple" of said premises.

(c) "That the said defendants Elmer Edward Grounitz and Clara Hall and each of them are hereby enjoined from further asserting title to or interest in said premises."

The title asserted by the defendants and intervener is predicated upon such judgment.

In the opinion prepared by Mr. Justice Bronson, it is held that that judgment is void; and that the plaintiff is not estopped from so asserting. I concur in these conclusions. I believe that the judgment was void even though the affidavit for publication be considered sufficient. The court confessedly never had jurisdiction over the persons of the defendants in the action. At the most, it had jurisdiction of the *res*. The plaintiff was required to embody in his complaint a demand of the relief to which he supposed himself entitled. Comp. Laws 1913, § 7440. And where the defendant fails to answer, "the relief granted the plaintiff cannot exceed that which he shall have demanded in his complaint." Comp. Laws 1913, § 7680. Where the judgment awards relief beyond the prayer of the complaint or the scope of its allegations, the excessive relief appearing from the face of the record is void for want of jurisdiction. Sache v. Wallace (Sache v. Gillette) 101 Minn. 169, 11 L.R.A.(N.S.) 803, 118 Am. St. Rep. 612, 112 N. W. 386, 11 Ann. Cas. 348. It seems to me that the judgment awarded Emil Grounitz against his brother and sister falls within this rule and the statutory time limit of one year in which to move to vacate a default judgment does not apply. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721.

ERNEST JESSEN and A. T. Jessen, Copartners as Jessen Brothers, Plaintiff-Respondent, v. JOHN SCHILLER and Barbara Schiller, Defendant-Appellant, and BRESDEN-LARSON LUMBER COMPANY, a Corporation, Garnishee.

(179 N. W. 372.)

Exemptions — rule of liberal construction applies to filing claim of exemption in garnishment.

1. The rule of liberal construction applies as to the time when a claim for exemption must be filed in a garnishment action in justice's court.

Exemptions — claim in garnishment may be made within time for answer.

2. Under this rule of liberal construction, the time fixed for an appearance or answer in the garnishee for the filing of a claim for exemptions (Comp. Laws 1913, § 9068), in justice's court is the time when an appearance or answer can be made from the hour specified in the garnishee summons so long as such garnishee action is open or awaiting the call of the court for an appearance or answer.

Opinion filed September 25, 1920.

In District Court, Hettinger County, *Lembke*, J.

Appeal by the defendant from a judgment rendered against the garnishee in favor of the plaintiffs.

Reversed and dismissal of the garnishee ordered.

Jacobsen & Murray, for appellant.

A default cannot be taken before the expiration of time allowed for appearance to which the action has been adjourned. 24 Cyc. 595.

The plaintiff did not take any issue on the garnishee's answer. Therefore the allegations of the answer are deemed and taken to be true. Comp. Laws 1913, § 7578.

Harvey J. Miller, for respondents.

If the defendant does not assert his claim within the time and in the manner prescribed by law, his rights are waived. Purcell v. Goldstein (N. D.) 136 N. W. 243; Lindley v. Miller, 67 Ill. 244; Griffin v. Maxwell, 23 Ill. App. 405; Alden v. Yeoman, 29 Ill. App. 53.

Bronson, J. This is an appeal from a garnishment judgment in favor of the plaintiffs upon findings made by the district court. The proceedings necessary to be stated are as follows: A civil action to recover $38.50, accompanied with garnishment proceedings, was instituted in justice's court. The return day fixed in both the summons and garnishee summons was September 5, 1919, at 8 A. M. On the return day, about 10:30 A. M., upon proceedings had, judgment was rendered in the main action against the defendants for $49.65. As the record of the justice discloses, the garnishment proceedings were held open subject to the outcome of the main action. The justice's record then recites as follows:

"Now, at 10:30 A. M. the garnishee by J. E. Eklund, Vice Presi-

dent, admits liability to the defendant John Schiller in the sum of $120. Now, at 10:30 A. M. the defendant John Schiller appears by his attorneys, Jacobsen & Murray, and files written answer and claim for exemption, including schedule of his personal property. To which the plaintiff objects as insufficient, not having been filed at or before the time set for appearance of the garnishee. The court, after the claim, finds that it was not in time and therefore denies the claim. Judgment is hereby entered against the garnishee, Bresden-Larson Lumber Company, a corporation, for the sum of $49.40 and costs."

Thereafter, the defendant John Schiller appealed from this garnishment judgment to the district court. Later, before the Honorable J. M. Hanley, District Judge, a motion for dismissal of the appeal, upon the grounds that the claim for exemption was not made in due form and in time, was denied and the cause set for trial by the court. Subsequently, the Honorable R. T. Lembke, District Judge, tried the action and made the findings of the court to the effect that the claim for exemption was not in due form and was filed too late. From the judgment rendered upon such findings the defendant John Schiller has appealed.

The objections of the respondent to the appeals taken by the appellant, the undertaking filed, the jurisdiction of this court as well as the jurisdiction of the trial judge, are without merit.

The real question in this case and the question presented for the consideration of this court is, Was the claim for exemptions filed within the time prescribed by statute?

We are of the opinion that it was. The right to exemptions is recognized and enjoined by the Constitution. Section 208. It has been established by legislative enactments. Towards this right and the legislative enactments in support thereof, this court has continuously applied a liberal rule of construction in the protection of the debtor.

Under the strict rule of interpretation claimed by the respondents, it was necessary for the defendant to file his claim for exemptions at the hour of 8 o'clock exactly, or before, although he had until the hour of 9 within which to make an appearance in the main action. Comp. Laws 1913, § 9029. And, under this rule, this would be so required, although no trial of such garnishee action could be had until the plaintiff recovered judgment in the main action. Comp. Laws 1913, §§

7581, 9063. Under the rule of liberal construction the time fixed for appearance or answer in the garnishee summons for the filing of a claim for exemptions (Comp. Laws 1913, § 9068), is the time when an appearance or answer can be made from the hour specified in the garnishee summons so long as such garnishee action is open or awaiting the call of the court for an appearance and an answer. The very fact that the statute (Comp. Laws 1913, § 9068), concerning such claims contemplates an appearance, a defense, and a hearing negatives the idea of eo instante proceedings. The judgment herein, both in the justice's court and in the district court, is based upon the failure to file the claim for exemptions within the time allowed. No opportunity accordingly was afforded the defendant to amend his claim, if in fact it was not in due form. The judgment of the trial court is reversed and the dismissal of the garnishee action ordered.

E. L. GUNBERG, Plaintiff and Appellant, v. GJERTRU JUVELAND, Ole A. Severson, Minnie McCrosky, Caroline Roy, Mandius Pederson, Selma Pederson, and Samuel Pederson, Defendants and Respondents. ADAMS COUNTY, North Dakota, a Municipal Corporation, Intervener.

(179 N. W. 375.)

Public lands — patent to heirs of deceased homestead entryman is issued to them as original parties.

1. The heirs of a deceased homestead entryman who dies before making final proof take under, and as direct beneficiaries of, § 2291, U. S. Rev. Stat. In such case patent is issued to them as original parties who are preferred by the Federal statute after the rights of the original homesteader have been destroyed by death; they being allowed the benefit of his residence and improvements upon the land.

Public lands — mortgage and seed lien not enforceable against heirs receiving patent.

2. A mortgage and seed-lien agreement which have been executed by a deceased entryman, who dies before making final proof, are not liens upon such

NOTE.—On validity of mortgage upon public lands executed by claimant under the homestead acts prior to patent or final proof, see notes in 6 L.R.A.(N.S.) 934, and L.R.A.1915B, 681.

real estate, and are not assumed by or enforceable against the heirs who receive patent for and take said land under the provisions of § 2291, U. S. Rev. Stat.

Opinion filed September 25, 1920.

From a judgment of the District Court of Adams County, *Crawford*, J., plaintiff appeals.

Affirmed.

Henry Moen and *F. M. Jackson*, for appellant.

The heirs, the defendants in this action, did not take this land as a gift from the government, but by inheritance and subject to the encumbrances placed thereon. Stark v. Starrs, 6 Wall. 402; Barney v. Dolph, 97 U. S. 652; Simmons v. Wagner, 101 U. S. 260; Cornelius v. Kessel, 128 U. S. 456; Wisconsin R. Co. v. Price Co. 133 U. S. 496.

E. C. Wilson, for respondents.

Heirs become entitled, under the statute, to a patent, not because they had succeeded to her equitable interest, but because the law gave them preference as new homesteaders, allowing to them the benefit of the residence of their ancestor. Gjerstadgen v. Van Duzen, 7 N. D. 612; Haynes v. Carroll, 74 Minn. 134, 76 N. W. 1017; Marley v. Sturkert (Neb.) 86 N. W. 1056.

Whatever rights survive the death of the homesteader belong to the heirs, and not to the estate of the deceased. The heirs do not succeed to such rights by inheritance, but by virtue of the law, which grants to them preference rights. Gould v. Tucker (S. D.) 100 N. W. 427; Adams v. McClintock, 21 N. D. 483; Stoll v. Gottbreht (N. D.) 176 N. W. 932; Hayes v. Wyatt, 19 Idaho, 544, 115 Pac. 13.

There was no privity of estate between the plaintiff (the heir) and his ancestor, nor had the mortgage ever attached to the land. The plaintiff owed no debt, or had he any legal obligations to pay anyone. He did not claim under his ancestor, nor was he in privity with him. Martyn v. Olson, 28 N. D. 317; Bernier v. Bernier, 147 U. S. 242; Hall v. Russell, 101 U. S. 503; McCune v. Ensig, 199 U. S. 503; Council Imp. Co. v. Draper (Idaho) 102 Pac. 7; Haun v. Martin (Or.) 86 Pac. 371; Whittenbrock v. Wheadon (Cal.) 60 Pac. 664;

Hussman v. Durham, 165 U. S. 144; Stark v. Fallis (Okla.) 109 Pac. 66; Chapman v. Price (Kan.) 4 Pac. 807.

P. B. Garberg, for intervener.

CHRISTIANSON, Ch. J. On September 25, 1906, one Nels O. Nelson made a homestead entry upon the land in controversy. On April 19, 1912, he signed and filed in the local land office a notice of intention to make final proof before Jacob Sonderall, a United States Commissioner, at Hettinger, North Dakota. On May 27, 1912, the said Nels O. Nelson died intestate, leaving surviving him as his heirs at law the said above-named defendants.

On June 18, 1912, the defendant Ole A. Severson (a half-brother of the deceased entryman) and two of the witnesses named in the notice of intention to make final proof submitted their testimony in support of said final proof. The final proof was submitted to the local land office, and, after certain proceedings which are not material in this controversy, the Commissioner of the General Land Office directed that the proof be accepted, and receipt and patent issued generally to the heirs of Nels O. Nelson, deceased. On June 26, 1914, patent was issued in accordance with such direction.

The plaintiff is the owner and holder of a certain note secured by a so-called preliminary mortgage upon the land in controversy. The note and mortgage were executed by the said Nels O. Nelson on the 14th day of December, 1911. Plaintiff brought this action to foreclose his mortgage. Adams county intervened and asserted that it had a prior lien upon the premises by virtue of a certain agreement dated April 17, 1912, under which it furnished certain seed grain to said Nels O. Nelson. The defendants challenged the validity of both the mortgage and the seed-grain lien, and asserted that they were the owners of the land, free and clear of both of said alleged liens. The trial court sustained the contentions of the defendants, and rendered judgment accordingly. Plaintiff has appealed from the judgment and demanded a trial anew in this court.

Whether title to land which has been the property of the United States has passed is a question which must be resolved by the laws of the United States. Wilcox v. Jackson, 13 Pet. 517, 10 L. ed. 276; Mc-

Cune v. Essig, 199 U. S. 382, 390, 50 L. ed. 237, 241, 26 Sup. Ct. Rep. 78.

Chapter 5, title 32, of the Revised Statutes of the United States, provides who may enter public lands as a homestead, and the conditions to be observed as to entry and settlement, and the procurement of title to the lands entered. By § 2291, Rev. Stat. (Comp. Stat. § 4532, 8 Fed. Stat. Anno. 2d ed. 557), it is provided that, if a person who has made a homestead entry dies *before* making final proof, such proof may be made by his widow, or, in case of her death, by his heirs or devisees. In such case the right to the patent accrues first to the widow, or in case there is none, then to the heirs and devisees.

Section 2448, Rev. Stat. (Comp. Stat. § 5098, 8 Fed. Stat. Anno. 2d ed. p. 856), provides:

"Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died or who hereafter dies, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life."

These statutory provisions have been construed and their purpose and effect announced many times by different state and Federal courts. In Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244, it was said that the object of § 2291, supra, was "to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent, or rules of distribution of the deceased entryman's estate."

In Gjerstadengen v. Van Duzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233, this court, in speaking of the status of a homestead in a case where the entrywoman died before making final proof, said:—

"The land did not belong to the estate of Olia Mikkelson, deceased. She filed upon it as a homestead in her lifetime; but she died before the patent was issued and even before her right to demand a patent had accrued. The law gave her no such interest in the land as could be transmitted by her to her heirs. Upon her death, all her rights in the land and her homestead entry ceased, and her heirs became entitled, under the statute, to a patent, not because they had succeeded to her equitable interest, but because the law gave them preference as new

homesteaders, allowing to them the benefit of the residence of their ancestor upon the land."

"It is apparent, from the statute (U. S. Rev. Stat. § 2291), that Congress did not intend to vest in a homesteader an interest which could be inherited under the laws of the state where the real estate might be situated, the same as other real estate, but to withhold from him such interest, and specifically designate the persons who, on his death, should be entitled to secure the right which the original entryman would have obtained had he survived."

In Martyn v. Olson, 28 N. D. 317, L.R.A.1915B, 681, 148 N. W. 734, this court held that a mortgage made by an entryman who dies before making final proof or before he has done the things requisite thereto is not a lien on the land covered by such homestead entry, and is not assumed by the heirs of the deceased entryman who take the land and receive patent therefor under the provisions of the Federal statute.

The appellant concedes the soundness of that decision but he contends that it is not applicable, for the asserted reason that in the case cited the entryman had not resided upon or cultivated the land for a sufficient length of time to make final proof.

It does appear, however, from the statement of facts in Martyn v. Olson, supra, that about two months after the death of the entryman, the heirs caused final proof to be made "without any further residence on or cultivation of the land than that furnished by the deceased." 28 N. D. 319.

The only distinction, therefore, between the case at bar and Martyn v. Olson is that in the case at bar the entryman had caused notice to be given of the time and place he would submit his final proof testimony, whereas no such notice was given in Martyn v. Olson.

It will be noted that the Federal statutes require not only cultivation and residence, but also proof of this fact in the manner provided by the statute. An entryman who has both resided upon and cultivated the land, in strict compliance with the statute, may nevertheless forfeit his right to a patent, if he fails to consummate the entry by the submission of final proof in the manner provided by law.

As has already been noted, the Federal statute prescribes not only the rights of the entryman, but also the rights of those who may receive the land in case he dies before completing the entry. As was said by

the United States Supreme Court in McCune v. Essig, 199 U. S. 382, 387, 50 L. ed. 237, 240, 26 Sup. Ct. Rep. 78:

"They (U. S. Rev. Stat. §§ 2291, 2292) say who shall enter, and what he shall do to complete title to the right thus acquired. He may reside upon and cultivate the land, and by doing so is entitled to a patent. If he dies, his widow is given the right of residence and cultivation, and shall be entitled to a patent, as in other cases. He can make no devolution of the land against her. The statute which gives him a right gives her a right. She is as much a beneficiary of the statute as he. The words of the statute are clear, and express who in turn shall be its beneficiaries.

In Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, the supreme court of Minnesota had occasion to consider when land entered under the homestead laws of the United States becomes a part of the entryman's estate, and subject to disposition as such. In that case the entryman made final proof and full payment to the government on April 10, 1906. He died on September 8, 1906, before final receipt or patent had been issued.

The Minnesota supreme court said:

"The Homestead Act (U. S. Rev. Stat. 2291, Comp. Stat. § 4532, 8 Fed. Stat. Anno. 2d ed. 557), provides that, if the person making homestead entry dies *before* making final proof, such proof may be made by his widow, or, in case of her death, by his heirs or devisees. In such case the right to the patent accrues first to the widow, or, if none, then to the heirs or devisees. The land is no part of the estate of the entryman, and does not descend as such. It is disposed of in accordance with the act of Congress, and the patentee takes his title, not by descent from the ancestor, but by purchase from the United States government.

"But *after* final proof the rule is different. It is a general rule that 'a person who complies with all the requisites necessary to entitle him to a patent . . . is to be regarded as the equitable owner' of the land. . . . In case of Re Cogswell, 3 Land Dec. 23, it is said: 'It is a fact generally known that . . . such title, for the purposes of private and judicial sale, taxation, inheritance of real estate, and all other kindred objects, is treated by the courts, the local legislatures, and individuals, in the same manner as if a patent had issued.'"

The Minnesota court concluded in that case that the homestead en-

tryman, at the time of his death, was the equitable owner of the land, and that it descended according to the laws of the state of Minnesota, and was a part of his estate to be administered.

The case was brought before the Supreme Court of the United States by a writ of error, and the decision of the Minnesota supreme court was affirmed. Doran v. Kennedy, 237 U. S. 362, 59 L. ed. 996, 35 Sup. Ct. Rep. 615. In doing so, the Federal Supreme Court followed in main the reasoning adopted by the Minnesota supreme court.

In considering the effect of the Federal statutes, the Federal Supreme Court said:

"The last section (Rev. Stat. § 2291) provides when a certificate shall be given or patent shall issue and to whom upon certain contingencies. It shall not be issued until the expiration of five years after entry, and may be at any time within two years thereafter, to 'the person making such entry.' If, however, he be dead, then to his widow, or, in case of her death, to his heirs or devisee, upon proving the necessary settlement and qualification for the time prescribed.

"This section, it is contended, made the heirs of Norton (there being no widow), the direct beneficiaries of the statute,—that is, the plaintiff and her grantors. In other words, they took directly under the statute, not from Norton; and such, it is further contended, is the effect of the decisions of this court, citing McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78, and other authorities.

"But it will be observed *the cited section provides for cases where the homesteader dies before final proof,* other sections applying when such proof has been made and nothing is yet to be performed to entitle to a patent.

"By § 2448 (Comp. Stat. § 5098, 8 Fed. Stat. Anno. 2d ed. p. 856), it is provided that 'where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.'

"Such are the circumstances in the present case. Norton had made his final proof before his death, and had become entitled to the patent. Plaintiff and her grantors, therefore, could only receive the land as his heirs, and not directly under § 2291, and as its beneficiaries.

Upon such proof Norton certainly became the equitable owner of the land. Indeed, it practically became his absolute property, subject to his disposition by assignment or by will, or to the disposition of the law . . . and subject, therefore, upon his death, to the probate jurisdiction of the state."

This language and reasoning are appropos in this case. Nels O. Nelson had not completed his entry. If he had desired to do so he could have abandoned the land and refrained from making final proof. At the time he died, the land was not subject to taxation under the laws of the state, and it was not subject to sale by him. By applying the Federal statutes and the decisions interpretative thereof we reach the conclusion that Nels O. Nelson never became the owner of the land in controversy. His rights remained those of an entryman occupying a tract of land under the Federal homestead laws. The final proof made after his death inured to the benefit of the persons named in the statute. Patent was issued to them in accordance with the statute and the practice of the Land Department prescribed in such cases. The patentees received their title direct from the government as new homesteaders, and that title was not subject either to the mortgage held by the plaintiff or to the seed lien claimed by the intervener.

Judgment affirmed.

EDWARD SHIRLEY, Nicolas Tandberg, Anton Johnson, Carl Schultz, Residents, Citizens, and Taxpayers within Coal Field School District No. 16 of Divide County, North Dakota, for Themselves, and for All Other Taxpayers within Said School District, Appellants, v. COAL FIELD SCHOOL DISTRICT NO. 16 OF DIVIDE COUNTY, North Dakota, a Public Corporation, and Albert Makee, Walter F. Rhodes, and John Wallin, Constituting the School Board of Said School District No. 16, and Mary F. Truax, as Clerk of Said School District, and Rolf Reite, as Treasurer of Said School District, Respondents.

(179 N. W. 551.)

Schools and school districts — notice of special election to vote on issuance of school bonds held sufficient.

1. In a special election to vote upon an issue of school bonds pursuant to

§ 1333, Comp. Laws 1913, notices thereof posted in at least three public and conspicuous places in the school district comply with the statute. It is not essential that such notices be posted upon the bulletin boards or places designated pursuant to § 4248, Comp. Laws 1913.

Schools and school districts — complaint in action to enjoin issue of bonds approved by voters at special election held demurrable.

2. In an action to enjoin school officials from issuing school bonds approved by the voters at a special election, where the complaint alleges active fraud and fraudulent design on the part of the school officials in the calling of such election, the posting of notices thereof and in the time when the same was held for the purpose of preventing an expression by the majority of the voters in the district, and does not allege that such voters, if they had voted, would have produced a different result, and where the school officials have called, noticed, and held such election pursuant to the statutory requirements, it is *held* that a demurrer to the complaint was properly sustained.

Opinion filed September 27, 1920.

Action in District Court, Ward County, *Leighton, J.*, to enjoin the defendants from issuing certain school bonds.

From a judgment dismissing the action and vacating a temporary injunction issued, the plaintiffs have appealed.

John E. Greene and *Olaf Braatelien,* for appellants.

Greenleaf & Wooledge for respondents.

"There is a presumption that an election officer or other official upon whom is imposed the duty of giving notice has performed that duty." Prichard v. Mageum, 46 L.R.A. 381, 80 N. W. 512; Parker v. State, 26 Tex. 207; Cummins v. Little, 16 N. J. Eq. 48; Austin v. Soule, 36 Vt. 645; Goss v. Cardell, 53 Vt. 447; Alger v. Curry, 40 Vt. 448; Fairbanks v. Benjamin, 50 Vt. 99; 19 Am. & Eng. Enc. Law, 564, 565; 15 Cyc. 324.

Bronson, J. *Statement.*—This is an action to restrain the issuance of bonds for the erection of a schoolhouse in a common school district. Upon a verified complaint and undertaking, the trial court issued a temporary restraining order. Later, upon a demurrer to the complaint and upon an order to show cause why the temporary injunction

issued should not be dismissed, the trial court sustained the demurrer and dissolved the injunction. Thereupon, the plaintiff electing to stand upon the complaint, judgment was entered dismissing the action and vacating the temporary injunction. The plaintiffs have appealed from such judgment. The facts alleged in the complaint, so far as the same are necessary to be stated, are as follows:

The defendant school district is comprised within the boundaries of Coal Field township, and comprehends thirty-six sections of land. Within it and near the northern boundaries thereof is located the village of Noonan, having a population of about 400 people. There are 250 legal voters therein and 225 children of school age. The plaintiffs are taxpayers and citizens of the district. The defendants are the school district and its officers. There are three public schoolhouses in the district,—one in the village of Noonan costing about $7,500, and two common schoolhouses in the southern portion, both of which are old and in poor condition.

On January 12, 1920, the school board, with knowledge that resident electors in the southern portion of the district were circulating petitions for the purpose of setting off from such school district, sections 13 to 36 therein and organizing a new school district, caused to be circulated a petition for the purpose of submitting to the voters the question of bonding the school district, in the sum of $39,000 in order to construct a new school building at Noonan. The petitions were signed by ninety-three electors, and presented to the school board. The board directed a special election to be held February 3, 1920. The clerk of the district, on January 17, 1920, posted notices of such election, *viz.*,—one at the postoffice, one at the village hall, one at the town pump house, and one at the schoolhouse,—all in the village of Noonan. No other notices of such election were posted at any other places within the district or published in the newspaper. By reason of such posting of notices, a large majority of the voters in the district was without knowledge of the holding of such election, and was thereby prevented from attending and voting at such election. Such petitions were circulated and the election so held with the fraudulent intent of avoiding the free and full expression of the will of the majority of the electors in the district upon the question of the issuing of such bonds, and with the fraudulent intention to thrust upon the territory in such district

the burden of taxation necessary to pay such bonds, before the electors in the southern portion of the district could carry out to completion there proceedings to organize a new school district within such territory. At the election, out of the 250 legal voters, there were cast 84 votes, 65 in favor of the issuance of the bonds and 19 in the negative. The affirmative votes were those of residents of such village, or those residing in that immediate vicinity.

For a long time prior to January 19, 1920, there had been established by the authorities of Coal Field township three public places, at which bulletin boards were provided, in the southerly portion of the school district. Voters were accustomed to observe and read notices of public meetings posted at such places. If notices of such election had been posted there, notice would have reached nearly, if not all, of the voters of such district; but it was the intent of the school board and the promoters issuing the bonds to prevent, by the posting of all of the notices within the village of Noonan, knowledge coming to the majority of the electors of the district, the defendants well knowing that if general and sufficient notice were given, as contemplated by law, the proposition would not receive the requisite majority at the election.

The valuation of the property, assessed in 1919 for purposes of taxation, in sections 13 to 36 (within which the village of Noonan is situated (evidently a mistake of the pleader), was $311,948; and in sections 1 to 12, $628,418. The construction of a new schoolhouse from the proceeds of such bonds, located in the village of Noonan, would deprive a large majority of the children of school age within the district from any benefit, by reason of the distance necessary to be traveled. One third of the burden of taxation would be imposed on resident taxpayers within the part of the district not to be benefited by the construction of such schoolhouse.

Upon the hearing of the demurrer and the order to dismiss the temporary injunction, it appears in the record that many affidavits and exhibits were introduced. The affidavit of the clerk of the district, one of the defendants, with exhibits attached, shows that at the time the election was held there were 124 male voters and 108 female voters in the district. That of the 93 signers upon the petition, 12 reside outside of the village of Noonan and at least 4 within the territory included within sections 13 to 36. That the enrolment in the district is 211,

of which 107 pupils reside outside of the village of Noonan; that 176 pupils attend the school at Noonan, 25 pupils, the school in section 27, and 10 pupils, the school in section 29. That the school building at Noonan was poorly constructed, and entirely too small; that the school board was obliged during the current year to rent additional room in Noonan at an expense of $35 per month, to provide for the school children.

The affidavit further states that the affiant knows that none of the defendants had any knowledge of the circulation of petitions to divide the district at the time of calling the election; that the election was called in good faith and by reason of the necessity of issuing bonds for the construction of an adequate school building. That the defendant Wallin is a resident of section 26. That the places where the notices of election were posted on January 17, 1920, were four of the most public and conspicuous places in the district. That all of the residents of the district use and have the village of Noonan as their postoffice addresses, and there they do their trading and shopping more or less That furthermore, notices of such election were published in the Noonan Miner, a weekly newspaper, on January 22, and 29, 1920; that two days before the election there was a farmers' meeting held at the farmers' elevator in Noonan, attended by farmers from the southern portion of the district and from all portions of the district, where the president of the school board discussed and explained the purposes of the election. That two of the plaintiffs voted at the election. The affidavit further alleges that the school board never designated and established any bulletin boards for posting notices. The affidavit of the plaintiff Schultz, acknowledged thirty-nine days after the acknowledgment of the affidavit of the defendant clerk, supports in general the allegations of the complaint. It states that the defendant Wallin has since resigned as a member of the school board; that there are 59 voters residing in sections 13 to 36; that few of them had notice of the election; that all of them excepting two or three have expressed themselves as opposed to bonding at all times since knowing it; that prior to January 12, 1920, the resident electors of sections 13 to 36 started a movement and circulated petitions to set off such sections into a new school district; that such petitions were signed by 46 of the electors in such territory.

Decision.—It is the contention of the appellants that the complaint discloses a failure to post notices as required by law. That § 4248, Comp. Laws 1913, provides for the annual designation of three places in a township as public or the most public places in a township where legal notices are required to be posted. That none of the notices in the calling of the election involved were posted at such places. That furthermore, through fraud and in an attempt to anticipate and defeat the division of the district and to prevent designedly an expression by the majority of the voters in such district the election was called, noticed, and was held in the manner set forth in the complaint. The contention of the appellants, that the notices of election were not duly posted, cannot be sustained. Section 1333, Comp. Laws 1913, with reference to calling a special election, provides for posting notices in at least three public and conspicuous places in the district. There is no provision of the law in that regard that notices shall be otherwise posted at any particular place or upon any particular bulletin boards. Section 4248, Comp. Laws 1913, has reference to townships and to the providing of public places in a township for the publication of legal notices. It does not pertain to the posting of notices concerning school districts. The boundaries of a school district may or may not be coextensive with that of a township. Manifestly, a place under § 1333, Comp. Laws 1913, is not rendered private and inconspicuous by reason of the failure to post notices upon the bulletin boards prescribed at the annual township meeting. It is not alleged that the school board had designated or established such bulletin boards or any other places as the most public places in the district. There is no contention upon the face of the complaint, or in the evidence submitted at the hearing, to warrant the meaning that the place where such notices were posted are not public and conspicuous places in the district. It therefore appears, as far as the allegations of the complaint are concerned and the evidence adduced at the hearing, to dissolve the injunctional order, that the defendants, in acting upon the petition for a special order concerning the issuance of said bonds and the holding of the same, acted in accordance with the statutory prerequisites.

The appellants, however, contend that the election so held, upon the posting as made and at the time so designated, could not have been called or held at a time better to exclude a majority expression of the

voters; that these circumstances, taken in connection with the alleged fraud and connivance of the defendants, the school district officers, show grounds for injunctive relief. It is deemed unnecessary to discuss the important question of the right in equity to set aside an election upon the grounds of fraud where an election has been called and held in accord with the statutory requirements. See 20 C. J. 216; High, Inj. 4th ed. §§ 1309, 1316; notes in 40 L.R.A.(N.S.) 576; 38 L.R.A.(N.S.) 1007; People ex rel. Atty. Gen. v. Tool, 35 Colo. 225, 6 L.R.A.(N.S.) 822, 117 Am. St. Rep. 198, 86 Pac. 224, 229, 231. In any event it is necessary in such case for the complainants to both plead and prove that such election, if called and held without such fraud, would have resulted differently.

The complaint does not allege, nor does any evidence submitted show, that the alleged large majority of the voters, prevented from attending the election by lack of notice thereof, would have attended and voted at such election and in such manner as to have produced a different result. The trial court therefore did not err in sustaining the demurrer.

It is further contended by the appellants that subsequent proceedings had in the district show circumstances for the exercise of equitable intervention, and they proffer to this court certified copies of proceedings in such district to show that the school district has since been divided.

Manifestly such proceedings are not subject to review in this action. They form no part of the record in this case. They may form a basis, if at all, for further proceedings on the part of the appellants, or others in the trial court.

The judgment is affirmed, with costs.

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

ROBINSON, J. I dissent.

E. H. GRIFFIN, Respondent, v. ERNEST WIESE, Appellant.

(179 N. W. 373.)

Animals — owner's liability for trespass held question for jury.

In an action to recover damages for the destruction of certain hay it is *held* that the trial court properly refused to direct a verdict, or order judgment notwithstanding the verdict, in favor of the defendant.

Opinion filed September 27, 1920.

From a judgment and an order denying a motion for judgment notwithstanding the verdict of the District Court of Stutsman County, *Coffey*, J., defendant appeals.

Affirmed.

C. S. Buck, for appellant.

That the title to unsevered crops growing on land belonging to one who is the owner of said premises or the one having right of possession has never been seriously disputed. Hartshort v. Ingles, 23 L.R.A. 531; Raney v. Hallvorsen, 29 N. D. 12; Golden Valley Land Co. v. Johnson, 21 N. D. 101.

E. E. Ellsworth, for respondent.

"Any person occupying or cultivating lands shall be considered the owner thereof in any action under the provisions of the last sections." Comp. Laws 1913, § 8501.

"A trespasser who sows and gathers crops is, after they are gathered, the owner of them, even as against the owner of the land." Lindsay v. Ry. Co. (Minn.) 13 N. W. 191; Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592.

CHRISTIANSON, Ch. J. The plaintiff brought this action to recover damages alleged to have been sustained by reason of defendant's cattle destroying certain stacks of millet in the fall of 1918. The case was tried to a jury. A verdict was returned in plaintiff's favor for $475, and interest. Defendant has appealed from the judgment, and from the order denying his motion for judgment notwithstanding the verdict.

The plaintiff had been in possession of a portion of section 36, township 139, range 66, Stutsman county, for several years under a contract for deed from one Ida A. Fried, the owner thereof. In January, 1918, Ida A. Fried served notice of cancelation of said contract. After service of such notice, the plaintiff made application to the judge of the district court of Stutsman county, for an order restraining the cancelation of the contract by notice, and requiring that such cancelation be had by proceedings in the district court.

The judge of the district court made such order as provided by statute, and afterwards an action was brought and tried in the district court, which resulted in a judgment being entered on July 1, 1918, canceling the contract and requiring the plaintiff, Griffin, to vacate said premises.

In the meantime, to wit, during June, 1918, the plaintiff had sown the millet which is involved in this controversy.

The plaintiff did not vacate the premises as demanded, and the defendant thereupon applied for an order to compel plaintiff to obey the directions of the judgment. Such matter came on for hearing on July 29, 1918.

It appears that, in the meantime, Ida A. Fried had leased the premises to one Otto Brown, and arrangements were made whereby it was stipulated and agreed, in writing, that said Griffin might remain on said premises until September 1, 1918.

It was further agreed that said Griffin might cut and remove from said premises all the millet which he had sown and which was then growing thereon. The evidence is also to the effect that later said Otto Brown leased certain of the premises to the defendant, Ernest Wiese, with authority to pasture his stock thereon.

The plaintiff cut the millet and stacked some of it. The undisputed evidence shows that the defendant's stock entered upon the premises and trampled down and ate some of the millet. The extent of the damage and the value of the millet, so destroyed, was a matter upon which the testimony was in square conflict. According to the testimony of the plaintiff and his witnesses, the damage was at least as great as that which the jury found. The undisputed evidence shows that both Brown and the defendant, Wiese, knew that the millet be-

longed to the plaintiff, and that he was to be permitted to cut and remove the same.

The sole questions presented on this appeal are whether the court erred in denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict. These motions were based upon the grounds:

(1) That there was an entire failure to prove that the plaintiff had any right to the use and occupancy of the grounds in question, on which the hay was raised at the time the trespasses are alleged to have been committed; namely, on or about October 15, 1918. And (2) that there is no such proof as would justify the jury in finding a verdict as to the amount of hay destroyed, if any was so destroyed, or the value thereof.

We are of the opinion that the trial court committed no error in denying these motions. It is admitted that the plaintiff was the owner of the millet, and had permission to go upon the premises and cut, stack, and remove the same. See also Lindsay v. Winona & St. P. R. Co. 29 Minn. 411, 43 Am. Rep. 228, 13 N. W. 191; Roney v. H. S. Halvorsen Co. 29 N. D. 13, 149 N. W. 688; 25 Cyc. 642. It is undisputed that the defendant was aware of this fact at the time he left the gates open and permitted his stock to go into the field where the millet was. There was a written statement signed by the lessee, Brown (which was procured by Ida B. Fried's attorney), stating that "E. H. Griffin may remain on section 36, Twp. 139, Rnge. 66, until September 1, 1918." There was testimony to the effect that while it was agreed that the plaintiff might cut and remove the millet, it was also agreed that it must be done within the time limited in the agreement signed by Brown." The plaintiff, however, claimed that while the agreement referred to gave him permission to remain upon and in occupancy of the buildings upon the premises only until September 1, 1918, nothing was said about the time that the millet should be taken off. He further testified that "it wasn't ready to take off."

In instructing the jury the trial court said:

"I instruct you, gentlemen of the jury, that as a matter of law, if you find that by the agreement of the parties the plaintiff had a right to the use of the premises for the purposes of raising and harvesting this millet, that the plaintiff had a reasonable time after the maturity

of the hay within which to remove the same from the premises, and a duty was incumbent upon the plaintiff to remove the same within a reasonable time after that allotted him, for the removal of the same. And if you find that the plaintiff did not exercise reasonable diligence, and did not remove the same within a reasonable time, after the expiration of his rights, or after the expiration of the date given him, and he then suffered damages by reason of the stock of the defendant running upon said premises, the plaintiff could not in such event recover damages for injury to his hay.

"These parties had rights and responsibilities resting upon each of them. Plaintiff had a right to occupy the premises for a given time. He had a duty to remove his property and to terminate his interests therein within a reasonable time, and it was the duty of the defendant to observe the rights of the plaintiff during such reasonable time as the plaintiff had. The question for the jury to determine under such circumstances is, What would be a reasonable time? That is a question of fact which the jury must determine in this case. If you find that the plaintiff had certain rights of occupancy, and rights to crops grown upon these premises for a space of time, or for a reasonable time, it would be a question for the jury to determine whether or not the plaintiff removed his property and terminated his occupancy of the premises within a reasonable time. And, if you find that the plaintiff did not remove his property within a reasonable time, and after the expiration of a reasonable time his property received injuries at the hands of the defendant's stock, the plaintiff could not in such event recover any damages. But if you find that the plaintiff had a reasonable time within which to remove this millet hay from the premises, and during that time the same was injured or destroyed by the defendant's stock, then the defendant is responsible, as I have already stated, in damages to the plaintiff for the injuries sustained, and it will be for the jury to determine in that event what the reasonable damages were. It will be for the jury to determine the amount of hay which you find was destroyed and the reasonable value of the same at the time it was destroyed; if you find that it was destroyed. In no event, of course, could the plaintiff recover damages for injuries resulting from loss by reason of injuries by the elements, or by any other injury excepting injury inflicted by the defendant's stock, if any."

It is apparent, therefore, that there was some evidence tending to show that plaintiff had, at least, an implied authority to leave the millet on the premises after September 1st. Whether he left it for a longer period than he was authorized to do was, under the circumstances, a question of fact, and the question was submitted to the jury under instructions the correctness of which have not been challenged.

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

BRONSON, BIRDZELL, and GRACE, JJ., concur.

ROBINSON, J. I dissent.

FIRST NATIONAL BANK OF GLASGOW, MONTANA, a Foreign Corporation, Respondent, v. W. J. CARROLL, Appellant.

(179 N. W. 664.)

Witness — in suit by indorsee after indorser's death, maker held competent to testify as to true consideration.

1. In an action by an indorsee of a promissory note against the maker, where the indorser had died before suit was brought and no representative of his was party to the action, § 7871, Comp. Laws 1913, does not preclude the defendant from testifying to the true consideration for the note.

Evidence — attorney may testify to pendency of suit in foreign state, without using court records.

2. An attorney representing a party in litigation in a foreign state may give competent testimony relating to the fact of the continued pendency of the suit without proving the contents of the court records.

Banks and banking — knowledge by payee bank director as to true consideration held not imputable to indorsee bank.

3. Where the payee of a note transfers it by indorsement to a bank in which

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NOTE.—Cases holding a bank chargeable with its president's and general manager's knowledge of facts which invalidate notes transferred to it by him, and which refuse to recognize the exception that a bank is not chargeable with the knowledge of its officers as to transactions in which they are personally interested, are collated in notes in 29 L.R.A.(N.S.) 558, and 49 L.R.A.(N.S.) 764, on imputation of knowledge of bank officers to bank, where officers are personally interested.

such payee is a director but not an active officer, the director's knowledge of the true consideration is not imputed to the bank.

Bills and notes — proof of good defense must be met by proof of holding in due course.

4. Where the plaintiff made out a prima facie case, and the defendant introduced evidence going to establish a defense to the note which was not met by proof that the plaintiff was a holder in due course (Comp. Laws 1913, § 6944, it was error to direct a verdict in favor of the plaintiff.

Opinion filed September 28, 1920.

Appeal from the District Court of Ward County, *K. E. Leighton,* J.

Reversed and remanded.

Palda & Aaker, for appellant.

The court erred in holding that the testimony of the defendant, Carroll, was barred under subdivision 2, § 7871, Comp. Laws 1913. Cardiff v. Marquis, 17 N. D. 110; Lake Grocery Co. v. Chiostri, 34 N. D. 386.

He cannot be excluded unless the party against whom his testimony is offered is within one of the classes protected by the statute. 40 Cyc. 2263, 2301, and cases cited.

The knowledge of the director of the plaintiff bank, Coleman, is imputed to the plaintiff, and hence plaintiff cannot be a holder in due course. McCarty v. Kepreta, 24 N. D. 395.

F. B. Lambert, for respondent.

In this state the purposes of the statute involved to prevent any party from securing an undue advantage in establishing, by his testimony, what transaction or conversation took place, when the lips of the other party are sealed by death, have been clearly expressed and continuously followed by this court. Braithwaite v. Aiken, 2 N. D. 61, 49 N. W. 419; Hutchinson v. Cleary, 3 N. D. 270, 55 N. W. 729; Regan v. Jones, 14 N. D. 591, 105 N. W. 613; First Nat. Bank v. Warner, 17 N. D. 76, 114 N. W. 1085, 17 Ann. Cas. 213; Cardiff v. Marquis, 17 N. D. 116, 114 N. W. 1088; Larson v. Newman, 19 N. D. 160, 23 L.R.A.(N.S.) 849, 121 N. W. 202; Truman v. Dakota Trust Co. 29 N. D. 456, 151 N. W. 219; Lake Grocery Co. v. Chiostri, 34 N. D. 386, 158 N. W. 998.

BIRDZELL, J. This is an appeal from a judgment entered pursuant to a directed verdict in favor of the plaintiff. The action was brought by the plaintiff as holder of a promissory note for $502, dated December 12, 1917, made payable to E. D. Coleman, and indorsed by him in blank. Coleman died before the trial of the action. At the trial the plaintiff proved the defendant's signature, and, to prove plaintiff's ownership, one R. M. Lewis, vice president of the plaintiff bank, was called and testified to the signature of Coleman as indorser and that the bank was the owner and holder of the note.

The plaintiff rested, whereupon the defendant went upon the stand and attempted to testify to the true consideration for the note. Some of the evidence was stricken out and frequent objections were made, so that it is somewhat difficult to ascertain what evidence the court considered in granting the plaintiff's motion for a directed verdict made at the close of the case. But in this opinion sufficient comment will be made upon the admissibility of the evidence to determine for purposes of a new trial what should be admitted; also wherein the court erred in granting the plaintiff's motion.

There are two questions raised upon the admissibility of evidence, which incidentally involve the burden of proof and a question of constructive notice to a corporation of a fact known to a director.

The defendant, over the objection of plaintiff's counsel, testified that the only consideration for the note in suit was a contingent liability of Coleman upon a cost bond of $300, which Coleman and one Truscott had signed in a suit in Montana in which the defendant was interested as plaintiff. The objection to the testimony was in substance that the statement by the defendant of the consideration for the note involved the giving of testimony concerning a transaction with a person since deceased, and that such testimony is precluded by § 7871, Comp. Laws 1913. To sustain the contention that the evidence is inadmissible the respondent's counsel relies upon the former decisions of this court, which were last reviewed in Druey v. Baldwin, 41 N. D. 473, 172 N. W. 663, 182 N. W. 700. The respondent's contention is sufficiently answered by the statute itself, which provides:

"(2) In a civil action or proceeding by or against executors, administrators, heirs at law, or next of kin in which judgment may be ren-

dered or ordered entered for or against them, neither party shall be allowed to testify against the other as to any transaction," etc.

The executors, administrators, heirs at law, or next of kin of Coleman are not parties to this proceeding, and it is consequently impossible for any judgment to be rendered or ordered for or against any of them. The defendant had the right to place before the jury evidence to establish his defense, if any, notwithstanding such evidence related to a transaction with a deceased person who was not a party. This would put upon the plaintiff the burden of establishing that it was a holder in due course, in which case the defense would be overcome.

Further objection was made to testimony going to establish that the suit in Montana in which the cost bond was furnished was still pending. The testimony consisted principally of statements by the attorney who represented one of the parties to the action. The objection was that this testimony was not the best evidence. We are of the opinion that the ordinary rule applicable to the proving of the contents of a record or of a writing is not applicable where a conclusion of fact is sufficient and where only this is sought to be presented. There are many situations in which facts common to every-day observation are also evidenced by written instruments. Yet it is not necessary to produce the written instruments to establish them. If, for instance, in an action of trespass it is desired to show that John Smith is the owner of a certain quarter section of land, it is ordinarily not necessary to introduce all the written muniments of title. We think the evidence of the attorney as to the continued pendency of the litigation is competent.

The record shows that Coleman in his lifetime was a director of the plaintiff bank, though not a managing officer, and the appellants contend that the bank must be presumed to have had knowledge of any fact of which Coleman had notice, and that hence the plaintiff cannot be a holder in due course. In this connection, appellants rely upon Emerado Farmers Elevator Co. v. Farmers Bank, 20 N. D. 270, 29 L.R.A.(N.S.) 567, 127 N. W. 522; McCarty v. Kepretka, 24 N. D. 395, 48 L.R.A.(N.S.) 65, 139 N. W. 992, Ann. Cas. 1915A, 834; and Grebe v. Swords, 28 N. D. 330, 149 N. W. 126. These are all cases in which the officers who had notice shared in the active control

and management of the business of the corporation. If the corporation could not acquire notice from such officers, it could not, as has been frequently asserted, be charged with notice at all. These holdings, however, are in conformity with a recent tendency to charge corporations with the knowledge obtained by their officers on a theory of constructive notice, and we have no disposition to depart from the rule laid down in these cases. It is clearly applicable to charge corporations with notice where its managing officers have notice. But it is another matter to charge a corporation with knowledge of facts known only to a single director, especially where the active officers of the corporation deal with that director in actual ignorance of the facts known to him. There seems to be a dearth of authority on the subject. In the case of Doane v. King, 30 Fed. 106, Mr. Justice Brewer stated the converse of the proposition presented in the instant case, saying (page 107):

"Certainly, plaintiff, although a director in the company, was not personally chargeable with notice of any false representations made by Felt, the treasurer, although the company of which he was a director might have been bound."

This is a clear recognition of the distinction between the functions of a director and an officer in applying the rule of constructive notice. This case was later before the United States Supreme Court, 139 U. S. 166, 35 L. ed. 84, 11 Sup. Ct. Rep. 465, on a writ of error, and, in the opinion of the court, written by Mr. Justice Harlan, the case is disposed of on the theory that a director plaintiff who pays value in good faith before maturity without notice for commercial paper obtained by an officer of the corporation through fraud is entitled to the protection accorded holders in due course. The directors of banks, as of corporations generally, act as a board, and not individually, whereas the officers charged with the active management are generally authorized individually to complete transactions on behalf of the corporation. It is one thing to charge a corporation with the knowledge of facts known to the managing officers, but quite a different matter to charge it with notice of a fact known only to a minority of its directors. See 1 Morse, Banks & Bkg. § 112. In the light of the facts in this case, in so far as they are disclosed by the record, it was possible for the bank of which Coleman was director to be a holder in due

course of the note which it obtained through Coleman's indorsement. In the state of the record, however, a verdict should not have been directed for the respondent. When the defendant offered evidence of the true consideration for the note, it was incumbent on the bank to show that it or someone through whom it claimed title was a holder in due course. No such evidence was offered. The plaintiff merely contented itself with the proof of a prima facie case which, of course, would have been sufficient had there been no evidence tending to establish a defense. But when evidence was offered impugning the right of the defendant to recover the face of the note, a prima facie case is no longer sufficient but is required to be supplemented by evidence showing that the plaintiff is a holder in due course. Comp. Laws 1913, § 6944.

For the reasons stated the judgment must be reversed and the case remanded for a new trial. The appellant is entitled to costs on this appeal, and the costs in District Court will abide the event of a new trial. Judgment reversed.

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

GRACE, J. I concur in the result.

RALPH WALDO PRESCOTT and Wallace M. Prescott, Plaintiffs, Contestants, and Respondents, v. F. E. MERRICK, as Proponent of the Will of William J. Morgridge, Deceased, Clara Allen, Stella J. Merrick, Emerson P. Merrick, Ruth M. Caufield, Walter D. Merrick, F. E. Merrick, and Delia F. Morgridge, Defendants and Contestees.

F. M. MERRICK as Proponent of the Will of William J. Morgridge, Deceased, Stella J. Merrick, Emerson P. Merrick, Ruth M. Caufield, Walter D. Merrick, and F. E. Merrick, Defendants, Contestees, and Appellants.

(179 N. W. 693.)

Appeal and error — party adopting line of inquiry cannot predicate error on opposite party's adoption thereof.

1. Where one party adopts a form of inqury for the purpose of eliciting cer-

tain facts, he cannot predicate error upon the adoption of the same form by the adverse party.

Wills — questions by contestants as to mental capacity of deceased held not reversible error.

2. Upon an issue of mental incompetency to make a will, the contestants asked witnesses who had observed the condition of the deceased whether or not in their opinion he had sufficient mental capacity to make a will, to know the disposition he was making of his property, and the beneficiaries. It is *held* that the inquiry in this form does not amount to reversible error.

Wills — inquiry as to mental capacity may cover period before and after execution of will.

3. Where there is ample evidence of permanent mental impairment following an apoplectic stroke, it is not necessary that witnesses should have seen the deceased at the date of the purported execution of the will in order to give testimony to his mental condition, as the range of inquiry may extend to a reasonable period before and after the execution of the will.

Wills — questions to nonexpert witnesses, including date of alleged will, not reversible error.

4. The inclusion of the date of execution in questions asked of nonexpert witnesses to elicit their opinions as to the mental competency of the deceased is not error, though the particular witnesses did not observe the deceased on that date.

Opinion filed September 28, 1920. Rehearing denied October 15, 1920.

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

Affirmed.

Adamson & Thompson and *Fisk & Murphy*, for appellants.

The rule is that a nonexpert witness may not express an opinion of the condition of the mind of a person under consideration at a time other than when he saw him. Blake v. Rourke (Iowa) 38 N. W. 392; Speer v. Speer (Iowa) 123 N. W. 176; Danning v. Butcher (Iowa)

NOTE.—The result of the best considered cases on the subject of what constitutes testamentary capacity seems to put the quantum of understanding requisite to the valid execution of a will upon the basis of knowing and comprehending the transaction and its effect; that is, that the testator shall understand the extent of the property of which he is disposing, and the objects of his bounty, as will be seen by an examination of the cases collated in notes in 27 L.R.A.(N.S.) 2, and L.R.A. 1915A, 444, on the question what constitutes capacity or incapacity to make a will.

On opinion evidence by nonexpert as to the contractual or testamentary capacity of another, see note in 38 L.R.A.(N.S.) 591.

59 N. W. 69; 27 L.R.A.(N.S.) 294; 140 Am. St. Rep. 268; State v. McGruder, 101 N. W. 646; Dolan v. Henry, 177 N. W. 718; Runyan v. Price (Ohio) 85 Am. Dec. 468; Betts v. Betts, 84 N. W. 977.

A witness cannot be permitted to give his opinion in answer to an inquiry which embraces the whole merits of the case and leaves nothing for the jury to decide. DeWitt v. Barley, 17 N. Y. 347; Jameson v. Drinkald, 12 Moore, 148; Muldowney v. Ry. Co. 39 Iowa, 615.

In the case at bar the contestants so framed their questions by including the words "mental capacity" as to invade the province of the jury. Walker v. Walker, 34 Ala. 469; Kempsey v. McGinniss, 21 Mich. 123; White v. Bailey, 10 Mich. 155.

Neither an expert nor a nonexpert can state his opinion of the capacity of the testator to make a will when such opinion assumes the shape and has the effect of being an opinion upon the legal capacity of the party in question. Brown v. Mitchell, 36 L.R.A. 67; Fairchild v. Bascomb, 36 Vt. 398; May v. Bradlee, 127 Mass. 414; Walker v. Walker, 34 Ala. 469; Kempsey v. McGinniss, 21 Mich. 123; Gibson v. Gibson, 9 Yerg. 329; Runyan v. Price, 15 Ohio St. 1, 86 Am. Dec. 459; Schneider v. Manning, 121 Ill. 376; Farrell v. Brennan, 32 Mo. 328, 82 Am. Dec. 137; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Hewlett v. Wood, 55 N. Y. 634; White v. Bailey, 10 Mich. 159; Re Blood, 62 Vt. 359.

Wm. Anderson, Cuthbert, Smythe, & Wheeler, and *Middaugh & Cuthbert,* for respondents.

As evidence of such capacity, it is settled that opinions of witnesses who know him are admissible, but only opinions founded on facts which must first be given to the jury that they may determine the weight to be given to the opinions founded on them. Dunham's Appeal from Probate, 27 Conn. 198; Potts v. House, 50 Am. Dec. 332; Barker v. Pope, 91 N. C. 168; Bricker v. Lightner, 40 Pa. 205; Wilkinson v. Pearson, 23 Pa. 117.

BIRDZELL, J. This is an appeal from a judgment in favor of the contestant in a proceeding to contest the purported will of William J. Morgridge, deceased. After a hearing upon the contest in the county court of Ramsey county, the document was admitted to probate, whereupon the contestants appealed to the district court demanding a trial

de novo. The issues framed were tried before the presiding district judge and a jury, resulting in a verdict that the document offered was not the last will and testament of William J. Morgridge. Judgment was entered upon the verdict. A motion for a new trial was subsequently made, which was overruled. There are appeals from the judgment and from the order denying the motion for a new trial.

The facts necessary to an understanding of the issues involved on the appeals in this court may be briefly stated as follows:

William J. Morgridge, a bachelor, had lived in Ramsey county for a number of years. During the period of his greatest activity in business affairs he was engaged in the mercantile business in the village of Grand Harbor. For about twelve years of that time prior to the year 1904 he was in partnership with one Fred E. Merrick. In 1904 Merrick severed his active connection with the business and thereafter Morgridge continued in sole charge until 1910 when he closed out and moved to Devils Lake, making his home at one of the hotels in that city. During the period of partnership association in business with Merrick, Morgridge lived in Merrick's home in Grand Harbor, in which he was treated practically as a member of the family. It seems that the relationship between Morgridge and the Merricks during this period was intimate and mutually satisfactory. After the dissolution of the partnership Merrick gave Morgridge a power of attorney, enabling Morgridge to transact business concerning the matters in which they both continued interested, and in addition to look after some farm lands which Merrick owned in Ramsey county. In December, 1915, Morgridge suffered a stroke of paralysis from the effects of which he never recovered. After this time he lived at the General Hospital in Devils Lake. The document in question was executed on November 23, 1917, and the deceased died February 1, 1919, being at the time between seventy and seventy-five years of age.

The deceased left property valued at approximately $80,000. The will provides for bequests as follows: $100 to Delia F. Morgridge, of Boston, Mass., a sister of the deceased; to a nephew, Ralph Waldo Prescott, $10,000; to one Clara Allen, of Boston, $100; to Stella Merrick of Medford, Oregon (wife of his former business partner, F. E. Merrick) $5,000; to Ruth Caufield, of Oregon City, Oregon (a daughter of F. E. and Stella Merrick), $1,000; to Walter D. and

Emerson P. Merrick (sons of F. E. and Stella Merrick), of Medford, Oregon, $1,000 each. The balance of the property was devised and bequeathed to the above-named persons in proportion to the amounts bequeathed in the will.

The contestants' answer to the petition for probate, after setting forth the heirship, alleges grounds for contest as follows: (1) The lack of mental capacity to make the will; (2) the lack of due execution; and (3) the existence of undue influence. The case was submitted to the jury under the first two issues.

There are a number of assignments of error based upon questions asked of a number of nonexpert witnesses. The question in the form objected to was first put to one, Baird, a banker with whom the deceased had had a number of business transactions, both before and after he was stricken. After laying a foundation showing Baird's acquaintance with and knowledge of the condition of the deceased during the period under examination, he was asked this question:

"Q. Now, Mr. Baird, from all your observations and experiences which you have related, would you say that William J. Morgridge had and possessed such sound mind, disposing mind and memory, and capacity that he could make a will on the 23d day of November, 1917?"

The question was objected to and the objection overruled, the witness answering:

"A. I do not believe he could make a will intelligently." Whereupon the following question was asked:

"Q. That is, you mean by that, you do not think he had the mental capacity to know what he was doing with his property or to whom he was disposing of it?"

"A. I do not think he did."

A similar question was put to a number of nonexpert witnesses who had at different times observed Morgridge's condition, but in the other instances the elements covered by the two questions above-quoted were combined.

The witness, Haley, who had known the deceased intimately during his lifetime and who had visited him at the hospital on a number of occasions, was asked the following question:

"Q. What would you say, Mr. Haley, from your observations, knowledge of the man and visits with him, hearing him talk and your

talking to him, as to whether or not he had sufficient mental capacity, soundness of mind and memory to make a will and to dispose, to know the disposition he was making of his property, and the beneficiaries under his will and the recipients of the property."

A similar question was put to Dr. Sihler, who treated the deceased professionally, who saw him more frequently than any other witness, and who was one of the witnesses to the will. He answered that in his opinion the deceased was incompetent at the time the will was made.

The appellant argues that these questions were improper for two reasons: First, they call for the conclusion of the witness as to the competency of the testator to make a will and thus involve both the question of mental capacity as a fact and the legal conclusion of competency which could only be drawn by the jury under proper instructions from the court; and, secondly, that the questions called for the conclusions of the various witnesses as to the existence of such capacity on November 23, 1917, the date of the will, without a foundation being laid showing that the various witnesses observed the condition of the deceased at that time.

In considering the assignments of error based upon the rulings on testimony above referred to, we do not wish to be understood as approving the form of the questions objected to to any greater extent than appears in the discussion to follow, which is necessarily limited to the circumstances in this particular case as mentioned below.

This case was tried in December, 1919. Upon the trial the proponents of the will introduced the deposition of Clark W. Kelly which was taken on October 10th, nearly two months before the trial. The witness was examined in chief by Mr. J. C. Adamson, as attorney for the proponents of the will. Upon inquiring with reference to the capacity of the testator, the question was put as follows:

"Q. Now, then, Mr. Kelly, basing your answer upon the specific conversations you had with Mr. Morgridge and the opportunity you had to observe him and listen to his talk and discussions and conversations which you had with him in October and in November, 1917, which you have testified to, you may state whether or not in your opinion Mr. Morgridge was, in the middle of November, 1917, of sufficient

mind and memory to execute a will and to dispose of his property and know what he was about at that time?"

This question was objected to by the attorney for the contestants on the specific ground that the witness had not shown himself competent to testify as to the mental requirements for a person to make a will. At the conclusion of the examination a motion was made to strike the answer for the same reason. A question substantially similar was asked of W. R. Merrick, in his deposition taken at Los Angeles a month before the trial. It will be seen that the questions asked by the proponents were in all substantial particulars in the same form as those asked by the contestants upon the trial, and it is a well-established rule that where one party adopts a form of inquiry for purposes of eliciting certain facts, he cannot predicate error upon the adoption of the same form by the adverse party. Montana Eastern R. Co. v. Lebeck, 32 N. D. 162, 155 N. W. 648; Wetzel v. Firebaugh, 251 Ill. 190–197, 95 N. E. 1085.

But aside from this consideration we are of the opinion that, in the circumstances presented in the instant case, it was not error to overrule the objections to the various questions asked of the witnesses for the contestants. The objection that the questions were so framed as to permit the witnesses to draw the legal conclusion which must be left to the jury under proper instructions presents a principle which has given rise to some difficulty in its application. The principle for which the appellants contend is clear enough. It is for the jury, and not for the witnesses, to say whether the deceased had the requisite capacity to make a will. Wigmore, Ev. § 1958. But the difficulty of presenting to the jury the condition of mind of a person whose competency is assailed is such that frequently it cannot be done to the best advantage without permitting the witness to state the condition in terms of conclusions. The witness must necessarily state a conclusion of capacity or lack of capacity from his own experience and judgment as to what constitutes capacity for doing certain acts. The fact that the law has defined the degree of capacity to perform the same acts should not, in itself, render the conclusion of the witnesses altogether incompetent where there is presented to the jury, as in the instant case, all of the facts from which the conclusion is drawn. It remains, nevertheless, the opinion of the witness as to the mental condition. For instance,

there is much testimony in the record before us to the effect that the deceased was slow to recognize even his most intimate friends; that at times he seemed to think that he did not have sufficient property to care for himself. The natural inference to be drawn from such testimony would be that he did not comprehend his property and the objects of his beneficence; from which it would follow that he had not the mental capacity to make a will. In the questions objected to, however, the legal definition of capacity to make a will was incorporated and the inquiry thus limited to the ability of the deceased to comprehend his property and dispose of it to beneficiaries. In these circumstances we are of the opinion that it was not error to overrule the objections to the questions. Macafee v. Higgins, 31 App. D. C. 355; Glass v. Glass, 127 Iowa, 646, 103 N. W. 1013; Searles v. Northwestern Mut. L. Ins. Co. 148 Iowa, 65–75, 29 L.R.A.(N.S.) 405, 126 N. W. 801; Dolan v. Henry, — Iowa, —, 177 N. W. 712. A question of the exact nature of those asked in the case at bar was upheld in Bost v. Bost, 87 N. C. 477. See also Horah v. Knox, 87 N. C. 483.

In so far as the questions call for the opinions of the witnesses as to the competency on November 23, 1917, regardless of whether or not the particular witness had observed the deceased on that date, they do not involve error.

The record shows that the deceased was suffering from a disease known as arterial sclerosis, and that in December, 1915, he suffered a stroke of apoplexy resulting in paralysis, from the effects of which he never recovered. There is much testimony going to show the degree and the nature of the mental impairment attendant upon the affliction of the deceased. And we may add that the witnesses differed greatly. From the nature of the deceased's condition, however, as testified to by the contestants' witnesses, it may well be inferred that, while there would be some variation in the mental power, a condition of constant or permanent impairment was shown, and where this condition is shown to exist the inquiry may extend to a reasonable period of time, either anterior or subsequent to the date of the execution of the will. Such evidence would afford a proper basis for the inference to be drawn by the jury as to the mental capacity at the time of the execution of the will. It may be true that it was technically improper to include in the question a date not covered by the observation of the par-

ticular witness; but it is clear that the proponents' case was not prejudiced by the inclusion of the date, for the jury had before it the observations upon which the opinions of the witnesses were based. Furthermore, the court in the instruction given specifically limited the evidence to the establishing of incompetency on the date of execution. This would have been the duty of the court if the date had not been mentioned in the questions. The inclusion of the date was harmless.

Additional assignments relating to the exclusion of evidence offered for purposes of impeachment seem to be without merit. The interest which the witnesses, particularly the witness Sihler, had in this contest proceeding was patent to the jury, and the matters concerning which impeachment was sought were clearly collateral, as they did not involve the interest of any witness, but only contradiction concerning purely foreign subject-matter. We do not deem it necessary to consider these assignments further.

It is apparent to us that a fair trial has been had, that all issues of fact have been properly submitted to the jury, and that their verdict is decisive. Finding no error in the record warranting reversal, the judgment and order appealed from are affirmed.

CAROLINA KOST, Petitioner and Appellant, v. SHERIDAN COUNTY, a Municipal Corporation, Defendant and Respondent.

(179 N. W. 703.)

Infants — application for mother's pension denied where applicant had not resided in county for a year.

A mother made application by petition for the allowance of a mother's pension under chapter 185, Session Laws of 1915. Under stipulated facts it appeared that she had been voluntarily absent from the county in which the application was made for more than a year previous thereto, and that she had taken up her residence in another county where she had lived for more than a year. It is *held:*

1. Under ¶ 5 of § 2 of chapter 185, Sessions Laws of 1915, an applicant for a mother's pension must have resided in the county for one year.

Infants — statutory period applies only to those not residing in county for year immediately before applying for mother's pension.

2. The provisions of ¶ 4 of § 2501, Comp. Laws 1913, which, in determining the period of residence in a given county, direct the exclusion of periods spent as inmates in public institutions, and each month during which poor relief was received from any county, apply only with respect to persons who have not resided in any one county for the period of a year immediately preceding the application.

Domicil — residence in given county is lost by voluntary absence therefrom for a year or more.

3. Under ¶ 6 of § 2501, Comp. Laws 1913, the residence of an individual in a given county is lost by voluntary absence from the county for one year or more, regardless of the receipt by such person of poor relief during a part of the period of absence.

Opinion filed October 16, 1920.

Appeal from the district court of Sheridan County, *Nuessle*, J. Affirmed.

J. H. Ulsrud, for petitioner and appellant.
Frank I. Temple, for defendant and respondent.

BIRDZELL, J. By petition dated December 16, 1916, the appellant, Carolina Kost, presented to the county court of Sheridan county an application for the allowance of a mother's pension under chapter 185, Session Laws of 1915. The petition was denied and an appeal was taken to the district court, wherein the order of the county court denying the petition was affirmed. The matter was presented on stipulated facts, which, so far as material, may be briefly stated as follows:

Carolina Kost is a widow and the mother of five children under fourteen years of age and one child over fourteen. The children under fourteen years of age are dependent upon the mother for support. Prior to September 29, 1915, the petitioner had resided in Sheridan county, but on that date she moved with her family to the village of Anamoose in McHenry county where she has ever since been living. Upon moving to Anamoose she had money and property valued at about $800. With some of this she purchased a house and lot which she still owns. She intends to remain permanently in the village of Anamoose.

During the month of June, 1916, and at various times thereafter until October 31, 1916, the petitioner received aid as a poor person from

the county of Sheridan and after the 31st of October, 1916, she received aid and relief from McHenry county. The sole question presented upon this appeal, is as to whether or not the petitioner's residence, for the purpose of applying the Mothers' Pension Act, is in the county of Sheridan.

Paragraph 5 of § 2 of the Mothers' Pension Act (Sess. Laws 1915, chap. 185) provides that no person shall receive benefit under the act who shall not have been a resident of the county in which the application is made for at least one year previous to the making of such application. By another section the residence is required to be stated in the application. Section 7 declares that the act is intended to supplement existing laws for the aid of the poor and is enacted for the specific purpose of furnishing permanent aid to mothers who come under its provisions. The difficulty arises upon a construction of the residence provisions of the statute above referred to in conjunction with § 2501, Comp. Laws 1913, regulating the residence of persons for purposes of applying the poor relief statutes.

The contention of the appellant is that the term "residence" as used in the Mother's Pension Law means a residence such as would fix the liability of a county for relief and support as the same is defined in § 2501, Comp. Laws 1913. Subdivision 4 of the section last referred to provides that "each male person and each unmarried female over the age of twenty-one years, who shall have resided one year continuously in any county in this state, shall thereby gain a residence in such county."

But it is further provided as follows:

"Every person who has resided one year continuously in the state, but not in any one county, shall have a settlement in the county in which he has longest resided within such year. The time during which a person has been an inmate of a hospital, poor house, jail, prison or other public institution and each month during which he has received relief from the poor fund of any county, shall be excluded in determining the time of residence hereunder."

The proposition of appellant's counsel is that the period of time during which the applicant received poor relief from Sheridan county and from McHenry county must be deducted in computing the year's residence in McHenry county, from which it would follow that the appli-

cant was still, at the time of petitioning, a resident of Sheridan county. Assuming that this statute is applicable in determining residence under the Mothers' Pension Act, we do not construe it as appellant's counsel does. Both ¶¶ 4 and 6 of § 2501, Comp. Laws 1913, bear unmistakable evidence of legislative intention to fix the residence of a person for purposes of poor relief in a county where he shall have resided continuously for one year. That portion of the statute above quoted, which has reference to fixing the obligation for relief with respect to a person who has *not* resided in any one county for a year, was added by an amendment in 1907 (Sess. Laws 1907, chap. 183) when the period of residence required was changed from ninety days to one year. The purpose of this provision is evident. It is to fix the obligation as between counties, only with respect to persons who have not resided continuously in any one county for a year prior to the time the application is made. In such cases the applicant will be deemed to have a settlement in the county in which he has longest resided within the year, excepting from the computation any period during which he was an inmate of a public institution and each month during which he received support from the poor fund in any county. Any other construction would render the different provisions of § 2501 repugnant to each other. For instance, ¶ 6 of this section provides that "each residence, when once legally acquired, shall continue until it is lost or defeated by acquiring a new one in this state, *or by voluntary absence from the county in which such residence had obtained for one year or more;* and upon acquiring a new residence, *or upon the happening of such voluntary absence,* all former residence shall be defeated and lost."

This is in no wise qualified by any provision respecting periods of time spent in public institutions or months during which poor relief was received. It recognizes the loss of residence, through *voluntary* absence for a year.

The applicant in this case was voluntarily absent from the county in which the application was made for more than one year prior to the application and consequently had lost her residence in Sheridan county under ¶ 6 of § 2501, Comp. Laws 1913. This subdivision is not qualified by the language of ¶ 4. We are of the opinion that the rules

of construction with reference to avoidance of repugnancies clearly require the interpretation of ¶ 4 as hereinabove indicated.

The applicant, not having resided in Sheridan county for the period of a year previous to her application, has not brought herself within the terms of the statute as to such county. It follows that the judgment appealed from is correct and it is affirmed.

WILLIAM P. TUTTLE, Respondent, v. LOUISE J. TUTTLE, Appellant.

(181 N. W. 888.)

Divorce — decree for husband will not be vacated twelve years afterwards where during that time wife has received benefits thereof.

This is an appeal from an order made by Judge Cooley denying a motion to vacate a judgment of divorce. In 1907, some thirteen years ago, the plaintiff being fifty-nine and the defendant sixty-three, this action was commenced. From the complaint and the answer it appears that each party charged the other with cruelty and desertion. On the trial each party was represented by distinguished counsel. Many witnesses were sworn. The testimony covers 500 pages, and it sustains the judgment. The moving affidavits, which impute bribery to the trial judge, are in no way convincing. And it appears that for twelve years the defendant has accepted the benefits of the judgment; she has been receiving $300 a month. In 1909 an appeal from the judgment was dismissed because the plaintiff had then accepted some of the benefits awarded her. Tuttle v. Tuttle, 19 N. D. 748.

Opinion filed October 28, 1920. Rehearing denied January 21, 1921.

Appeal from an order of the District Court of Burleigh County, Honorable *Chas. M. Cooley,* Special Judge.

Affirmed.

Leslie A. Simpson and *S. E. Ellsworth,* for appellant.

It is well settled that judgments may be set aside and vacated on motion made in the original action, and such has been the practice generally in such cases. Beach v. Beach, 6 Dak. 371, 40 N. W. 701; Gaar, S. & Co. v. Spaulding, 2 N. D. 420; Yorke v. Yorke, 3 N. D.

343, 55 N. W. 1095; Nichells v. Nichells, 5 N. D. 125, 64 N. W. 73.

Fraud, as other facts, may be established by a preponderance of the evidence. While a preponderance of evidence is required to sustain the burden of proof, a preponderance is sufficient, and proof beyond a reasonable doubt is not necessary." 20 Cyc. 121, notes 15, 16; 17 Cyc. 760, 761.

A proceeding or action in equity to cancel a contract implied by fraud is governed by the same principles which apply to a similar action to vacate a decree. 20 Cyc. 87, 91; Dennie v. Harris (Iowa) 153 N. W. 343; Haverty v. Haverty (Kan.) 11 Pac. 364.

"A court record, based upon a legal fraud, may demand obedience while it stands, but it is idle to talk of the sanctity of such a record. Whatsoever is tainted with fraud—a court record no less than a contract—must fall before the clear evidence of the fraud by which it was established. This principle can never be departed from without making the law the instrument for the perpetration of injustice, oppression of crime. This is familiar law." Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095.

"Equity will restrain the enforcement of a judgment which was unjustly obtained by means of a conspiracy or fraudulent collusion." 23 Cyc. 1027.

"The district court, being a court of general jurisdiction, can, in a case of equity, where fraud and collusion are charged against a judge in entering an order or decree, review the same and annul it, if the facts justify such a conclusion." Sanford v. Head & Merrit, 5 Cal. 297; Stokes v. Knarr, 11 Wis. 392.

Lawrence & Murphy and *Edward Engerud,* for respondent.

"No inquiry can be made into the honesty of the decision of a court when that decision is interposed as conclusive evidence of probable cause. Root v. Rose, 6 N. D. 575.

"The peace and interests of society require the power to disturb the decrees and judgments of courts of competent jurisdiction, and to reopen controversies which it is the policy of the law to quiet, to be exercised with strictness and caution. Waldron v. Waldron, 76 Ala. 285; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Graves v. Graves, 10 L.R.A.(N.S.) 226; 15 R. C. L. pp. 875, 876, 878.

"A charge of fraud in obtaining a judgment of divorce must, in

order to sustain a bill in equity to set it aside, be established by the clearest and most satisfactory evidence." Whittaker v. Whittaker, 151 Ill. 266, 37 N. E. 1077; Whiting v. Whiting, 114 Mass. 494; Holbrook v. Holbrook, 114 Mass. 568; Watkinson v. Watkinson, 68 N. J. Eq. 632, 69 L.R.A. 397, 60 Atl. 931, 6 Ann. Cas. 326; Wiemer v. Wiemer, 21 N. D. 371, 130 N. W. 1015.

"A burden rests upon whoever seeks to set aside a judgment or decree, of proving facts and establishing grounds sufficient to warrant the court in annulling it." Waldron v. Waldron, 76 Ala. 285; Corney v. Corney, 108 Ark. 415, 159 S. W. 20; Re James, 99 Cal. 374, 37 Am. St. Rep. 60, 35 Pac. 1122; Penn v. McGhee, 6 Ga. App. 631, 65 S. E. 686; Van Sickle v. Harmeyer, 172 Ill. App. 218; Ellis v. Ellis, 61 Iowa, 644, 17 N. W. 28.

ROBINSON, J. This is an appeal from an order made by Judge Cooley refusing to vacate a judgment of divorce. It was duly given twelve years ago, and under it the defendant has been receiving $300 a month, so she has now received about $40,000 under the judgment she seeks to vacate. She appealed from the judgment and the appeal was dismissed, not on any technicality, but on a showing that she had then received a large sum of money under the judgment. Tuttle v. Tuttle, 19 N. D. 748, 124 N. W. 429. The decision of this court is signed by Justices B. F. Spalding, C. J. Fisk, John Carmody, and D. E. Morgan. The last two justices are now dead. Judge Winchester, who gave the decision, is dead. Several of the distinguished attorneys who took part in the trial are dead. The death roll includes Mr. Cochrane, who was attorney for defendant; and, on very dubious affidavits imputing bribery to attorney Cochrane and the late Judge Winchester, the defendant moves to vacate the judgment. If the motion were to prevail, then, in twelve years hence, when some of the present judges may be no more, there might be a similar motion to vacate any decision by this present court.

In November, 1907, nearly thirteen years ago, when the plaintiff was fifty-nine and the defendant sixty-three years, this action was commenced. From the complaint and the answer it appears that each party charged the other with cruelty and desertion. On the trial of this

suit both parties were represented by distinguished counsel and both parties were present and testified. In all, sixteen witnesses testified. The testimony taken before Judge Winchester covers 356 typewritten pages, the depositions, 165 pages, and then there are numerous exhibits. To attempt a statement of the testimony would be an act of folly. Judge Cooley has found that the judgment is well sustained by the evidence, and the writer is well satisfied that the decision of Judge Winchester is in accordance with the testimony and that it is in all respects just and righteous.

The motion is based on several dubious affidavits imputing bribery to Judge Winchester, and attorney Cochrane. If the judgment was wrong and contrary to the evidence, the remedy of the plaintiff was by an appeal within a year, and not by a motion after the lapse of twelve years and after receiving $40,000 on the judgment. The motion is based on affidavits written by counsel, subscribed and sworn to by the affiants. Such affidavits are the weakest kind of evidence. They have little or no force when they relate to transactions long past, to transactions with deceased persons, or to matters not susceptible of proof to the contrary.

The principal affidavit is made by Mr. Pettibone. It avers that pending the suit on different occasions Tuttle stated that it was his intention to bribe W. F. Cochrane, one of defendant's attorneys; that Tuttle showed him (Mr. Pettibone) a roll of currency, $1,500, which he said he was going to give Judge Winchester for campaign purposes. The affidavit avers that Pettibone saw Tuttle enter the judge's chambers and there remain with the judge for half an hour; that Tuttle stated to him that he had delivered the roll to the judge; that W. F. Cochrane said to Pettibone that Tuttle should have given him $10,000 for his action in the divorce suit. The conclusion of the affidavit is that affiant is not in any manner interested in the suit, but desires to see justice done. To give credit to the affiant we must conclude that the desire to see justice done was very tardy and that Judge Winchester, attorney Cochrane and Mr. Tuttle were fools as well as knaves.

Mrs. Tuttle makes several affidavits. She avers that she did not know of the bribery until January, 1919, when it was disclosed to her by Mr. Pettibone.

Knappen, editor of a newspaper, makes affidavit in regard to con-

versations with Tuttle concerning the divorce matter in 1908 and 1919. In this busy world, ten or twelve years is a long time to remember casual remarks such as commonly "pass in at one ear and out at the other." Who can remember even the text from which his pastor preached ten years ago?

George Hogue makes affidavit that in October, 1908, Tuttle tried to hire him to bribe Cochrane by offering him $10,000 to arrange the record so that in case of an appeal Tuttle would be sure to win. And that during 1908, he, George Hogue, took a prominent part assisting Tuttle in his campaign for election to the House of Representatives. How strange that a man of truth and honor should work to secure the election of a man confessedly guilty of bribery and corruption!

There is no good reason for extending the opinion by a discussion of the moving affidavits. They are all alike; they are all controverted; they are all dubious and highly improbable, and if true, the facts stated do not show cause for vacating a regular judgment after such a lapse of time and after defendant has for so many years accepted the benefits of the judgment.

It is shown that in January, 1918, defendant commenced an action against the plaintiff in the district court of Burleigh county to recover about $480,000 ($300,000, with interest from January, 1909). The basis of the action is that in the divorce suit she should have recovered at least $300,000. Such an action, in the opinion of the writer, taken in connection with the proceedings in this case, gives to the whole a color of blackmail. It shows an attempt to extort money from the plaintiff, to force him to buy his peace by harassing him with vexatious, groundless, and expensive litigation. The judgment in the case was given after a full and fair hearing. It imports absolute validity and verity. It is not subject to a collateral attack, nor is the plaintiff subject to a suit for obtaining the judgment. Hence, no party has a right to commence or prosecute such an action.

The order appealed from is affirmed, with costs.

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

BRONSON, J. I concur in the affirmance of the order of the trial court. In the other opinions filed the facts are quite fully stated. The

crux of the controversy is the sufficiency of the moving papers, in equity, to warrant the vacation of the judgment of divorce that has stood unimpeached for over ten years, and through which the moving party has continuously accepted benefits both before and after the discovery of the alleged fraud and bribery. It is evident that the trial judge, the Honorable Charles M. Cooley, gave careful and considerate attention to plaintiff's claims. He has rendered a well-prepared and well-considered memorandum decision. Therein he has stated that the presumptions are in favor of the correctness of the decree attacked, and of the honor and integrity of the court which rendered the decree; that charges of this character must be established by clear and satisfactory evidence (citing Garrison v. Akin, 2 Barb. 25; Wiemer v. Wiemer, 21 N. D. 371, 130 N. W. 1016); that the evidence, submitted in the form of affidavits, is of an unsatisfactory character and insufficient to warrant the vacation of the decree through a motion made upon such affidavits alone; that, upon principles of estoppel, the plaintiff, through the acceptance of benefits under the decree both before and after the discovery of the alleged fraud and bribery, in sums of money aggregating over $36,000 is not in a position now, after the lapse of over ten years since the rendition of the decree to question the decree; and, further, that the decree of divorce, so questioned, is sustained by the evidence produced at the trial where both parties were present, and where both parties submitted evidence and the case for the decision of such trial court. We quite agree with the decision and findings of the trial court. Manifestly, plaintiff's affidavits, procured ex parte, not subject to cross-examination, show largely merely circumstantial conditions. Largely, they are in the nature of hearsay statements. The innuendo and the insinuation may be strong, but the asserted proof of the acts of fraud or of the corruption of the court is very weak and unsatisfactory. Assuredly the solemnity of a decree thus rendered and now hoary with age, and the integrity of the trial judge, long since deceased, whose lips may not now utter to mortal ears any defense of his judicial acts, may not thus be impeached.

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

GRACE, J. (dissenting). On February 9. 1909, the plaintiff pro

cured a decree of divorce from the defendant, and in that case findings of fact, conclusions of law, and order for judgment were made and the decree of divorce granted.

This motion is dated April 17, 1919, and was served upon the plaintiff in due time and manner, and was heard on the 25th day of September, 1919, and the order made from which appeal is taken.

The grounds upon which it is sought to set aside the decree are fraud and bribery by the plaintiff in procuring it. The affidavits in support of the motion are those of defendant, Pettibone, Knapper, Christopher and Hogue. The affidavit of one L. C. Pettibone is as follows:

State of North Dakota, }
County of Stutsman. } ss.

"L. C. Pettibone, being first duly sworn, upon his oath deposes and says that he is a citizen of the United States and a resident at Dawson in Kidder county, North Dakota, and has been for more than twenty years last past; and that during said time he has been and now is engaged in a general real estate business. That he has known Wm. P. Tuttle, the above-named plaintiff for about twenty years last past and since the year 1905 has been intimately acquainted with him. That he also is acquainted with Louise J. Tuttle and has been for some years last past prior to 1909. That from the year 1905 up and inclusive of a portion of the year 1914 he was associated in various business transactions with the plaintiff above named, and, together with said Tuttle, in Dawson and Bismarck, occupied the same office. That during the years 1905 up and inclusive of the year 1913, this affiant was familiar with the business transactions of the said Tuttle and of the various matters concerning which the plaintiff, Wm. P. Tuttle, was involved financially, and knows said Tuttle did not pay out money in October, 1908, to exceed $1,000 in business matters. That during said years the said Wm. P. Tuttle had and maintained bank accounts in various banks in different states, including Chicago, Illinois, St. Paul, Minnesota, Dawson and Steele, North Dakota. That affiant was familiar with the institution, the progress of the trial and the final determination of the above-entitled action, which was an action in divorce and knows of his personal knowledge that the same was tried before W. H. Winchester, in the district court of Burleigh county, beginning on or

about December 8, 1908. That during the months intervening between January 1, 1908, and December 1, 1908, the said Wm. P. Tuttle, upon various occasions stated to this affiant that it was his intention to bribe said judge of the district court above named to decide the case in his favor and between said dates, the said Wm. P. Tuttle stated to this affiant upon different occasions, that it was his intention to bribe W. F. Cochrane, one of the defendant's attorneys, with the same purpose in view; and during said times the said Tuttle requested the said affiant to interview the said Cochrane and to promise him anything to induce him in plaintiff's favor in said case, which affiant declined to do.

"Affiant further states that during the month of October, 1908, he accompanied the said Wm. P. Tuttle to Burleigh county courthouse in Bismarck, North Dakota, and entered the main court room of said courthouse. That at said time a number of other people were present on some matters then pending before Judge Winchester. Affiant and Wm. P. Tuttle sat in the main court room waiting until the other people had dispersed. That just previous to taking the said trip to the courthouse with said Tuttle, at a room at the hotel in Bismarck, said Tuttle had exhibited to affiant a yellow envelope containing a large amount of currency, which he said amounted to $1,500; that he, Tuttle, said he was going to deliver said money to Judge Winchester for campaign expenses, that while they were alone in said courthouse and before entering the presence of Judge Winchester, the said Tuttle again exhibited to affiant the yellow envelope requesting him, the affiant, to deliver it to the judge and to advise him that it was for campaign expenses; that said affiant absolutely refused and declined to have anything to do with the matter; that plaintiff, Wm. P. Tuttle, then entered the chambers alone and there remained for from one half to three quarters of an hour, with Judge Winchester, whereupon he, Wm. P. Tuttle, joined this affiant in said court room; that affiant did not again see said yellow envelope or its contents after the said Tuttle emerged from the room where he interviewed said Judge Winchester; that immediately thereafter the said Tuttle stated to this affiant that he had delivered said $1,500 to Judge Winchester, and that during the interview and at the time said money was so delivered by him, he had discussed thoroughly the above-entitled pending action, with the judge, and stated to affiant also that he had delivered said $1,500 to Judge

Winchester and the judge had accepted the same, with the remark to affiant that the judge seemed glad to get it.

"Affiant further states that the said Tuttle stated that the judge had then promised in the course of the trial to censure Wm. J. Tuttle, a son of plaintiff and defendant, if said Wm. J. Tuttle should take the witness stand in said case in behalf of his mother. The said Tuttle further stated to this affiant after said October, 1908, and prior to the date of trial in said case, that it was agreed between the plaintiff and the judge as to the amount of alimony that the judge should determine that the plaintiff should pay to the defendant, and it was further stated to the affiant by Wm. P. Tuttle that the judge asserted that it should be the sum of $300 per month rather than the sum of $150, which the plaintiff himself stated to affiant he had suggested; that the judge gave for his reason that in case there should be an appeal, that the supreme court might think that the sum of $150 would be inadequate; all of which statements were made prior to the date of trial of said action.

"Affiant further states that after trial and determination of said action before said Judge Winchester, the said Tuttle stated to this affiant on or about January, 1909, that he, Tuttle, was to give Judge Winchester a trip to Mexico at Tuttle's expense, and stated further to affiant that he, Tuttle, was to arrange for said trip for said Judge Winchester through some tourist association in Chicago, Illinois.

"Affiant further states that some time after the trial of said action he had a conversation with W. F. Cochrane, formerly of Bismarck, and the identical man that appeared as one of the attorneys for Louis J. Tuttle, and that said Cochrane stated to this affiant that Tuttle should have given him at least $10,000 for Cochrane's action in connection with said case in behalf of said Tuttle.

"Affiant further states that he was present at the trial of said action and according to affiant's best recollection on the evening of December 11, 1908, at the close of the taking of testimony in said action he heard Judge Winchester severely censure Wm. J. Tuttle, heretofore mentioned, which language so used by the trial judge at said time corresponed with what the plaintiff, Wm. P. Tuttle, had before the trial stated to this affiant would be used by said judge upon the trial.

"Affiant further states that from the close of the trial of the said

action in December, 1908, he had not seen Mrs. Wm. P. Tuttle for a period of about ten years and until on or about the 28th of January, 1919, at which time this affiant disclosed to said defendant, Louise J. Tuttle, substantial evidence of the things in this affidavit set forth, and prior to that time he had never disclosed to said Louise J. Tuttle or Wm. J. Tuttle, her son, or defendant's attorneys, any of the things hereinbefore stated.

"Affiant further states that he is not in any manner related to said Louise J. Tuttle or to the plaintiff, Wm. P. Tuttle, and has no interest whatever in this case save that he desires to see justice done.

"L. C. Pettibone.

"Subscribed and sworn to before me this 10th day of April, A. D. 1919.

"Jay M. Allen,

"Notary Public, Stutsman Co., N. Dak.,

"My commission expires March 25, 1921."

Other affidavits, showing, or tending to show, fraud and bribery, are those of H. P. Knappen, Aaron Christopher, and George M. Hogue, and in the order named are as follows:

State of North Dakota,
County of Burleigh. } ss.

"H. P. Knappen being duly sworn says he is a married man and now is and for many years has been a resident of the city of Bismarck, North Dakota, and for many years and now is an editor and manager of a newspaper published in Bismarck. That he has known Wm. P. Tuttle since the year 1906 or 1907, but does not know the defendant, Louise J. Tuttle; that he knows of his own knowledge of the above action and that it was an action for divorce, and that he remembers well the commencement of the action and the trial thereof as well as the decision made by the judge before whom said action was tried; that he remembers said Wm. J. Tuttle talking many times to affiant both before and after the trial of the case, said conversations taking place at Bismarck, North Dakota, with exception of one talk which took place at Steele, North Dakota; that affiant was much impressed by the extreme hatred of said Tuttle toward his wife and his son Wm. J. Tuttle, as evidenced by the language used by said Tuttle to affiant,

said language being so unnatural that it raised a question in affiant's mind of said Tuttle's normal mentality; that said Tuttle on several occasions during October and November, 1908, and later and in early February or March, 1909, requested affiant to publish in his newspaper matters derogatory to the defendant, Louise J. Tuttle, and before said case was tried informed this affiant that he had it arranged with the court that he should be granted a divorce from his (Tuttle's) wife and knew that he would only have to pay such alimony as he (Tuttle) would voluntarily pay, and told this affiant that he had contributed large sums of money to the campaign fund of the trial judge who was a candidate for the office at the 1908 election, and that the trial of the case would not take place until after said election had occurred, and that the judge had agreed to decide the case in his (Tuttle's) favor and to deny the wife any relief that she was asking for, and during one of said conversations stated to affiant that W. F. Cochrane, one of the defendant's attorneys, had for a consideration, which Tuttle stated he had promised, consented to aid the plaintiff in his efforts to obtain his divorce, and had agreed with the plaintiff not to appeal the case to the supreme court after the trial judge should announce his decision in the plaintiff's favor.

"Affiant well recalls said Tuttle coming to affiant's newspaper office sometime in early March, 1909, to affiant's best recollection, and stating in substance and effect that 'the trial judge had carried out the agreement entered into between himself (Tuttle) and the judge previous to the trial and stating that he (Tuttle) was entitled to the decision as he had paid the court to give it,' and at the same time requesting affiant to publish in his newspaper a write-up of the case that would severely censure the defendant, Mrs. Louise J. Tuttle.

"Affiant further states that the language of said Tuttle at that time shocked affiant and disgusted him, and, not believing then the statements of Tuttle concerning the court or the defendant's attorney, but nevertheless somewhat surprised at the decision, refused to publish the article submitted.

"H. P. Knappen.

"Subscribed and sworn to before me this 1st day of August, 1919.

"John F. Fort,

"Notary Public, North Dakota,

"My commission expires Dec. 12, 1922."

State of Minnesota,
County of Hennepin. } ss.

"Aaron Christopher, being first duly sworn says he at present resides in the city of Minneapolis, Minnesota, and his business is that of hotel clerk, in Hotel Dyckman, in said city; that for many years and until recent months he was resident of Bismarck, North Dakota, and for years was hotel clerk in the Northwest Hotel and also the McKenzie Hotel at Bismarck, North Dakota; that he is well acquainted with Wm. P. Tuttle, the plaintiff in this action, and has known him since about the year 1907; that he well remembers the above-entitled action and knows that it is an action for divorce and well recalls the time said action was pending and the time that the same was decided; that while he was clerk at the Northwest Hotel and during the year 1908, the said Wm. P. Tuttle during that year and the year 1909 was a guest very frequently in said hotel and the affiant at that time was very well acquainted with the said Wm. P. Tuttle and had many conversations with him. Affiant well recalls that upon different occasions the said Wm. P. Tuttle showed great hatred and animosity toward his wife, the defendant, and also toward his son, W. J. Tuttle; affiant further states that he remembers that upon one occasion about the month of January, 1909, when the said Wm. P. Tuttle in a conversation in the presence of this affiant stated that he had 'put it all over' his wife in the divorce suit and told the affiant that the defendant, Louise J. Tuttle, never had a chance in said suit and that he, himself, had dictated the granting of the divorce to himself and also fixed the alimony that he was to pay the defendant in said suit.

"He stated to the affiant at said time that he had contributed various sums of money to the campaign expense fund that preceding year, of the judge who tried said case and that he, Tuttle, knew in advance just what the decision would be, as before the trial of the case the judge had agreed with him, Tuttle. Said Tuttle further stated in said conversation that he felt that he was entitled to the decision in view of the fact that he figured he had paid well to obtain it. Further affiant saith not.

"Aaron Christopher.

"Subscribed and sworn to before me this 5th day of September, 1919.

"Jessie M. Sullivan,

"Notary Public, Hennepin Co., Minnesota,

"My commission expires April 10, 1923."

State of North Dakota, } ss.
County of Burleigh. }

"George M. Hogue, being first duly sworn, says that he is a resident of Kidder county, North Dakota, for more than twenty years past; that for many years at Steele in Kidder county, North Dakota, he has been and now is engaged in the farm loan business and is the secretary of the State Game Commission Board of North Dakota. That he is well acquainted with Wm. P. Tuttle above named and has been since about the year 1905, and that he was intimately associated with him during the year 1907, 1908, and 1909, during which time the said Wm. P. Tuttle made his residence at Dawson, North Dakota, living in a house owned by the said Wm. P. Tuttle, and occupied by the family of L. C. Rhoades, and said home in said family has been the residence of said Wm. P. Tuttle since the year 1905. Affiant further states that he was familiar with the above-entitled action which was an action for divorce, and that he was made familiar with all the steps in said action before and up to the conclusion of trial thereof, as such facts concerning said case were given to him by the said Wm. P. Tuttle. Affiant further states that he is not acquainted with Louise J. Tuttle and does not know her, excepting as he has been informed concerning her by the said Wm. P. Tuttle. That while said action was pending in said court, and before the trial thereof and at the Northwest Hotel of Bismarck, North Dakota, and during the month of October, 1908, the said Wm. P. Tuttle, approached this affiant, and stated to this affiant that one, W. F. Cochrane, was the attorney for his wife, Louise J. Tuttle, and that it was necessary for said Tuttle to adopt methods which would induce the said Cochrane to act with the said Tuttle as against his wife in the conduct of said case, at that time the said Wm. P. Tuttle stating to affiant that the said case would soon be called for trial, and the said Wm. P. Tuttle stating to affiant that he wished him (affiant) to interview the said Cochrane concerning said divorce case, and to make known said Tuttle's wishes to him, the said Cochrane, at the same time in-

structing this affiant to promise the said Cochrane ten thousand dollars, ($10,000) if he would arrange the record in the case, so that it could be won on appeal to the supreme court, after the judge of the district court had decided the case in Tuttle's favor, the said Tuttle at the said time stating to this affiant that he had already fixed it with the trial judge of said court to decide said case in his (Tuttle's) favor, and that he had made arrangements with the judge concerning the alimony, which he (Tuttle) should pay to his wife, and had made arrangements as to just what the decision would be, and stating further that the judge had agreed to decide the case in his (Tuttle's) favor. Said Tuttle stating at the same time to this affiant that if he (affiant) could make arrangements with said Cochrane that there would be at least five hundred dollars ($500) in it for this affiant. Affiant further states that he declined to interview said Cochrane concerning the subject-matter, that had been stated to him by said Tuttle. Affiant further states that during the year 1908, he, the said affiant, took a prominent part and assisted the said Tuttle in his campaign to his election to the House of Representatives of North Dakota from the county of Kidder, and that during the said campaign, the said Tuttle many times stated to this affiant that he had contributed large sums of money toward the campaign expenses in the election for said judge, and sometime later, in October, or early in November, 1908, the said Tuttle stated to this affiant that just previous to that time, he had given to said trial judge fifteen hundred dollars ($1,500), and that he had promised said judge, free of expense to the judge, a trip to Mexico during the then coming winter.

"Affiant further states that during the month of January, 1909, he was in Bismarck, North Dakota, a great portion of the time in consultation with the said Wm. P. Tuttle, concerning an election contest which the said Tuttle had with one John Story over said Tuttle in the house of representatives of North Dakota and that during said month of January or early in February, 1909, the said Tuttle stated to this affiant, that the judge of the district court had decided the divorce case and that he had decided in favor of him (Tuttle), and that the judge had carried out his agreement that he had made concerning said case, prior to the trial thereof. Said Tuttle further stating to this affiant that it had cost him a great deal of money to get that decision, but

that he was glad that the court had carried out his agreement with him, and stating that he (Tuttle), thought the decision was worth the money, that he had paid for it. Said Tuttle further stating to affiant upon this occasion that between the month of October, 1908, and the month of March, 1909, that he thought the judge was a little severe in making him pay three hundred dollars ($300) a month for the support of his wife, because the judge had stated to him (Tuttle) in 1908, that he thought perhaps one hundred and fifty dollars ($150) a month would be all right, but later, in December, had changed his mind and insisted upon the said Tuttle paying three hundred dollars ($300) a month, the said Tuttle stating to affiant that it would be better for him (Tuttle) to make it $300 a month, because if the case got into the supreme court, said supreme court might consider one hundred and fifty dollars a month too small an allowance. Later and some time after, as affiant recalls, and in March, 1909, the said Tuttle stated to this affiant that the trial judge had started on his trip to Mexico, and told affiant that he (Tuttle) had paid the expenses of such trip of the judge, and that he had procured the transportation through a tourists' traveling agency in Chicago, Illinois, with which he, said Tuttle, was financially connected. Affiant further stated that he never disclosed the information herein to said Louise J. Tuttle or to any other person, prior to the time that this motion was made to set aside the divorce decree.

"Further affiant saith not.

"Geo. M. Hogue.

"Subscribed and sworn to before me this 20th day of Sept. 1919.

"John F. Fort,

"Notary Public, Burleigh Co., N. D.

"My commission expires Dec. 12, 1922."

The affidavit of Wm. P. Tuttle denies that he bribed the trial judge in the divorce action, or paid him any moneys whatever to secure a favorable decision therein, and denies the occurrences set forth and alleged in the moving affidavits; and denies that the judge received any money from the affiant for the purpose of influencing his official action.

He maintains further in the affidavit, that the action resulting in a decree of divorce granted him, was fully and fairly tried upon its merits, with all parties present in court, testifying, and that the deci-

sion was made upon the merits and upon the testimony solely, and that the same was justified and fully sustained by the testimony; and was solely upon the evidence, and that the evidence submitted in the cause was not only sufficient to justify the decree in his favor, but was overwhelming in his favor, and that it was established by creditable, competent, and abundant proof; that the plaintiff was entitled to the decree, and that the defendant was not entitled to any relief.

The affidavit further sets forth that while under the laws of the state of North Dakota, then existing, he was not required to pay the defendant any alimony; that he voluntarily agreed to and willingly consented that he be bound to pay her the sum of $300 per month, during the balance of her life.

The affidavit further sets forth that he has paid that sum from the time of the decree and ever since, including the time, or times, subsequent to the service of the motion papers in the present proceeding.

The affidavit further sets forth that application is made by the defendant for the purpose of endeavoring to secure money or property from him, and further sets forth that this application or proceeding was made at the instigation of L. C. Pettibone, for the express and specific purpose of exercising his malice against the plaintiff; and to compel the plaintiff to pay money to Pettibone, upon false and unfounded claims now pending in various courts, brought by L. C. Pettibone against plaintiff and describes such actions.

It was further set forth in his affidavit that the judgment and decree have been effective for a period of more than ten years, and that neither L. C. Pettibone or any other person, during said time, ever claimed or charged any of the facts set out in the application.

Joseph Simons, in this proceeding, made an affidavit in behalf of the plaintiff, which is to the effect that the divorce action was instituted in good faith, for the purpose of having the claims therefore set forth tried upon their merits. States that he assisted in procuring witnesses, and was present at that trial, and that the plaintiff at no time gave any evidence, but that the action was to be tried upon its merits, and to be governed and decided upon the evidence submitted.

The affidavit further sets forth the statement affirming the good character and honor and integrity of the plaintiff, and shows that he was the agent and broker of the plaintiff, was a member of the Chicago

Board of Trade, and that, as such agent, he made to defendant for the plaintiff, the payments of alimony, monthly; and further states that, on the 21st day of April, 1919, he paid $300 to Louise J. Tuttle, the defendant, which payment had been personally solicited, over the telephone, by her from him, and the payment was made on the 22d day of April, 1919, which is exhibit "A;" and that the receipt of the same, by her, was just prior to the service of the papers in this proceeding, upon Wm. P. Tuttle.

There are other counteraffidavits referring to different matters, but we think, it is not necessary to make further reference to them.

The affidavits of Louise J. Tuttle, the defendant, state that no substantial evidence of corrupt conduct on the part of plaintiff, or of collusion between him and Judge Winchester, or with any of her attorneys, in the procurement of the decree, has come to the notice or knowledge of the affiant, at any time since the trial of the action, until January 28, 1919, when Mr. Lee Pettibone, of Dawson, North Dakota, stated to her that he knew of reputable persons who would furnish evidence that prior to said trial Judge Winchester had received and taken from plaintiff a large sum of money.

Her affidavit then sets forth the steps she has since taken to bring the matter to the attention of the court of the sixth judicial district.

She further sets forth in her affidavit that the statement made by Wm. P. Tuttle, in his affidavit, that the proceedings to set aside the judgment is made at the instigation of L. C. Pettibone, is an absolute falsehood, and she further states that it was with the utmost difficulty that she secured the information concerning the facts which she suspected existed for years, but that she had no substantial evidence or knowledge concerning the existence of such state of facts, until she met Mr. Pettibone in Chicago at the time above stated; and that it was only after much difficulty that she induced him to divulge even the most meager details concerning the information which she complained of in connection with said divorce, and that all of her facts which she has procured in support of her motion was done at her own instigation, and upon her own research, through herself and her attorneys; and that she makes, and has made, the application in good faith, and only because she knows that her husband had no grounds for divorce against her, and bringing to the attention of the court the scandalous and fraudulent actions, on the part of her husband, in procuring the divorce.

Pettibone, in a counteraffidavit to that of Wm. P. Tuttle, states that the statement contained in Tuttle's affidavit "that he believes, and has reason to believe, that this application is made at the instigation of one L. C. Pettibone, for the express and specific purpose of exercising the malice of the said L. C. Pettibone against this affiant, and to cause him pain and suffering, when it is used as a means to require the said affiant to pay money to the said L. C. Pettibone upon false and unfounded claims now pending in various courts, wherein the said L. C. Pettibone has brought suit against this affiant," is absolutely false and was known to be false by Tuttle when he made such statement in said affidavit.

It is contended that the proceeding, by motion, to set aside and vacate the decree is not the proper one; that, instead thereof, the defendant should have brought an action to set it aside, and this was the holding of the trial court. In this, we think it was wholly mistaken; and that this proceeding, by motion, is proper and the one practically in universal use in seeking the relief sought to be obtained in this proceeding. Beach v. Beach, 6 Dak. 371, 40 N. W. 701; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Simensen v. Simensen, 13 N. D. 310, 100 N. W. 708. This matter needs no further discussion; it is a settled practice in this state.

We come now to the principal question presented in this case, viz: Was the decree of divorce procured by the plaintiff by fraud and bribery? The affidavits supporting defendant's motion clearly and unquestionably show that it was. Those affidavits are practically undenied, excepting by the plaintiff. They contained affirmative evidence of fraud and bribery, which is clear and convincing, and, as against this, there is nothing but the negative of the defendant, which largely is a mere bare denial.

As appeared upon the argument of the matter before this court, the men who have made those affidavits are reputable citizens of this, or near this, immediate vicinity. One of them viz., Hogue, is a member of the state game board. Their affidavits were made in a judicial proceeding, and were subscribed and sworn to by each of them. It cannot be imagined or assumed, that they would, in their affidavits, set forth the acts, conversations, and declarations of the plaintiff, as described by them, which clearly show the commission of fraud and bribery in the procuring of the decree, and deliberately swear to the truth of the same, unless the same were, in fact, true.

It would seem that such affiants, being men of intelligence, would not deliberately swear falsely to such a state of facts, realizing, as they must have, the gravity of the situation in which they placed themselves.

We feel that their statements are so clear and conclusive, with reference to the fraud and bribery committed in obtaining the decree of divorce, as more fully appears from the affidavits, that they must be taken and considered in this proceeding to be true.

There are other circumstances which indicate and prove the verity of those statements. The evidence given by plaintiff in the former case shows that at the time of the granting of the divorce, he had means and property approximately of the value of $350,000 or more. The defendant in her answer claimed the plaintiff had property and means of the value of about $1,000,000. Whatever the evidence and the claims of the parties may show, it is certain he was a very wealthy man.

The only cause claimed by him as a ground of divorce was cruel and inhuman treatment, consisting, in short, of the alleged nagging disposition of his wife, and charges of infidelity by her against him.

We think his testimony and that of his witnesses, as to the alleged nagging disposition of his wife, and her alleged charges against him, of seeking the society of, and consorting with, other women, falls flat when all the facts and the plaintiff's motive and conduct is honestly and conscientiously scrutinized, as disclosed by the evidence.

The evidence conclusively shows that the plaintiff went about considerably with one Stella Miles; that upon many occasions he took her riding in various conveyances; that he gave her valuable presents. He admits that he gave her some presents.

All the circumstances of this character, which are shown by the evidence, were such as would not only arouse suspicion, but the resentment of any decent or virtuous woman.

The defendant knew that plaintiff was improperly conducting himself with some woman on the west side of Chicago, but she did not learn just who the party was until near the time the divorce proceeding was commenced.

If the defendant, in these circumstances, reprimanded, or, as the term is used, nagged the plaintiff in regard to his conduct, it was for the purpose—and we think the evidence so shows—of dissuading him from his unnatural and unbecoming conduct. All that she did in this

regard was proper and justified, and meant for his welfare and benefit.

Again, his continued refusal to cohabit with her, his cold and clammy treatment of her, in fact, his entire conduct, as disclosed by the evidence, is sufficient to show that he was the one wholly at fault, for, as the evidence indisputably shows from the testimony of the acquaintances of the defendant, who had known her well and intimately, she was a woman of refinement and culture, and of a splendid and lovable disposition, a woman who kept and maintained her home in comfort for the plaintiff. In all the testimony that is adduced, there is not one syllable which in any manner reflects upon her good name, character, and splendid womanly qualities.

The burden of plaintiff's charge is that she had a bad temper and a nagging disposition. He testified, however, that her temper was never anything but the smoothest when there was a third person present; that he had known times when they were both at outs and someone would come and she could be as pleasant as if nothing ever happened, while he could not and got the reputation, with the visitor, of being a grouch.

There is ample testimony to show her disposition was good, and that she did not have a bad temper. The only conclusion that can be drawn from all the evidence in the case is, that the plaintiff tired of the defendant, and took the means which he did to get rid of her; and this, after years of struggle and work together to build up a large community property; and though the defendant is a woman of unquestioned character and virtue, and one whose character is unimpeachable; and though the property was of the value of from $350,000 to $1,000,000, and though she had been accustomed to live as one in their circumstances was justified, the plaintiff and the court, at her advanced age of more than sixty years, turned her out upon the world, practically penniless, except for the pittance which the plaintiff claims, out of his generosity, he offered to give her, to wit, $300 a month, and would not have given her this, but a much smaller sum, except he was fearful on appeal that a smaller sum would not be looked upon with favor.

Not a penny of the community property was allowed her. These circumstances, in connection with the other evidence now before this court, is sufficient to label the whole divorce proceeding as one conceived in iniquity by plaintiff, and carried out by fraud and corruption, on the part of the plaintiff and the court and W. F. Cochrane, one of her attorneys.

The evidence in the case tends to show that the plaintiff bore considerable enmity towards Wm. J. Tuttle, his only son, his only living child. It further tends to show that, on the occasion of differences between the plaintiff and the son, the mother was inclined to shield or take the part of the son.

Some of the evidence tends to show, that it was the ill feeling, in part, plaintiff bore his son which, to some extent, moved him to bring the divorce proceeding. The inference to be drawn from the testimony, as a whole, is, that he had no further use for his wife, nor his son. The ill feeling as to the son was further manifested, and if the affidavits above are true, the plaintiff procured the court to severely reprimand the son while he gave his testimony, and this, without any apparent cause or reason, so far as the evidence discloses.

As showing the true nature and moral character of the plaintiff, and that defendant's charges of infidelity against him were not without reason and justification, and to show that it was his desire to associate and consort with women other than his wife, that caused him to lose all affection for his own wife and child, and which would appear to be the motive of seeking the divorce, so as to get rid of his wife, with the payment of a mere pittance, his improper actions towards one Virginia Rogers is quite material.

Mr. and Mrs. Rogers lived in Chicago. Virginia Rogers was a stepchild of Mrs. Rogers, and at the time in question was sixteen years of age. The son of Mr. Tuttle was about the same age; and the parents had been acquainted for some six years prior to the time of the event, and the children were associates and acquaintances.

In June, 1896, the plaintiff and his son were living at Chicago Beach Hotel; Mrs. Tuttle was in Europe. The plaintiff at that time came to the home of Mrs. Rogers and invited the stepdaughter to the Chicago Beach Hotel, to take dinner with himself and his son, and to attend a dance at the hotel in the evening. She testified in the trial of this case. She was then about twenty-five years of age. She went to the hotel about 5:30 in the evening, and had supper with plaintiff and his son. About 9:30 she prepared to return to her home. In the parlor of the hotel, before she went up to prepare to return to her home, the plaintiff asked her if she would not like to see some paintings and pictures.

The defendant's brief contains a substantially correct version of this testimony set out in narrative form, and is as follows:

"Then he said I had better be starting, and I went upstairs to put on my wraps where I had left them in his room. I asked where Will was and he (Mr. Tuttle) said he did not know, but it did not make any difference.

"When we reached the apartments where I had left my wraps he went into the room with me and closed the door. I walked over by the window and he pulled me on his lap in the same old way as he always had; but he held me as though I was in a vice and he kissed me, which was very strange, in a way that frightened me; he kissed me a great many times. While still holding be in a vicelike grip he asked me if I liked nice things and to have fine clothes and to travel. During the time that he was talking he was still kissing me and holding me tight. He put his hand under my dress as far as he could. He did not say anything at that time. I tried my best to get away from him and got away as soon as I could and went to the door. When I got there I found the door was locked. He tried to get there before I did and asked me if I wanted the door opened. He unfastened it at the same time but not until after I found it locked. I did not cry out; I was too frightened. I did not have my wrap on at this time. I took it with me over my arm and put on my hat standing in the hall. Mr. Tuttle said nothing more; and after I had my hat and wrap on we started home. He went with me holding my hand all the way over to the street car. He was talking just the way he always did and I was too frightened to say anything about what he had done. I did not say anything at all while in the car. We went straight home and he went with me. When we returned my stepmother was standing on the porch. I did not speak to her or anyone; but ran straight upstairs. I was so nervous and worked up and had stood it as long as I could; and so ran upstairs without saying a word to any one. I did not stop to listen to what Mr. Tuttle said to my stepmother.

"My stepmother came to my room afterward. I had not retired but was lying on the bed crying, I think, when she came into the room. She knew something had happened, but she did not want papa to know anything about it because she thought he would shoot Mr. Tuttle. I attempted to tell her what had happened that night but she restrained

me. The next morning I told her what had occurred. I told her about it as I have told you here. I did not tell my father about it, because, as I said, I was afraid he would shoot Mr. Tuttle if he knew.

"Up to this time I had thought a great deal of Mr. Tuttle. After this incident I never saw him until the other morning in the court room. I never went to his home after that.

"He did not then, nor has he at any time since, attempted any explanation of what he did to me that night at the hotel. He did not attempt any explanation on the street car that night. He acted as though everything was just as it had always been. He did not ask my reasons for being frightened and never referred to it in any way."

Upon cross-examination, the testimony given by Virginia Rogers was in no material degree changed. Her testimony must be taken as true. There is no testimony to dispute it. The plaintiff does not dispute its truthfulness. The next morning Virginia recited her experience to her mother, who was also present and gave testimony at the trial.

We think, considering all the testimony, with reference to the plaintiff's association and relations with women other than his wife, his conduct in general towards them, and the testimony which shows his nature and natural tendencies in this regard, that there can be no question but what the defendant's excited state of mind, if any, upon the various occasions, together with whatever reprimands she had administered to her husband, were well deserved by him, and were meant for his good and recall from his ways of error, and that there was no cruel and inhuman treatment, by the defendant, of plaintiff, by reason of administering any of such reprimands, nor even by having him watched by detectives, which, in the circumstances of this case, would be ground for divorce. The fact is, under the evidence, plaintiff had no ground for divorce, though we think it clearly appears that the defendant did; that the treatment of defendant, by plaintiff, was cruel and inhuman, there is no doubt, and that is clearly shown by the evidence. It also clearly appears, that plaintiff for several years denied defendant marital rights, and finally that he wholly deserted her.

The conclusion is irresistible from all of the evidence that plaintiff's motive in the divorce suit was to get rid of the presence and association of both his wife and son, against each of whom he seemed to have an enmity which is explainable on no other theory than that he had wholly transferred his affections to others.

In the face of such evidence as this, and the evidence as a whole, and the showing herein made, all presumptions of regularity in the procuring of and of the validity and verity of such judgment are overcome; and the judgment may be shown to be, as this judgment clearly is, a fraudulent and collusive one.

The affidavits above set forth show the fraud of the plaintiff, the court, and W. F. Cochrane, an attorney for the defendant; and that the judgment is the result of such fraud would seem the only reasonable and logical conclusion that can be reached, and one that cannot well be avoided; that the judgment is unconscionable, unjust and inequitable, and fraudulent seems clear; and that if defendant had received a fair trial before an impartial court, and one where the fraudulent practices and schemes above shown were absent, a different result and judgment must have resulted.

In the plaintiff's brief appears the following:

"Suppose that the evidence was such that it clearly established the facts which entitled Mr. Tuttle to a divorce. In that case, the fact that the trial judge had received and accepted a bribe would clearly not be ground for vacating the judgment, because no harm had been done. The judgment was right on the evidence, even though the trial judge was corrupt. On the other hand, if the evidence did not warrant or sustain the decision of the trial court granting a divorce to Mr. Tuttle, but the decision was rendered contrary to the evidence, by the corrupted judge, Mrs. Tuttle had an ample remedy by appeal.

"In a divorce case in North Dakota, the case is tried anew in the supreme court, on the evidence presented to the trial court. Consequently, if Mrs. Tuttle claims that the decision was against the evidence, she was bound to raise that question by appeal. If she did not avail herself of that remedy, but elected to acquiesce in the erroneous decision, by accepting the benefits of the judgment, her mouth is forever closed to say that the judgment was wrong.

"It follows, therefore, that Mrs. Tuttle is between the horns of a dilemma. She cannot complain of the corruption of the trial judge, unless the judgment was wrong. But, if the judgment is wrong, she is estopped to allege error, because she elected to accept the benfits of it, instead of having it reversed on appeal."

From what we have above said, we are fully convinced the judgment

was wrong and contrary to the evidence; and we are further of the opinion that the judgment being a fraudulent one, she did not waive any of her rights, if she failed to appeal. But she did take an appeal and that appeal was taken by Mr. Cochrane, her attorney, who was also, according to the affidavits, a party to the fraud. That appeal was dismissed upon a technicality and was not decided upon the merits. See Tuttle v. Tuttle, 19 N. D. 748, 124 N. W. 429. As we view it, the trial being tainted with fraud, which the plaintiff, according to the affidavits, actively engineered and in which he participated, he is not in a position before a court of equity to plead estoppel, on the ground that the defendant has received benefits under the judgment, and in the circumstances of this case, she is not estopped.

There was, as a matter of law, no trial, if the allegations of the affidavits are true, and in this proceeding they must be presumed to be true. How then could there be any trial? What chance or opportunity was there for the defendant to obtain justice in that trial? The trial was a mere farce, and the judgment a nullity, absolutely void from its inception.

The case of Rykowsky v. Bentz, 45 N. D. 499, 178 N. W. 284, was recently decided by this court. In that case a motion was made by the defendant to vacate the judgment on the ground that it had been taken against him by default, through fraud. It was contended by plaintiff that the relief could not be granted, for the reason that § 7483, Comp. Laws 1913, applied. That section, in effect, provides, that the court may in its discretion and upon such terms as may be just at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him, through his mistake, inadvertence, surprise, or excusable neglect.

In reply to this contention, this court, speaking through Chief Justice Christianson, said: "If the judgment was taken against the defendant, under the circumstances set forth in this affidavit, it was obtained through fraud, and would be subject to attack for that reason. See Shary v. Eszlinger, 45 N. D. 133, 176 N. W. 938. The power to set aside judgments obtained by fraud is not dependent upon § 7483, supra, but is inherent in all courts of record. Black, Judgm. § 321; Williams v. Fairmount School Dist. 21 N. D. 198, 129 N. W. 1027; Whittaker v. Warren, 14 S. D. 611, 86 N. W. 638. Hence, the dis-

trict court had power to vacate the judgment, notwithstanding more than one year had elapsed after the defendant had notice thereof."

In that case, the district court refused to vacate the judgment, but this court held, that, in that, it was in error and reversed its decision, and we think the same should be done in this case.

The plaintiff relies upon the fact that there is some litigation between Pettibone and him, as the inducing cause of this proceeding. In other words, that, through malice, Pettibone has been a prime factor in bringing about this proceeding. We do not think the litigation between Pettibone and plaintiff would be sufficient to cause the former to swear to the affidavit given in this proceeding.

As we view the matter, Pettibone's motive is immaterial; that does not necessarily affect the truth of the statements in his affidavit. If those statements are true, it is immaterial if there are strained relations between the plaintiff and Pettibone. In fact, if their relations are strained, that may be the very cause of exposing the fraud so long covered up.

In many cases of fraud, perhaps, it is just such an incident, or the bringing about of such a condition, that causes the fraud to be brought to light. It is often difficult to discern and uncover fraud. The perpetrators thereof so cover up their fraudulent acts and intentions, that the fraud is not sometimes readily discovered, and, as in this case, unless some event transpires which causes the fraud to become known, discovery is often never made; and, if it is true, there is any strained relations between the plaintiff and Pettibone on account of litigations between them, and that this caused him to tell the defendant, it does not weaken, but strengthens, defendant's position in this proceeding.

It was the event that brought her the first knowledge she ever had of the great fraud perpetrated upon her, as alleged in the affidavits, which wrecked her life, caused an unjust, unconscionable, and unwarranted decree of divorce to be entered against her, and which denied her all interest in the community property, and which locked the courts of justice against her at the trial.

As soon as the defendant knew of the fraud she took immediate action. In fact, the ten years or more which has elapsed before she did take that action is immaterial, so long as she acted promptly after the discovery of the fraud.

The Statute of Limitations against fraud does not commence to run until after the fraud is discovered. She acted with promptness and despatch upon the discovery thereof, and we think she should be given a chance to obtain justice, which has too long been denied her on account of the great fraud committed against her.

Plaintiff has this to say in the brief, towards its close: "The whole proceeding by which a judge is to be branded after his death as bribe taken, a gentleman like Mr. Tuttle, whose honor and integrity have not otherwise been questioned is to be stigmatized as a criminal, and an established judgment is to be overturned and a large sum of money, or the opportunity to get it, is to be afforded this defendant, upon affidavits which contain nothing more than an alleged admission contained within conversations occurring more than ten years prior to the giving of the affidavits."

This is stated, as a reason why relief should not be granted defendant. The answer to this is, that the only real way to prevent dishonor to the names of the parties mentioned is to afford an opportunity to prove that the allegations in the affidavit, made under oath, are not true. If they are true, no name connected with the alleged fraud is entitled to any protection, and whether they are true or not should be determined in a court of justice.

If the plaintiff feels that the charges in the affidavits are false, it would seem he should be the most anxious of all to have the makers of those affidavits examined under oath, in a court of justice.

We think the good faith of defendant is plainly evident and sustained by the affidavits in this proceeding, and the record of the trial. That the judgment has remained unattacked for ten years is of no consequence if the judgment were procured by fraud. If it had stood for twice that period of time, that added nothing to its verity nor validity if, in fact, it was procured through fraud.

The defendant has acted promptly upon the discovery of it, and that is all the law requires of her.

The order appealed from should be reversed, and the case should be remanded to the trial court, with directions to enter an order vacating and setting aside the judgment and decree of divorce under consideration in this proceeding.

FARMERS SECURITY BANK OF PARK RIVER, a Corporation, Appellant, v. C. F. NELSON, as Administrator of the Estate of Peter J. Wibe, Deceased, Respondent.

(179 N. W. 917.)

Bills and notes — accommodation shown; bona fide purchase not shown.

The plaintiff sues to recover on a promissory note $2,528 and interest from March 12, 1914. The defense is that the note was given for a special accommodation to make a show of assets and it was not to be transferred. The evidence shows the payee had no right to transfer the note. It did not sell the note; the bank did not receive it in good faith or for value, or in due course of business. The verdict for the defendant is well sustained by the evidence.

Opinion filed November 1, 1920.

Appeal from judgment and order denying motion for judgment notwithstanding verdict or for a new trial, in District Court, Towner County, Honorable *C. W. Buttz,* Judge.

Affirmed.

McIntyre & Burtness, for appellant.

Accommodation paper is paper to which the accommodation party has put his name without consideration. 8 Corpus Juris, 255, 258 (¶¶ 403, 408); Comp. Laws 1913, § 6914.

Accommodation paper cannot be revoked after negotiation. Such revocation, however, affects only one who takes with knowledge of what has been done, and does not prevent a recovery on the instrument by an innocent indorsee to whom it has been negotiated. 8 C. J. 260, 263 (¶¶ 410, 412).

To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith." First Nat. Bank v. Flath, 10 N. D. 281.

It is not the good faith of the payee that is in question. It is the good faith of the person who parts with his money or other property when he purchases the note. American Nat. Bank v. Lundy, 21 N. D. 167.

The Negotiable Instruments Act in specific terms requires the actual knowledge of the infirmity or defect or knowledge of such facts as amount to bad faith. Johanna v. Lennon, 32 N. D. 71; Hart v. United States Trust Co. (Pa.) 12 Atl. 561.

Kehoe & Moseley and *H. A. Libby,* for respondent.

Accommodation paper is operative only when negotiated and until negotiation an accommodation party may revoke the instrument, and this is so although security was given the accommodation party for the use of his name. 8 Corpus Juris, 258, ¶ 408.

Wibe wrote the letter to the plaintiff in the last of March, 1914. The note was still in the possession of the association. The plaintiff did not acquire it till the 1st of June 1914. Hence, the revocation was made in time. 8 Corpus Juris, 259, ¶ 408; St. Paul Nat. Bank v. Howe (Minn.) 42 N. W. 200.

The question as to whether Mrs. Olsen wrote and mailed the letter was not in dispute. She and her mother testified that she wrote it. The question as to whether the plaintiff received it was, however, in dispute, and that question was properly submitted to the jury under appropriate instructions. Hurley v. Olcott (N. Y.) 91 N. E. 270; Malloy v. Drumheller (Wash.) 122 Pac. 1005; Marston v. Bigelow (Mass.) 5 L.R.A. 43; Fleming v. Evans (Kan.) 61 Pac. 503; 16 Cyc. 1070.

Robinson, J. The plaintiff sues to recover on a promissory note, $2,528 and interest from March 12, 1914. The defense is that the note was given for a special accommodation to make a showing of assets and it was not to be transferred, and that plaintiff is not a good faith purchaser; that it did not receive the note in due course or for value. The jury found a verdict for defendant, on which judgment was entered. Though forty errors are alleged, as usual, the only real question is on the sufficiency of the evidence to sustain the verdict. Certain it is the note was made without any consideration. It was made to the Northwestern Underwriters' Association, a Grand Forks insurance company. He made the note, not that it might be transferred, but that the company might use it as evidence to evade the Blue Sky Law and to mollify the insurance commissioner. The transfer of the note was an act of bad faith. There is evidence that defendant caused his daughter

to write to the bank a letter by which it was cautioned against the purchase of the note. The bank denies the receipt of the letter, but its evidence is no more convincing than is the evidence that the letter was written, mailed, and received by the bank.

Then it appears that the bank did not pay for the note in cash or take it in the usual course of banking business. The note was turned over to the bank with several other notes in exchange for a lot of notes held by the bank. There is nothing to show the value of the notes, and they were all of a questionable character.

In 1909 the bank was organized by three persons, with an authorized capital of $20,000. The capital stock was divided between the three organizers thus: One took sixty-six shares; another took sixty-six shares; C. R. Verry took sixty-eight shares and became the first president, cashier and manager of the bank. The underwriters' company was organized about the same time as the bank. Its authorized capital stock was $100,000. Its directors and organizers were H. H. Hand, E. Sandlie, M. E. Nelson. One, Mr. Bradley, became president; H. H. Hand, secretary. In time they organized the now defunct Fire & Marine Insurance Company, which became a feeder, and obtained large bunches of farmers' notes and transferred them to the parental company—an innocent purchaser, of course—and yet each company had the same officers, clerks, and did business in the same rooms.

Exhibit 6 shows a lot of notes, amounting to $13,399.86, marked "Notes turned over to the Insurance Company by Farmers' Security Bank on June 2, 1914, having been taken up and settled for as per attached sheet." Exhibit 7 purports to show a list of notes turned over to the bank June 2, 1914, by Northwestern underwriters in part payment of notes shown by exhibit 6. The bunch amounts to $8,444.20, and includes the Wibe note in suit. The same exhibit shows the insurance company was given a credit for checking account of C. R. Verry, Treasurer of Northern Fire & Marine Insurance Company, $623.62, and for collection account, $5,290.35. Turned over to the bank same date. This is of importance as it shows that Verry, the organizer and first president and manager of the bank, was also treasurer of the Fire & Marine Insurance Company. It shows a kind of a marital relation between the companies and the bank. Exhibit 8 is a list of notes amounting to $85,445 which, on September 23, 1914, the underwriters

turned over to the bank; agreeing that if any note was not paid when due it may be charged back or collected from the underwriters company after sixty days when it becomes due.

Mr. Bradley was president of the Underwriters Company and of the Fire & Marine Insurance Company. He testifies:

Q. Did your company ever sell and deliver that note to the bank?

A. No, we did not sell the note.

Q. Did your company ever receive any value from the plaintiff bank for the note?

A. No. (Fol. 213, 214, 233.)

It is needless to quote the testimony showing the intimate relations, winding and devious ways of those three corporations. It is clearly shown the Northwestern Company had no right to sell or transfer the note. It did not sell the note; the bank did not receive it in good faith or for value, or in due course of business. Both by the direct and the circumstantial evidence, the verdict is well sustained.

Affirmed.

BIRDZELL and GRACE, JJ., concur.

BRONSON, J., disqualified did not participate.

BIRDZELL, J. (concurring). While I concur in the result stated in the opinion of the court prepared by Mr. Justice Robinson, I regard the statement of facts in that opinion and the discussion of the assignments of error as not sufficiently adequate to demonstrate the correctness of the conclusion. In concurring, therefore, I desire to state a little more fully the contentions upon which the appellant relies upon this appeal, together with whatever additional facts are necessary to indicate the propriety of the affirmance of the judgment.

The first specifications relate to testimony elicited on cross-examination of a witness by the name of O'Brien, an employee of the bank, regarding some notes, aggregating between forty-nine and fifty-two thousand dollars. These were notes of the Northern Fire & Marine Insurance Company. At the time the evidence was received it was objected to on the ground that the transaction involving them was entirely distinct from that involving the note in suit. The evidence was received, however, upon the understanding that its relevancy would be

established later. Appellant's counsel later moved to strike it out on the ground that it had not been connected with the Wibe transaction, and the contention is made upon this appeal that it was prejudicial error to allow the jury to consider such testimony. Other testimony relating to this group of notes was to the effect that at the time they were received by the bank a pass book was issued to the company representing the aggregate amount so deposited with the bank. It would seem, however, that the deposit so entered did not represent a bona fide debit and credit transaction with the bank; that the bank did not purchase the notes at all or enter them on its books as bills receivable, but that it took them for collection and to be credited up to what was known as the "Collection Account." It further appears that notes carried by the bank which had run sixty days past due and which were indorsed by the Northwestern Underwriters' Association were to be charged back to this collection account. There was further evidence to the effect that there was a deficit in the collection account some time prior to June 1, 1914, to the extent of $10,190, which was caused by the act of the cashier of the bank, one Verry, in taking from the notes so held for collection a number of them, aggregating $10,190, and placing the amount partly to his own credit and partly to the credit of other accounts in which he was personally interested.

It appears that the bank took the note in suit on June 2, 1914, receiving it from the Underwriters' association in part payment of a group of notes, owned by the bank and entered in its bills receivable account, aggregating with interest $14,692.66, which were past due and which were turned back to the insurance company. The memoranda which were made at the time in connection with the listing of the notes exchanged are strong evidence of the identity of the insurance company and the underwriters' association for purposes of the financial transactions with the plaintiff bank. For instance, the list of notes turned back to the insurance company is headed as follows:

"Notes turned over to Insurance Co. (N. W. Und. Ass'n), by Farmers' Security Bank on June 21, 1914, having been taken up and settled for as per attached sheet."

The attached sheet is headed:

"Notes turned over to bank on June 2nd, 1914, by N. W. Und. Ass'n as part payment of notes described on first sheet."

Among the notes so listed is the note in suit. They aggregate $8,544.20. This sheet also contains memoranda showing the payment of cash items making up the difference between $8,544.20 and $14,692.81, or over $6,000. The respondent contends that the moment Verry took notes held for collection amounting to $10,190, the bank should have credited the collection account of the insurance company with that amount. And, since it was understood that past-due notes held by the bank and indorsed by the Underwriters' association were proper items to charge against the collection account, the notes which the bank turned back on June 2d in exchange for the note in suit should have been regarded as paid and all liability of the underwriters' association thereon canceled. Or, to state the matter another way, there was no consideration whatsoever or value given for the transfer to the bank on June 2d of the Wibe note, since it operated only as payment of obligations which the bank was otherwise bound to regard as paid. I am of the opinion that there is ample evidence to establish the identity of the two companies for purposes of the financial transactions of the bank and that the connection between the arrangement with reference to the forty-nine thousand dollars of notes held for collection and the application of the proceeds in payment of notes held by the bank in its bills receivable account is so closely related to the transaction regarding the Wibe note as to affect the consideration for its transfer to the bank. There is additional testimony that further tends to establish the connection which it is unnecessary to mention. For these reasons, I am of the opinion that no error was committed in admitting the testimony relative to the $49,000 transaction.

It is argued that the court erred in allowing one Bradley, an officer of the insurance company and the underwriters' association, to testify concerning promises made to return the note in suit to the maker. Reading the whole of his testimony, it appears that it does no more than to present to the jury from his standpoint the true character of the transaction between the underwriters' association and Wibe. It was properly received for such purpose. It appears that the trial court properly instructed the jury on the subject of the liability of an accommodation maker. So that, under the instructions, the jury was compelled to find a verdict for the plaintiff if it had believed that it gave value for the note without knowledge that the accommodation had been

withdrawn or that it had been diverted from the purpose for which it was originally given. Under the instructions the plaintiff's rights were to be measured by its knowledge at the time it took the instrument unaffected by any subsequent transactions between the association and Wibe. The testimony objected to was, in my opinion, competent and material for the purpose above indicated.

The appellant complains of evidence going to establish an admission made by one of the attorneys for the bank before the judge of the county court of Towner county in certain probate proceedings in the estate of Peter J. Wibe, deceased. It is claimed that the attorney for the bank represented to the county judge that the note in suit was an accommodation note. There is abundant evidence that the note was an accommodation note, and the plaintiff's primary contention is that it can recover as a holder for value notwithstanding such fact. Even conceding, then, that the testimony establishing the admission of the plaintiff's attorney should not have been received, it was clearly error without prejudice.

The appellant seems to place principal reliance upon the alleged error of the trial court in permitting the case to be reopened after both sides had rested for the purpose of taking additional evidence and of admitting thereafter the testimony of one Agnes Olson, a daughter of the deceased. She testified that she usually wrote her father's letters for him, and that in the latter part of March, 1914, she wrote a letter to the plaintiff bank for her father in response to an inquiry which he had received from the bank. The bank denies having written the letter of inquiry, as well as having received the letter which Mrs. Olson testifies that she wrote. The appellant constructs from her testimony the contents of the letter which, if written, substantially read:

"I am surprised to see that my notes are offered for sale as that wasn't my understanding with the Northwestern Underwriters' Association to sell them. So you will have to take your own risk if you buy those notes, as there is no other security behind them but the Northwestern Underwriters' Association. I wrote Bradley to return the notes."

An appellate tribunal, in a case of this character, is in no position to weigh evidence or pass upon the credibility of witnesses. It is clear that if a letter such as the above was written and mailed, it has a most important bearing upon the issues in this case and we cannot deter-

mine that the trial court abused its discretion in reopening the case to permit testimony of this importance to be given. The appellants argue that the letter, if written, would constitute no notice to the bank that Wibe had withdrawn his accommodation from the underwriters' association. It would appear, however, that the letter was such as to clearly apprise the bank that Wibe did not recognize the note as a binding obligation of any sort, and that he had, in fact, withdrawn his accommodation.

It is also argued in this connection that the court erred in instructing the jury that it was for them to say whether the latter amounted to a protest against the sale of the note by the underwriters' association or whether it amounted to a notice to the bank that it was being diverted by the association or notice that he was withdrawing his accommodation. It is said that the legal import of the letter was for the court and that it should not have been left to the jury to determine its effect. In my opinion, the appellant is right in contending that the legal import of the letter was for the court and should not have been left to the jury, but I am further of the opinion that the court would have been justified in instructing the jury that the letter, if written and received, amounted to notice that the accommodation was withdrawn and consequently to notice of a complete defense. The instruction, then, was really more favorable to the plaintiff than it should have been.

Though there are additional assignments argued, the views of the writer concerning them can readily be inferred from what has already been said. I am of the opinion that the judgment should be affirmed.

CHRISTIANSON, Ch. J., concurs.

LENA THORP, Appellant, v. GEORGE W. THORP, Respondent.

(180 N. W. 26.)

Divorce — order forbidding mother awarded minor child from associating with certain person reversed.

In 1915 there was duly entered in this case a judgment dissolving the mar-

riage between the plaintiff and the defendant and awarding to the plaintiff a liberal alimony, giving to her the custody of the minor child and making for its future support a special and generous allowance of $500 a year for twenty years.

In 1919 the court made an order forbidding the plaintiff to move from her residence into an apartment house and from permitting the child to go in company with Mrs. Grant, a teacher in the public schools, and a lady of the highest repute. *Held*, that there is no sufficient reason for the order and it is reversed.

Opinion filed November 1, 1920.

Appeal from an order of the District Court of Stutsman County; Honorable *J. A. Coffey*, Judge.

Order reversed.

John W. Carr and *S. E. Ellsworth*, for appellant.

"A defendant in a civil action is not entitled to the provisional remedy by injunction. This remedy is entirely a creature of statute, and is awarded only to the plaintiff in a proper action. Forman v. Healy, 11 N. D. 563, 63 N. W. 866.

"A court of equity will refuse to grant an injunction where circumstances are such that the injunction cannot be enforced by the court, or where such enforcement will require a continuous supervision on the part of the court." 22 Cyc. 781.

"A court of equity ought not to attempt to do by injunction anything that will not be possible by enforcement." McConnell v. Arkansas Brick Mfg. Co. (Ark.) 69 S. W. 559.

"A mandatory injunction will never be granted where its enforcement will require too great an amount of supervision by the court." McCabe v. Watt (Pa.) 73 Atl. 455; Hawley v. Burk, 134 Ill. App. 96; Miller v. Edison El. Co. 73 N. Y. Supp. 376.

Engerud, Divet, Holt, & Frame, for respondent.

When it appears that the thing done was something that *ought* to be done we apprehend that technical objections to the procedure will not be permitted to defeat the accomplishment of substantial justice; and if there are any procedural defects they can be easily remedied. Houghton v. Houghton (S. D.) 157 N. W. 316; Arne v. Holland (Minn.) 89 N. W. 3.

The courts have recognized the propriety of safe-guarding children

from exposure to influences tending to impair the affection or loyalty of the children to a parent. Albertus v. Albertus (Iowa) 160 N. W. 830; Ladd v. Ladd (Iowa) 176 N. W. 211; Dimmitt v. Dimmitt (Mo.) 150 S. W. 1111; Copeland v. Copeland (Okla.) L.R.A.1917B, 287, 290 and annotations.

The strict principles of res adjudicata do not apply to provisions of a divorce respecting the custody of children. Houghton v. Houghton (S. D.) 157 N. W. 316; People ex rel. v. Allen, 40 Hun, 611, affirmed in 105 N. Y. 628; State v. Dist. Court (Mont.) 128 Pac. 590; Stone v. Stone (Ind.) 64 N. E. 86; Oliver v. Oliver (Mass.) 24 N. E. 51; Harlan v. Harlan (Cal.) 98 Pac. 32.

If the child were competent to testify, we were not informed as to what she would testify to, and the exclusion of testimony is never reversible error unless by an offer of proof it is shown to be competent and material and its exclusion prejudicial. Smith v. Barnes Co. 32 N. D. 4; State v. Schonberg, 24 N. D. 532.

ROBINSON, J. In 1915 there was duly entered in this case a judgment dissolving the marriage between the plaintiff and the defendant and awarding to the plaintiff a liberal alimony and the custody of her minor child, Margaret Thorp, whose age was then six years. In April, 1919, the court made an order forbidding the plaintiff to remove from her residence to an apartment house over a pool room in Jamestown, and from permitting the child to associate with one Mary Grant, except when in the company of her mother. From that order the plaintiff appeals. The order is made on the judgment roll and on the affidavit of defendant. It avers that the plaintiff continuously and against the best interests of the child permits her to be in the company of Mary Grant, who is imbued with a hatred of the defendant; that the purpose of the plaintiff is to remove the child from her commodious home into a certain building owned by Mary Grant and to place the child in a flat over a pool room frequented by men who stand around the entrance to the room and often use vile language; that in using the flat and passing in and out of it the child would hear bad language; and defendant fears that an association of the child with Mary Grant may estrange it from her father.

Lena Thorp, the plaintiff, makes affidavit that during the life of

the child she has at all times taken the utmost care of her and has ever been watchful of her mental and physical development; that the welfare of the child has always been her first consideration. The plaintiff also shows good reason for leaving her home and moving into the flat and avers that it is one of the most desirable flats in Jamestown; that it is within three blocks of the public school; that one of the flats in the building is the residence of Mary Grant and her husband and that she, Mrs. Grant, is one of the teachers in the public schools of Jamestown, where she has been teaching for eighteen years; that she is an educated and refined woman whose moral character is above suspicion; that the pool room is a clean, sanitary place and well conducted; and that the plaintiff has never heard Mrs. Grant speak ill of defendant or say a thing of him in the presence of the child. Her affidavit is well corroborated by that of Mrs. Grant.

In the order, as formulated, the learned judge says, in effect, that the order is granted not only on the affidavits but also on his own personal knowledge of the situation and circumstances affecting the relation of the parties, etc. That is in no way proper. If the judge had knowledge of material facts on which to base a decision, he should have stated the same by certificate or affidavit, so that a reviewing court might consider the same.

On the facts, as disclosed by the affidavits, no good reason is shown for interfering with the plaintiff's custody of the child or her right to remove her residence to a desirable flat, nor for any order in regard to the association of the child with Mrs. Grant. Defendant had no reason for thinking or suspecting that a lady of good character and high repute would think of doing the child so great an injury as to say a word to lessen her pride of birth and her love for a father who has made for her ample and generous provisions.

It appears, however, that more than a year has elapsed since the making of the order appealed from, and that portion of the order which restrains the plaintiff from removing to the flat over the pool room is moot. Judge Birdzell is of the opinion that that portion of the order should be affirmed and hence disagrees to this extent with the opinion of the writer. But he is further of the opinion, in accord with the views of the writer, that upon this record there does not appear to be sufficient reason for prohibiting ordinary communication

between the child and Mrs. Grant. The decision of this court is that the order appealed from is reversed in so far as it relates to Mrs. Grant, with costs to the appellant.

BIRDZELL and GRACE, JJ., concur.

BRONSON, J. (dissenting). This is an appeal from an order of the district court restraining the appellant concerning the residence and associations of her child. The facts, necessary to be stated, are as follows:

In October, 1915, a decree of divorce, between the parties, was entered. It awarded to the wife, the appellant herein, the care, custody, and full control of their minor child, with the provisions that the respondent should be permitted to have access to such child at reasonable times and should have the privilege of entertaining such child and have her with him as much as he desired during vacation periods when such child was not attending school. It further awarded to the appellant the home in Jamestown, and $125 per month, support money. It further directed that the respondent should deposit $500 annually until the sum of $10,000 had been accumulated for purposes of a fund for the education of the minor child. In April, 1919, the respondent made a motion to modify the decree by providing that the custody of the minor child be transferred to this defendant or that the decree be modified so as to permanently enjoin the appellant from moving the child into a certain flat, and from permitting such child to come in further contact with one Mary E. Grant. Upon this application, an order to show cause was issued. After a hearing was had on April 28, 1919, both parties appearing through counsel, the court made an order that the appellant be restrained and enjoined from taking the minor child to the apartment involved over a certain pool room, and from making a home for her there, and restraining and enjoining the appellant from permitting the infant to associate with said Mary E. Grant, except when such child was accompanied by her mother. The court in such order further stated that, "after considering the previous records and files in this action and the affidavit of Geo. W. Thorp, attached to and served with the order to show cause, and his additional affidavit made this day, and the affidavit of Lena Thorp,

and Mary E. Grant, as well as the court's personal knowledge of the situation and circumstances affecting the relations of Mrs. Mary E. Grant to the parties herein, and the location and surroundings of the plaintiff's present residence and the building in which the plaintiff proposes to take up her residence with the child in question, the court is of the opinion that it would be inimical to the welfare of the infant daughter of the parties hereto to have her home in said apartments over said pool room, and in close association with Mrs. Mary E. Grant, who occupies part of the said second story of said pool-room building." The appellant has appealed from this order. The papers returned to this court, in addition to the original, notice, and undertaking of appeal, consist of the following papers: Summons, complaint, affidavit of service, stipulation of counsel, agreement of the parties, findings of fact, conclusions of law, order for judgment, judgment and notice of entry of judgment in the original divorce action; also the application of the defendant for modification of decree and for an order to show cause, the order to show cause, the affidavit of the appellant, the affidavit of Mary E. Grant, and affidavit of the respondent and the order herein involved. These papers are accompanied by a certificate of the clerk of the district court. There is no certificate attached by the judge of the district court who made the order.

This case is an equity action. This court may affirm, reverse, or modify the order, so made, if it is to be considered as a modification of the decree of divorce formerly entered in this case. See Rindlaub v. Rindlaub, 19 N. D. 352, 125 N. W. 479. This court might entertain, likewise, at a subsequent date after a modification of the order herein, another petition for a further modification. See § 7844, Comp. Laws 1913; Rindlaub v. Rindlaub, 28 N. D. 168, 147 N. W. 725.

It is apparent in this case that there has been no settlement of the record herein. It does not appear what matters were considered by the trial court excepting such as mentioned in this order. It does affirmatively appear that the court's personal knowledge of the situation and circumstances affecting the relations of Mrs. Grant and the location and surroundings of the appellant's present residence and the location in which she expected to take up her residence were within the personal knowledge of the trial court. It does further appear that the court had under its consideration, in rendering the order herein,

the records in the original divorce action. Manifestly, all of these records have not been certified to this court. The transcript of the evidence in such action has not been sent to this court. This court has recently held that upon appeals of this nature a record must be settled as the statute requires; that either the order of the trial court must describe the papers and the evidence upon which the same were made or the record must be settled. Solon v. O'Shea, 45 N. D. 362, 177 N. W. 757. It appears in the papers certified to this court that Mary E. Grant has been a school teacher in the public schools of Jamestown for a period of more than eighteen years. As suggested upon oral argument it is quite possible that this order as made in its broad language restrains the appellant from associating with said Mary E. Grant even in the relation of teacher and student, unless the appellant be present. Furthermore, it is quite probable, upon the papers as certified to this court, that the question of moving the child's residence to a certain apartment is now a moot question. The order was entered April 22, 1919. The papers in this case were not filed with this court until June 20, 1920. Orders of this character, in effect, modify the decree of divorce entered and ordinarily should be entered as a modification of the original decree of divorce herein. See § 4404, Comp. Laws 1913; Rindlaub v. Rindlaub, 28 N. D. 168, 147 N. W. 725; Houghton v. Houghton, 37 S. D. 184, 157 N. W. 316. It would be manifestly improper to either affirm or reverse this order upon the present state of the record before this court. This court is unable to determine what was the entire evidence presented before the trial court. This court is likewise unable to determine to what extent the question concerning the apartments has become a moot question and the extent to which the association of Mary E. Grant, at least concerning her relation as teacher to such child, requires any modification of the original decree of divorce herein. This case accordingly must be remanded for the purpose of settling a record as this court has heretofore held, and in that connection I am of the opinion that upon the settlement of such record the trial court should permit additional testimony to be adduced by the testimony of the parties in open court, and, of other witnesses concerned, as to whether the questions concerning such apartment is not now moot, and the extent to which specifically the original decree of divorce should be mod-

ified, if at all, concerning the association of said Mary E. Grant with such child, and concerning, particularly her relations, if any, as teacher in the public schools, to such child.

Concerning the latter question it is quite evident that if material evidence was not excluded, it should have been at least adduced. See Laws 1919, chap. 8. To this court trying *de novo* this subject-matter, with the power, beyond a mere reversal or affirmance, to enter another or different order, and subject possibly to a subsequent application to amend its order, if so made, there should be presented a record settled as the statute requires, and containing all the requisite evidence. The best interests of the child, and of the parents so require. The due expedition of this controversy, unfortunate as it seems, and containing potential possibilities of further strife and litigation, so demands.

CHRISTIANSON, Ch. J. (dissenting in part). The decree of divorce in this action was entered in October, 1915. That decree provided: "That the care, custody and full control of said minor child, Margaret Lucile Thorp, be . . . awarded to the plaintiff. That the defendant be permitted to have access to such child at reasonable times and have the privilege of entertaining said child and having her with him as much as he desires during vacation periods and when said child is not attending school; and that should the plaintiff herein depart this life prior to the time that said minor child reaches her majority, then and in that event the custody and control of said minor child should be and hereby is, awarded to Mrs. E. W. Thorp, mother of said defendant." In April, 1919, the trial court made an order, giving directions relating to the care of said minor child. This appeal is from such order. The only ruling complained of—the only ruling presented to this court for review on this appeal—is the making of that order. This is not a case like Rindlaub v. Rindlaub, 19 N. D. 352, 125 N. W. 479, 28 N. D. 168, 147 N. W. 725, where an appeal was taken from the decree of divorce, and this court, on a trial *de novo,* modified the decree, and specifically reserved jurisdiction to make further orders relating to custody of children. See 19 N. D. 392. In the case at bar no appeal was taken from the decree of divorce. The original subject-matter of the controversy was never brought within the jurisdiction of this court. The only matter this court has before it is the order made in April, 1919.

While the order appealed from sought to accomplish two purposes, viz.: (1) To restrain the plaintiff from taking the child to a certain flat above a pool room; and (2) to restrain the plaintiff from permitting the child to associate with one Mrs. Grant, except when accompanied by the plaintiff, the two propositions were to some extent interlocked; and, of course, the trial court was confronted, and required to deal, with the matter as the situation then existed.

The lapse of time has somewhat changed the aspects of the matter, and the majority members have seen fit to treat each of the two provisions separately. I am inclined to agree with the majority members in so far as they say that that portion of the order which restrained the plaintiff from taking the child to the flat over the pool room has become moot. For, it appears that the term during which plaintiff proposed to occupy such flat expired long before this case was submitted to this court. I wholly disagree with the majority members, however, when they say that that portion of the order which restrained the plaintiff from permitting the child to associate with Mrs. Grant, except in the presence of the plaintiff, should be reversed. In my opinion this court cannot, upon the record before us, do otherwise than affirm the order *in toto*.

It should be borne in mind that the order before us was made by the same judge who originally tried the case and rendered the decree of divorce. The evidence in the case is not before us, but the trial judge knew what that evidence was. He knew the parties to the action, the child, and Mrs. Grant. He was familiar with all the surrounding circumstances. He is a resident of the city of Jamestown (a city having a population of about 6,600), and his chambers are in that city. He was familiar with the various places involved in this controversy. He knew the character and location of the home where the child has been living. He knew the location of the pool room and its surroundings. He knew what, if any, part Mrs. Grant took in the trial of the divorce action. No one doubts that his actions were actuated by the highest motives, and a sincere belief that the ends of justice would be best subserved by ruling as he did. Nor can anyone deny that the district court had power to give directions for the care of the child. That power is expressly recognized by Comp. Laws 1913, § 4404, which provides: "In an action for divorce the court may before or after

judgment give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same." Comp. Laws 1913, § 4404.

In the decree of divorce the plaintiff was awarded the home which had formerly been occupied by the parties to this action. It is admitted that this is a good home, located in one of the most desirable residential sections of the city of Jamestown. It is admitted that the flat which plaintiff proposed to occupy with her daughter is located over a pool room in the business section of the city. In the defendant's affidavit it is said: "Said flat is located over a large and well-patronized pool room, cigar store, and soft drink establishment, and that the doorway to said flat from the main street of this city, opens out upon the sidewalk, at which place there frequently and almost continuously are congregated large bodies of men, and at and around the entrance of which place oftentimes there are loafing and loitering large numbers of young men of about town, having nothing in particular to do, and frequently vile and obscene language is used at and around said entrance and on said street by promiscuous persons, such as usually congregate around and about pool halls. That in order for said child to live in said flat, it will be necessary for her to pass in and out thereof, and by and through said crowds and to continually hear such obscene and indecent language, and witness such loud and boisterous conduct."

There are, it is true, affidavits by the plaintiff and Mrs. Grant (the owner of the building), to the effect that the pool room is under the constant supervision of the peace officers of the city, and is a clean, sanitary, and well-conducted place. But surely this court cannot say, upon this record, that the condition related in the affidavit of the plaintiff is not the true one. That is a matter upon which the findings of the trial court should control.

What about the second provision of the order? As already stated, we have no means of knowing what connection, if any, Mrs. Grant had with this action at its inception. The evidence upon which the decree was based is not before us. Upon the oral argument it was stated by respondent's counsel, and not denied by appellant's counsel, that Mrs. Grant took some interest in the matter at and prior to the time the decree of divorce was entered. It was further stated that the

defendant felt that she was largely responsible for the trouble between the parties to this action which resulted in the divorce proceedings.

In his affidavit, defendant, says: "This defendant verily believes that the said plaintiff is not fully aware of the embarrassment caused this defendant by allowing said Grant to associate with said daughter. That many times and frequently said Grant has the daughter of this defendant on the streets and in public places when her mother is not with her; that when said Grant is not with said child that the child is free and happy with her father at such times as she visits him or meets him; that frequently when this defendant meets said Grant on the street, whether with or without the child, said Grant appears to endeavor to display in the presence of said child and others and in public places, by facial expressions and an assumed contemptuous attitude, her dislike and hatred towards this defendant, and that at such times as she is so with the child, the child is very much embarrassed, due no doubt to the fact that she is now old enough to become aware of the enmity existing between defendant and said Grant, and that said daughter is embarrassed and hesitates to speak to this defendant when she is in the company of said Grant, either due to the fact that she feels that defendant does not desire her to be with said Grant, and that she therefore may think that he thinks that she is disloyal to him, or else she feels that she will be criticized or embarrassed if she speaks to her father in the presence of said Grant."

In her affidavit, plaintiff says: "That never since the granting of said decree of divorce, has this plaintiff heard the said Mary E. Grant make any remark derogatory of the character of the defendant in the presence of the said minor child. That this plaintiff did, after the granting of said decree, *caution* said Mary E. Grant against discussing the matrimonial difficulties of plaintiff and defendant in the presence of said child, . . . That this plaintiff *did forbid* the said Mary E. Grant from making any reference to said matter at all, or any reference to the defendant, in the presence of said child, and that this plaintiff has never at any time heard said Mary E. Grant mention this defendant in the presence of said child."

In her affidavit Mrs. Grant specifically admits "that her feeling toward (defendant) at the present time, while not of vindictive hatred, is such as would condemn in the strongest terms possible his course of conduct toward the plaintiff and his behavior in general."

Here we have Mrs. Grant's admission under oath, voluntarily made, in an affidavit of her present feelings towards the defendant. We also have the sworn statement of the plaintiff that she "did *forbid* the said Mary E. Grant from making any reference to said matter (the matrimonial difficulties of plaintiff and defendant) at all, or any reference to the defendant, in the presence of said child." We have the sworn statement of the defendant as to the conduct of Mrs. Grant towards him, and the conduct of the child towards her father when she is accompanied by Mrs. Grant. Under the terms of the decree (which has never been assailed) the defendant was "permitted to have access to such child at reasonable times," and was accorded "the privilege of entertaining said child and having her with him as much as he desires during vacation periods and when said child is not attending school." The decree further provided that in case plaintiff died before the child attained majority, defendant's mother should have the custody and control of the child. There is no contention that the provisions of the decree were unsatisfactory. Neither party appealed therefrom. It is admitted that the defendant has fully complied with the terms and provisions thereof; and the proof shows that he has made contributions towards the support of his daughter, in addition to those prescribed by the decree. Can it be said upon the record before us that it was not necessary to make the order appealed from in order to preserve to the defendant the rights accorded to him by the decree? Can it be said that that order is not conducive to the welfare and happiness of the child? Why did the plaintiff find it necessary to "*forbid* Mrs. Grant" to make "any reference to the defendant" before the child? Is it possible for anyone who entertains such feelings for another as Mrs. Grant's affidavit shows that she entertains towards the defendant to conceal those feelings from a child as old as the one involved here? Under the circumstances was it wise for, would it be conducive to the welfare and happiness of, the child to be so placed that she would be in daily contact with Mrs. Grant? Would this be fair to the defendant, or would it be fair to the child? These, and similar questions readily suggest themselves, and probably suggested themselves to the trial court. The trial court,—not this court, was charged with the duty of giving "such direction for the custody, care, and education of the child as might seem necessary and proper." Section 4404, supra. The per-

formance of this duty required the exercise of judgment upon matters not strictly judicial in their nature. By the very nature of things men of equal intelligence might differ as to what directions should be given for the care and education of a child. It is a matter of common knowledge that parents, both equally devoted, frequently differ on matters of that kind. Clearly the power conferred by § 4404, supra, is a discretionary one. The discretion should be exercised with due regard to the welfare of the child and the rights of the parties. 14 Cyc. 808. The presumption is that the trial court exercised its powers properly. This court has no right to substitute its judgment for that of the trial court. This court can interfere only where it is clearly shown that the discretion vested in the trial court has been abused. And whoever asserts an abuse of discretion has the burden of presenting to this court a record affirmatively showing that such assertion is true. Erickson v. Wiper, 33 N. D. 193, 225, 157 N. W. 592. In my opinion the record in this case wholly fails to show any abuse of discretion.

MARSHALL WELLS COMPANY, Respondent, v. PETER REGAN, Appellant.

(180 N. W. 54.)

Appeal and error — party conceding there was one issue for jury cannot on appeal assert there were others.

1. Where at the close of the trial a party informs the trial court that there is only one issue of fact to submit to the jury, he cannot be heard to say on appeal that there were other questions of fact which should have been submitted.

Contracts — finding that there was no conflict on the issue for the jury raised by defendant held proper.

2. For reasons stated in the opinion it is *held* that the trial court properly held that there was no substantial conflict in the evidence on what was conceded to be the only possible issue of fact in the case.

Opinion filed November 3, 1920.

From a judgment of the district court of Ramsey County, *Kneeshaw*, J., defendant appeals.

Affirmed.

Palda & Aaker and *H. S. Blood*, for appellant.

Cuthbert, Smythe, & Wheeler, and *Middaugh & Cuthbert*, for respondent.

"Where an absolute and unqualified admission is made in a pending cause, whether by written stipulation of the attorney or as a matter of proof on the hearing, it cannot be retracted on a subsequent trial, unless by leave of court." 20 Century Dig. § 1035, and general admissions.

"Statements of plaintiff in the trial of an action between him and another defendant, involving the same matters as in the pending case, are competent to sustain defendant's contention." 20 Century Dig. 1071, § 739; Mercer v. King, 13 Ky. L. Rep. 429; Union Mut. L. Ins. Co. v. Masten, 3 Fed. 885.

"Express admissions *in judicio* stand as conclusive presumptions of law (1 Greenl. Ev. § 27) and cannot be disputed unless it is first shown that they were made by mistake." Holley v. Young, 68 Me. 215, 28 Am. Rep. 40; California Electrical Works v. Finch, 47 Fed. 583.

PER CURIAM. Plaintiff brought this action to recover upon a contract for the installation of a heating plant in the house of the defendant situated in the city of Devils Lake in this state, and recovered a verdict in the sum of $991.43 with interest. Judgment was entered pursuant to the verdict and the defendant has appealed from the judgment. The evidence shows that on or about March 12, 1918, the plaintiff through its agent, Johnson, and a special sales agent, entered into an agreement with the defendant to sell the defendant a hot-water heating plant and install the same in his residence in the city of Devils Lake, for the agreed price of $800. The defendant, Regan, admits that such arrangement was made. There is, however, a conflict as to the terms of the agreement. Regan claims that he stated that he desired a boiler with a fire box of the same size as the one in the United States Weather Bureau in the city of Devils Lake. It is admitted that the parties went down to the weather bureau and examined this boiler. Both representatives for the plaintiff admitted that the defendant

stated that he wanted a boiler with a fire box of the same size as the boiler in the weather bureau, but that they informed him that this boiler would be too large for his house and would not be economical and that they suggested to him that all he wanted would be a boiler of sufficient capacity to heat his house to a temperature of at least 70° in the coldest weather; that thereafter a certain memorandum or agreement was drawn up which, at defendant's request, was submitted to his attorney. The attorney, raised some question as to whether the sales agents had power to bind the company with respect to the matter in question and suggested that the proposition be submitted to the company to the end that there might be a ratification of the contract by the company direct. Thereafter the plaintiff wrote a letter to the defendant accepting the order and guaranteeing that the heating plant would heat his house in the coldest weather to a temperature of 70°. The plaintiff company thereupon proceeded to ship the material including the boiler and have the plant installed. The defendant admits that he saw the boiler at the depot, and also later while it was being installed. After the plant had been completely installed, with the single exception of inserting the glass tube in the water gauge, the defendant made complaint that the boiler did not have a fire box as large as that in the weather bureau and refused to accept or pay for the plant. The plaintiff, thereupon, sent another representative to see the defendant and endeavored to adjust the matter with him with the result that it was agreed that plaintiff should send him a boiler with a fire box of the desired size. After this took place the defendant communicated with one Jillek, who was engaged in the plumbing and heating business in Devils Lake, with the result that he decided that he wanted Jillek to install the new boiler. The defendant saw the new boiler after it arrived at Devils Lake and expressed his satisfaction with it.

Later a conversation took place between Regan, Jillek, and the representatives of the plaintiff, at which it was arranged that Jillek should go ahead and install the new boiler and complete the job. Jillek, testified: "He (Regan), said, 'If they would employ me to put in his job and furnish me the necessary material that I asked for he would accept the job and pay for it.' I says, 'that if they give me these things I will take the responsibility and I will guarantee that

I will heat his house.' He, (Regan) said, 'if you give Jillcck what he wants I know he will do me a good job and I will accept it and pay for it.'" A Mr. Locke, gives the following version of the conversation: "Mr. Regan, says, 'Mr. Jillek, if you will put in that plant I know it will be right and I will pay for it.'" Johnson who was present at the conversation gives this version. "Give Joe what he wants. He is a good man and whatever he says goes. You give him what he wants and he will guarantee the job." After this conversation took place, a written agreement was prepared which reads as follows: "Devils Lake, North Dakota, February 22, 1919. Marshall Wells Co., Duluth, Minn. Upon furnishing the extra radiation and fittings necessary as submitted by me I hereby certify and guarantee the equipment and parts for the Peter Regan heating plant to be complete in every respect. Signed by, Joe Jillek, Steamfitter, Devils Lake, N. D."

The defendant, Regan, and one Johnson signed the agreement as witnesses.

Jillek prepared a list of additional material and parts which he desired. They were all furnished by the plaintiff. Jillek commenced to install the new boiler, and some additional radiation which had been furnished by plaintiff. While the work was progressing the defendant came along, and forbade his continuing the work. The plaintiff sought to obtain permission to remove the first boiler, but defendant refused to permit it to remove it except upon payment of damages.

The defendant refused to permit Jillek to finish the work. He also refused to pay the plaintiff, or even permit it to remove any of its material on the premises. The plaintiff thereupon brought this action for the price of the heating plant as agreed upon, viz., $800, and the value of the first boiler, viz., $191.43. The complaint is framed on the theory that after the first boiler had been installed there was a second contract between the parties under which the defendant agreed to pay the price first agreed upon, viz., $800, and return the first boiler, upon plaintiff's furnishing a new boiler and the additional parts specified by Jillek; that plaintiff performed all parts of the second agreement, and that plaintiff has broken such contract by failing to return the first boiler or pay the $800, to plaintiff's damage in the sum of $991.43.

At the close of all the testimony the plaintiff moved for a directed verdict. The record shows that after this motion was made the following colloquy took place between the trial court and defendant's counsel:

"The Court: Mr. Blood, what issue of fact is there for the jury to pass upon? What has the jury to pass upon here at all? What am I going to charge the jury? The only possible issue is that the second boiler was not as large as the one he was to get.

"Mr. Blood: That is the issue."

Plaintiff's counsel thereupon asked that the case be reopened for the purpose of making a motion to strike out the testimony of one Clementrude (who had been called and who had testified as a witness in behalf of the defendant with respect to the comparative sizes of the last boiler furnished to the defendant and the boiler in the weather bureau at Devils Lake). The case was reopened. Plaintiff's counsel thereupon moved that Clementrude's testimony on the matter of the size of the boiler be stricken out, "for the reason that on cross-examination, it was conclusively demonstrated that he had no knowledge of the subject himself and that his testimony on direct was purely hearsay, conjecture, and guess work." The court sustained the motion. Thereupon the court made the following statement to defendant's counsel: "If you can suggest anything for the jury to pass upon, Mr. Blood, I will instruct the jury." Defendant's counsel replied: "Our theory is that he did not get what he contracted for the second time, that the second boiler was not the size of the one in the weather bureau station." The court: "What is there to show that it was not? Mr. Clementrude testified that it was not, but he says that he does not know anything about it."

Hence, we have this situation as disclosed by the record: The defendant assumed, and in fact informed the trial court, that there was only one issue to submit to the jury, namely, whether the second boiler was of the agreed size. The trial court acted upon the question thus presented, and held, as a matter of law, that there was no conflict in the evidence as to the size of the second boiler, or rather that the evidence showed that the second boiler was of the agreed size. We have no hesitancy in holding that the trial court was correct in so ruling.

There was no substantial evidence, whatever, tending to show that the second boiler was not of the size agreed upon; and there was abundant testimony adduced by the plaintiff to the effect that it was. In these circumstances the defendant may not complain in this court that the trial court took him at his word and acted accordingly. 3 C. J. pp. 734, 860.

Defendant contends, however, that in as much as the evidence shows that he paid freight on the first boiler that he is entitled to have the judgment reduced in the sum so expended. While no foundation is laid in the pleadings for the recovery of such claim, plaintiff's counsel stated upon the oral argument that plaintiff was willing that such allowance be made. Hence the order and judgment of this court will be that the judgment appealed from be affirmed, but that plaintiff be allowed credit upon said judgment for the amount of freight paid by him upon the first boiler.

THOMAS BAILEY et al., Respondents, v. CHARLES M. PUGH et al., Constituting the Board of County Commissioners of Dunn County, North Dakota, Appellants.

(179 N. W. 705.)

Counties — mandamus — in proceedings to remove county seat, it is for commissioners, and not court, to pass on petition — mandamus not issued to compel county commissioners to reverse their decision against sufficiency of petition for removal of county seat.

In proceedings for the removal of a county seat, it is for the county commissioners, and not the court, to pass on the sufficiency of the petition for removal. When the county commissioners decide against the sufficiency of a petition, the court may not, by mandamus or otherwise, compel them to undo or reverse their decision.

Opinion filed November 5, 1920.

Appeal from a judgment of the District Court of Dunn County; Honorable *F. T. Lambke,* Judge.

Reversed.

Murtha & Starke and *W. F. Burnett,* for appellants.

The passing upon the sufficiency of the petitions of Dunn Center was a discretionary matter which could not be controlled by mandamus. Sawyer v. Mahew (S. D.) 71 N. W. 141; Oliver v. Wilson, 8 N. D. 590; State ex rel. Wiles v. Albright, 11 N. D. 22, 98 Am. Dec. 375.

The writ of mandamus will not issue where there is a plain, speedy and adequate remedy at law. Taubman v. County Commrs. (S. D.) 84 N. W. 784.

A court or board clothed with judicial functions may be compelled to act, but the court issuing the writ cannot control its decision. Ex parte Morgan, 114 U. S. 174; Ins. Co. v. Adams, 9 Pet. 571.

Nuchols & Kelsch, for respondents.

ROBINSON, J. This proceeding relates to the removal of the county seat of Dunn county. It is an appeal from an order of mandamus made by Judge Lembke on the 19th day of June, 1920. As the record shows, in May, 1920, there were filed with the county auditor numerous petitions for the removal of the county seat. On June 8th the county commissioners met in special session to consider the same and after considering for about nine days, on June 18, 1920, the board of county commissioners made and entered an order or resolution denying the petitions and declaring that the same were not signed by qualified electors equal in number to three fifths of all the votes cast in the county at the last preceding general election. That resolution has not been reconsidered or undone. It remains in full force and effect. But on June 19, 1920, at 7:15 P. M. the court issued to the county commissioners a peremptory writ of mandamus commanding them forthwith to convene and before 10 o'clock P. M. of that day to enter and record a proper resolution granting the petitions and directing the county auditor to publish legal notices, to prepare ballots and submit to the voters the question of the removal of the county seat at the primary election on June 30, 1920. And it was further ordered that in case the board of county commissioners refused to comply with the order of the court that C. A. Barton, Joseph Huschka and O. O. Odegard are hereby appointed as special commissioners to act in place of the county commissioners and to carry out all the orders, directions, and commands of the peremptory writ. The writ was served only on

one of the county commissioners and it was in no way possible to serve it on the other two commissioners before 10 P. M. of June 19th. However, Barton and Odegard, the two special commissioners, met at 10 P. M. on June 19th, and at 10:40 P. M. made an order in accord with the writ. Then the question of removal was submitted to the voters at the primary election on June 30th, and a majority of the votes were given in favor of Manning as the county seat. The statutes which relate to the matter are as follows:

Comp. Laws, § 3233: When the inhabitants of any county desire to remove the county seat, they may present a petition to the board of county commissioners of their county praying for such removal and that an election be held to determine whether or not such removal shall be made.

Comp. Laws, § 3234: If the petition is signed by qualified electors of the county, equal in number to at least three fifths of all the votes cast in the county at the last preceding general election, the board must, at the next general election, submit the question of the removal to the electors of the county.

Comp. Laws, § 3239 (Sess. Laws 1917, chap. 102) as amended: In counties where the county seat is not located on a railroad or interstate river, the question of the county seat removal may be voted on at any primary election, and if more than two towns are contending for the location of the county seat at such election, then the two towns receiving the highest vote at such primary election, and these two towns only, shall be placed on the official ballot at the first coming general election, and the town then receiving the highest number of votes cast for the county seat shall be designated as the county seat.

The case does not call for any discussion. The mandamus order shows on its face that it is dictatorial, arbitrary, and void. The court had neither jurisdiction of the subject-matter nor of the county commissioners; nor did the court have any jurisdiction to appoint special county commissioners. This court has justly held that on the sufficiency of a petition for the removal of a county seat the decision of the county commissioners is final. State ex rel. Little v. Langlie, 5 N. D. 594, 601, 32 L.R.A. 723, 67 N. W. 958. As the court there held: When we consider the nature of the question to be passed upon, the peculiar facilities that county commissioners have living in close

contact with the people, for their reaching a correct result, and the enormous expense involving a trial of that question in court, we are impelled to the conclusion that the decision of the board is final.

In this matter it seems the county commissioners took some eight or nine days to consider and decide on the voluminous records and petitions and the sufficiency of the removal petitions, and then, in the most summary manner, the court makes an order directing that on the same day, and before 10 P. M., the board shall reconvene and reverse their decision and enter a decision as dictated by the court. Clearly the order was null and void. It was never served, and of course it was justly disregarded by the county commissioners.

Reversed with costs and case remanded forthwith.

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

BRONSON, J. I concur in the result.

EMIL C. HAGE, Thomas Lonnevik, and Siver Serumgard, as the Lake Region Investment Company, Respondents, v. M. SIGBERT AWES COMPANY, a Corporation, Appellant.

(179 N. W. 986.)

Brokers — one broker held not liable to another under contract between them as to sale of land listed with latter.

This is an appeal from a judgment on a verdict for $813. The complaint does not state and the evidence does not show a cause of action, but there is a clear showing that the plaintiff has no cause of action.

Opinion filed June 25, 1920. On rehearing November 6, 1920.

Appeal from the District Court of Ramsey County; Honorable *A. G. Burr,* Judge.

Reversed and dismissed.

Flynn, Traynor & Traynor, for appellant.

The plaintiffs are not entitled to recover because they did not and could not deliver to defendant on the terms agreed.

Under these circumstances plaintiff had nothing to sell to defendant and they knew it. That such a contract is void and no compensation or commission can be recovered by the broker under such circumstances. Halland v. Johnson (N. D.) 174 N. W. 874.

The failure of the plaintiffs to deliver to the defendant at $25 per acre defeats the right of plaintiffs to recover their commission. This is clearly the law in this state. Anderson v. Johnson, 16 N. D. 174, 112 N. W. 139; Paulson v. Reeds, 33 N. D. 152; Grangaard v. Botzina, 33 N. D. 271; Fulton v. Cretain, 17 N. D. 335.

Serumgard & Conant, for respondents.

ROBINSON, J. This is an appeal from a judgment on a verdict for $813. The gist of the complaint is that in 1916, at Devils Lake, in Ramsey county, both the plaintiff and the defendant were engaged in the business of buying and selling land on their own account and on commission. That 680 acres of land—described in the complaint—had been listed with the plaintiff for sale on commission, and that in April, 1916, it was agreed between the plaintiff and defendant that if the defendant bought or took over any of the land contained in the plaintiffs' list of land for sale on commission, the defendant would pay to the plaintiff a commission of $1 per acre for the land bought or taken over; that on August 21, 1916, the defendant bought and took over said 680 acres.

It appears that in 1915 the defendant had desk room in the office of Siver Serumgard and had the same land listed for sale. Then in 1916 the plaintiffs formed their corporation to sell and deal in lands, and the land was listed with them for sale at $25 an acre. It was also listed with the defendant. The land was part of an estate. It was listed by the executrix, who had no authority to list it for sale at any price. In time the land was advertised for sale at auction, pursuant to an order of the court, and at the auction sale the plaintiff bid for the land $25.92 per acre; defendant bid $26.06 per acre and the land was sold and conveyed to defendant.

The complaint does not state a cause of action; the evidence does not show a cause of action. On the contrary, the complaint and the evidence show that plaintiff has no cause of action. The executrix did not own the land. She had no legal authority to list it for sale at $25

an acre, or at any price, and at the public sale of the land, which was duly advertised and made pursuant to an order of the court, the plaintiff and the defendant and every other person had a perfect right to bid for the land without paying for the privilege $1 an acre, or any sum whatever. As the writer thinks, there was no reasonable cause for commencing and prosecuting such an action.

Reversed and dismissed.

BIRDZELL and GRACE, JJ., concur.

CHRISTIANSON, Ch. J. (dissenting). The majority members not only reverse the judgment, but order a dismissal of the action. That is, they hold as a matter of law that plaintiffs have no cause of action. I am unable to agree with these conclusions.

The evidence adduced by the plaintiffs shows that the defendant had been maintaining an office at Devils Lake. In 1916, Awes, the principal officer of the defendant corporation approached plaintiffs and stated, in substance, that he wanted to enter into a working agreement with them, whereby his corporation would have the benefit of and handle lands which had been listed with the plaintiffs; that if such arrangement was made defendant would not keep a man at Devils Lake, and would pay plaintiffs $1 per acre for all the land which it acquired or disposed of from such lists. This proposition was accepted by the plaintiffs. At the time, the plaintiffs had upon their lists, among others, 680 acres belonging to the Mooers's estate. The surviving widow, Elizabeth W. Mooers, who was administratrix of the estate had listed the land for sale with the plaintiffs at a price of $25 per acre net to the owners. The plaintiffs informed Awes of this fact, and gave him the memorandum relative thereto which they had in their files. Thereafter one of the members of the plaintiff copartnership took Awes out to inspect the land. Later, Serumgard, one of the members of the plaintiff copartnership had a conversation with the administratrix relative to the sale of the land which she had listed with them. He explained to her that it would be necessary to have the sale made through proceedings had in the probate court. She stated that she did not want to go to this trouble and expense unless she was sure the land could be sold. Serumgard thereupon assured

her that he would see that the land was purchased at a price to net the owners at least $25 per acre. He thereupon prepared, and the administratrix signed and verified, a petition for license to sell such real estate; and later sale was held pursuant thereto. In accordance with his promise to the administratrix, Serumgard submitted a bid for the land in the sum of $17,666.15, or about $25.97 per acre. The defendant company, also, submitted a bid of $26.06 per acre, and was awarded the land. At the time he submitted his bid, Serumgard had no knowledge that the defendant had made, or was intending to make, a bid for the land. The testimony of Lonnevik, one of the copartners, shows that at a later date Awes recognized that his company was indebted to the plaintiff in connection with the acquisition by his company of the land in question.

The majority opinion is predicated upon the proposition that the administratrix had no authority to sell or list the land for sale at any price. It is true she could not sell it, or enter into any valid contract to sell, except in the manner provided by law for the sale of such property. There was no reason, however, why, before putting the estate to the expense of obtaining license to sell and advertising the sale, she should not endeavor to interest prospective purchasers. I do not see, however, wherein the validity of the listing arrangement between the plaintiffs and the administratrix makes any difference as to the respective rights of the parties to this action. The arrangement between the plaintiffs and the defendant was that it would pay $1 per acre for land which it "took" from their list. It was in effect an agreement to pay for service or information leading to the purchase of land. Plaintiffs were not expected to close the deals. The defendant was supposed to do that. That was the construction which the parties themselves placed on their agreement, for the evidence shows that the defendant company purchased two other tracts of land which it "took" from plaintiffs' list, and in both instances defendant made the deal, and option agreements were taken direct from the owners to the defendant company. In these cases the defendant company paid plaintiffs the agreed compensation.

In denying defendant's motion for a new trial the trial court filed a memorandum decision from which I quote:

"The defendant applies to the court for a new trial. It seems to

the court the case turns upon the nature of the case involved, and the real issues to be determined. Is this a case where a broker seeks to recover commission for the sale of land, or, is this a case where one person renders service to another for which the other promises to pay? The defendant in this case treats it as if it were a case where a broker is seeking to recover his compensation. The theory of the case is to be determined by the complaint. It is not claimed the complaint is demurrable. In other words it is conceded the complaint states a cause of action. What is the cause of action? Plaintiffs allege that they had land listed for sale and that the defendant agreed with him that if he took over any of that land he would pay them $1 an acre. This is seen in ¶ 4. True, in ¶ 3, plaintiffs allege they were brokers but this is merely a description of their business. Plaintiffs do not claim to be recovering as brokers, but it is because they were brokers they happened to have land listed. From the evidence it is clear both parties were land brokers and that the defendant, in order to save expense to himself and obviate the expense of maintaining an office force, agreed that if he made use of the lists of plaintiff he would pay them $1 an acre in case he bought any of the land. Of course this was disputed but the jury found this way. Now, he made use of their list and afterwards bought the land. He was not required to buy it from plaintiffs, but they put him on the track. If he did not want to pay them $1 an acre, he should not have made use of the information he got from them. Whether it would have cost him a $1 an acre to have maintained an office force and thus get in touch with the land that was offered for sale is not the question. After finding out from them that this land was for sale and making use of their machinery, good faith required that he make no use of the information unless he intended to pay them for it. Whether he paid too much in this particular case does not concern us. We are not making the contract for the parties. It makes no difference that he bought the land through probate proceedings. . . . Simply because the parties happen to be brokers in land does not make this case a case of broker seeking to recover his compensation. It is a case of one broker doing service for another. This is the cause of action, and there being evidence to sustain it, and the jury having found in favor of the plaintiff, I see no reason why the verdict should be disturbed."

The memorandum decision speaks for itself. It shows that the trial court, in denying the motion for a new trial, did not merely make a formal ruling, but carefully considered the questions presented on such motion. I see no reason for disturbing the findings of the jury, and the ruling of the trial court.

BRONSON, J., concurs.

On Rehearing.

PER CURIAM. A reargument was ordered. After a reconsideration of the evidence in the light of the reargument the court adheres to the conclusion originally announced.

It stands admitted in this case that the land was not listed by anyone having authority to bind the seller to sell at a fixed price, and that all parties were dealing in regard to it with knowledge that the land would have to be sold through the probate court. It was understood, however, that the administratrix was willing to sell at $25 per acre if more could not be obtained.

If the action be regarded as one for a commission for obtaining the land for the defendants at a given price, it would seem clear that it cannot be maintained; for the plaintiffs did not obtain the land for the defendants at the price indicated. One of them testified:

"We got him (Awes) the bargain and he took it according to the terms that we offered it to him; we brought the purchaser—we brought together the owner of the land and Mr. Awes' company as buyer, and by that we had earned a commission."

The evidence clearly shows that the defendant was unable to and did not buy on the terms on which the plaintiffs say they had the land listed so that they did not earn a commission by obtaining the land for the purchaser at the price stated.

Taking the view of the case which is most favorable to the plaintiffs, that the contract was one whereby the defendants agreed to pay to the plaintiffs $1 an acre for such land as they, the defendants, might take from the plaintiffs' lists, we are of the opinion that the evidence is equally insufficient to sustain a recovery in this action. There were two witnesses who testified for the plaintiffs and both of them, as will

be seen from the evidence quoted below, have defined listing as including the price at which the land could be purchased. The following testimony of the plaintiffs' witnesses makes this element of the contract clear, and it seems to us to be equally clear that in the subsequent dealings respecting the Mooers's land both parties ignored the list price. In fact, it seems to us that they did not treat this transaction as falling within the terms of their service or commission arrangement at all.

The terms of the contract appear in the testimony given by two of the plaintiffs. Mr. Serumgard testified:

"Mr. Awes met us in the office and the question came up as to some sort of a working arrangement. Mr. Awes had maintained an office there the year before and had kept a man. Now, he said to us: 'Boys, we can just as well work this together the coming season; I won't keep a man *if you fellows will list up land for me and get me bargains. I will allow you—I will pay you $1 an acre for all the land I take off your list.*' At first I demurred to this, but Mr. Lonnevik told him that would be agreeable to him, and I finally told Mr. Awes the same thing; that he could go ahead and do that. Then he wanted to know if we had any land listed, and I had already told him at a previous conversation about a tract of land that we had listed known as the Mooers's land . . . and owned by the estate of George Mooers; Mrs. Mooers being the administrator. We told him that we had that and that *it was a snap, and that it was listed to us at $25 per acre;* and we looked this over. Mr. Lonnevik and Mr. Awes went into the other office and looked it over.

"Q. What do you mean by looked it over?

"A. The listing of the land, description of the land, and the memorandum of the improvements and quality of the land, and the buildings, fences, and so on. We had a memorandum of those things."

On cross-examination he testified that by having the land listed he meant as follows:

"Q. Mr. Serumgard, what do you mean by having the land listed?

"A. I mean that we would arrange with the owner to have the land for sale at a fixed price, and that is what I mean by having it listed."

. . . . . .

"Q. You didn't have any agreement either with Mrs. Mooers that

if you could get her $25 an acre for the land that you could have anything more than that you obtained for it?

"A. No, sir.

"Q. That conversation between Mrs. Mooers and Mr. Hage was that Mr. Hage asked her if her land was for sale, and she said she would be glad to sell it if she could get $25 an acre?

"A. Yes, sir; that we could have it for sale at that figure, she would take that for it."

Upon redirect examination Mr. Serumgard testified that he had another interview with Mr. Awes some time during the month of April; that Mr. Awes came into his office when he was alone and *"wanted to know about whether we had any snaps,* and I told him that the biggest snap we had on our list is the Mooers land, and he told me that as soon as Tom got back they would go out and look at it."

Mr. Lonnevik also testified to the agreement as follows:

"Well, Mr. Awes made us a proposition to ———

"Q. Tell what he said?

"A. To list land for him. He said: 'Heretofore I had had a man here, but if you gentlemen will work together with me it will not be necessary for me to keep a man here. You can list up land for me and I will pay you $1 an acre; any land that you cannot sell, or that I can find buyers for, any lands that I can use, I am willing to pay you $1 an acre.

"Q. Yes, and then what?

"A. Well, we made that agreement with him."

He also testified to the fact of Mr. Awes going out to see the land and to a conversation taking place there as follows:

"Q. What, if anything, did he say while you were doing this?

"A. Well, he thought it was *a snap, $25 an acre.* . . .

"Q. And, now, then, did this memorandum listing that you talk about state the minimum price that Mrs. Mooers would take for her land or any price?

"A. I don't remember whether it did or not.

"Q. You know what it was listed to us at, do you?

"A. Yes.

"Q. What was it?

"A. *Twenty-five dollars* an acre."

On cross-examination he testified that they had no listing that would bind Mrs. Mooers unless they sold it first; that "it was listed with the right to sell if we could get *$25 an acre for her.*"

It appears that Mr. Serumgard, one of the plaintiffs in this action, acted as attorney for Mrs. Mooers in securing the license to sell and that he had an understanding with Mrs. Mooers that the land would be sold at not less than $25 per acre. She was to get more if the land went higher. In order not to disappoint her, he personally put in a bid for $17,666.15, which was $25.92 per acre. The defendant on the same day put in a bid of $26.06 per acre and the land was sold to it. From these circumstances it will readily be seen that if the defendant had put in a bid for the land at $25 per acre (at which the plaintiffs claim it was listed with them) it (the defendant corporation) would not have become the purchaser. The defendant bid at a competitive sale and not in reliance upon any listing at a price fixed by the seller, either to the plaintiffs or to anybody else, and the plaintiffs were the competing bidders at the sale.

As a further evidence that the plaintiffs and defendant had abandoned the listing, so far as the sale through the probate court is concerned, and that they did not intend their contract to be applicable thereto, the plaintiff who bid in the land testified that he was doing it *so the land could be sold,* and that "Mr. Awes could have had it from us at the price if it was sold to us."

This would have involved a change in the list price. In other words, if the Awes Company had not bid at the probate sale at all and the bid of Mr. Serumgard, at $25.92, had been accepted, Awes could have had the land at $25.92 or 92 cents per acre above the previous list price. To have consummated the deal, however, the Awes Company, according to the plaintiffs' theory in this law suit, would have had to add $1 an acre for commission to the plaintiffs, making the land cost it $26.92 per acre, instead of $26, including commission if taken under the so-called service contract. We are of the opinion that the contract as proved by the plaintiffs cannot be reasonably construed to embrace an obligation on the part of the defendant to pay a commission on a land purchase that it might make at a probate sale where it would bid in competition with the plaintiffs. It follows that the judgment must be reversed and the case dismissed. It is so ordered.

BIRDZELL, GRACE, and ROBINSON, JJ., concur.

CHRISTIANSON, Ch. J. (dissenting further). The foregoing dissenting opinion was prepared and filed when the views of the majority members were expressed in the opinion written by Mr. Justice Robinson. Afterwards a rehearing was ordered and the case reargued, and, while the majority members adhere to the first opinion, they have deemed it necessary, or at least desirable, to reinforce or supplement it with an additional opinion. The additional opinion quotes certain excerpts from the testimony as a basis for the conclusion that the plaintiffs and defendant, so far as the sale of this particular land was concerned, abandoned the arrangement between them, "and that they did not intend their contract to be applicable thereto."

The transcript of the evidence in this case covers some eighty-five pages of typewritten matter, and, of course, it is impossible to get a correct understanding of the arrangement between the parties or of their understanding of it from a few questions and answers. The question is: What does the entire evidence show that the agreement was, how did the parties understand it, and what did they do under it?

It will be noted that the last sentence in the first quotation from Serumgard's testimony reads thus: "Mr. Lonnevik and Mr. Awes went into the other office and looked it over." The next question and answer were as follows:

"Q. What do you mean by looked it over?

"A. The listing of the land, description of the land, and the memorandum of the improvements and quality of the lands and the buildings, fences, and so on. We had a memorandum of these things."

Lonnevik testified as follows with respect to this matter:

"Shortly after, on that same day, we made the agreement with Mr. Awes, he asked me if we had any lands listed up at that time, and I handed him this list or this description of that land of Mrs. Mooers.

"Q. The memorandum of the listing?

"A. Yes, sir.

"Q. That wasn't signed by Mrs. Mooers, however?

"A. I don't think it was.

"Q. And what did Mr. Awes say then, if anything, when he took it?

"A. Well, he read it over, and he said he was going over to see Mrs. Mooers about it."

Lonnevik further testified that Awes took the memorandum with him and that he never returned it to the plaintiffs.

This testimony most graphically presents the interpretation which the parties themselves placed upon their agreement as applied to this particular tract of land. The interpretation was contemporaneous with the making of the agreement. Immediately after the agreement had been made, Awes asked if they "had any lands listed up at that time, and, he says, 'I want your best snaps, that is your best deals now.'" Lonnevik thereupon handed him the memorandum of the land belonging to the Mooers's estate. There is no contention that there was any misunderstanding as to the actual ownership of this land. Both parties knew that it belonged to the Mooers's estate, of which Mrs. Mooers was the administratrix. They knew that Mrs. Mooers had indicated that she was willing that the land be sold if it would bring $25 per acre. But both parties knew that the administratrix could not fix any definite price thereon. They knew that it could be sold only through proceedings had in the county court; that notice of such sale must be given; that all the world would have an opportunity to bid at the sale, and that the land would go to the highest bidder. The defendant made no objection to the condition of the title. He made no intimation that the land should be excluded from the arrangement just made. He examined the memorandum and retained it, and said he was going over to see Mrs. Mooers about it. The evidence further shows that he did go and see her. Not only did the defendant avail himself of the information thus given, but he also later had the plaintiffs furnish a man and an automobile and take him out so that he could examine the land.

This all took place with the unquestioned knowledge on the part of the defendant that this land belonged to the Mooers's estate, and that in any event title must be procured through a sale by the administratrix in the manner prescribed by law. Can there be any reasonable room for doubt but that when the plaintiffs called defendant's attention to the Mooers' "snap," and when the defendant looked over the so-called list, which contained a description of the land and the buildings and improvements thereon, that both parties assumed that this was within the terms of the working agreement just formulated? Can there be any serious question but that when the defendant later availed himself

of plaintiffs' services in taking him out to examine the land, and locating the boundaries thereof, that both parties assumed that it was one of the deals covered by the arrangement formerly made? I think not. Nor do I believe that there is anything connected with the actual purchase of the land by the defendant which entitles him to say that the deal was not within the terms of the agreement, as intended and construed by the parties.

It should also be remembered (as stated in the former dissent) that in all matters arising between these parties, the defendant closed his own deals with the owners of the lands. He did not require the plaintiffs to do this. He merely "took lands from their lists." It will be noted that in this case he took the so-called list or memorandum, and said, "I will go and see Mrs. Mooers about it." He did go and see her. If the title to the property had been in her name, and if the property had been hers to sell, he doubtless would have closed the deal, the same as he closed other deals for lands "taken from plaintiffs' lists." He did, however, proceed to close the deal in the only way in which it could be done, namely, by submitting a bid to Mrs. Mooers as administratrix. When we consider the character of the title to this land there is no essential difference between what defendant did in this case, and what he did in other cases where he acquired title to lands "taken from plaintiffs' lists."

The majority members persist in treating the relation between the parties to this action as one between a real estate broker and a person who employs such broker to purchase for, or obtain the sale to, him of certain land at a stated price, on certain fixed terms. In such case, of course, the broker has not earned the compensation stipulated to be paid him unless he makes the purchase, or procures the sale, at the price and on the terms stated. In other words, the broker cannot recover the consideration agreed to be paid him for his service until he has performed the service. But, as already indicated, that was not the relation between the parties to this action, and that was not their contract. Here the plaintiffs did not act as intermediaries in negotiating the sale of land to the defendants. The defendant merely availed itself of the information received from plaintiffs' lists, and whatever services were incident thereto, and negotiated and closed its own deals with the different owners. That was true of every deal that was consummated for land which defendant "took from plaintiff's lists."

As was aptly remarked by the trial court (in the memorandum opinion set out in the former dissent), "We are not making the contracts for the parties." The parties have the constitutional right to make their own lawful contracts. All contracts must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful. Comp. Laws 1913, § 5896. Even a written contract, the language of which is ambiguous or doubtful, may be explained by reference to the circumstances under which it was made and the matter to which it relates. Comp. Laws 1913, § 5907. In interpreting such contracts it is always competent to take into consideration the construction which the parties themselves have placed upon it. 6 R. C. L. p. 852, § 241.

Basing their argument upon the same basic error as to the nature of the relations and contract between the parties, already referred to, the majority members devote considerable space in the additional opinion to the bids submitted respectively by the defendant and by Serumgard. In this connection it is well to note that the defendant said nothing to Serumgard about its intention to put in a bid for the land. He had no way of knowing that defendant would make a bid, unless it informed him. There was, of course, no obligation on the part of the defendant to purchase any of the lands "from plaintiffs' lists." The only obligation it had assumed was to pay $1 per acre for each tract of land it "took" from such lists. While, as I construe the contract between the parties, the bids are of no particular consequence and have no material bearing on plaintiffs' right to recover, it will be noted that the bids of Awes and Serumgard were only a few cents per acre apart. And the evidence shows that the land was listed with the plaintiffs, by Mrs. Mooers, on April 3, 1916, at which time she said she would accept $25 per acre for it. The sale was not made until July 24th. If there were any crops on the land they most likely were put in after the land was listed. And while there is no specific testimony to that effect, it was assumed in questions asked upon the trial that there were crops upon the land; and upon the oral argument it was stated by Serumgard (who argued the case in person), in response to questions of comments made by members of the court, that the bid submitted by Serumgard represented $25 per acre for the land,

and that the amount in excess thereof represented the value of the seed which the estate had furnished in putting some of the land into crop that spring, and which crops were then on the land. The correctness of that statement was not denied by appellant's counsel.

It is stated in the supplemental opinion that Serumgard acted as attorney for Mrs. Mooers in securing the license to sell. This statement, while in a sense true, is likely to be misunderstood unless explained. Serumgard was not the attorney for the estate. He did not act as Mrs. Mooers counsel in the probate proceedings. It is conceded that another firm of Devils Lake attorneys were in charge of the proceedings for the probate of the Mooers's estate. Serumgard's only connection with it arose out of the listing of the land with the plaintiffs and the proposed sale thereof. In order to make it possible to have the land sold it was necessary to make the sale through proper proceedings in the probate court, Mr. Serumgard, merely prepared the petition for license to sell and the papers incidental thereto. The record affirmatively shows that he did not even prepare the order confirming the sale of the administratrix's deed.

It seems to me that the evidence in this case justified the jury in finding that the agreement between the parties was what they said it was. The parties contemporaneously with the making of the agreement construed it as applicable to the land in controversy. The defendant availed itself of the information given by plaintiffs; and (as in other deals where it acquired lands taken from plaintiffs' lists) it closed the deal therefor,—closed it in the only manner in which it could be closed. And, according to Lonnevik's testimony (see former dissent) Awes, after having purchased the land, recognized that the defendant company was indebted to the plaintiffs for compensation as a result of the acquisition by the company of the land in question.

The case was submitted to the jury, not upon the few isolated questions and answers set out in the per curiam opinion, but upon all the evidence contained in the eighty-five pages of the transcript. The jury saw the witnesses, and heard their story, and under proper instructions, said that the agreement between the parties related to and embraced the transaction in question. The learned trial court, after full reflection, on motion for a new trial said there was sufficient evidence to justify the jury in arriving at this conclusion. In my opinion this

court is not justified in saying that the conclusions of the jury and of the trial court are contrary to, and have no substantial support in, the evidence.

BRONSON, J., concurs.

STATE OF NORTH DAKOTA EX REL. LAUREAS J. WEHE, a Commissioner of the North Dakota Workmen's Compensation Bureau, Respondent, v. NORTH DAKOTA WORKMEN'S COMPENSATION BUREAU, John N. Hagan, Commissioner of Agriculture and Labor and Ex-Officio Chairman and Member of the North Dakota Workmen's Compensation Bureau, and S. S. McDonald, Commissioner and Member of the North Dakota Workmen's Compensation Bureau (Together with the Plaintiff as Such Constitutes the Full Membership of Said Bureau), as Such Members of the North Dakota Workmen's Compensation Bureau, Appellants.

(180 N. W. 49.)

Mandamus — in mandamus to obtain salary warrant, answer held to show petitioner's legal removal.

In a petition for mandamus, the petitioner sought to compel the issuance of a salary warrant. The defendants answered, alleging that the petitioner had been removed from office. The answer also set forth the proceedings had to remove the petitioner. A demurrer was interposed to the answer. It is *held:*

For reasons stated in the opinion, the answer sufficiently alleges the existence of legal grounds for removal and the exercise of the power.

Opinion filed November 16, 1920.

Appeal from district court of Burleigh County, *Nuessle,* J.

Reversed.

Foster & Baker, for appellants.

The petition is insufficient and the demurrer should be carried back to it. Rush v. Philadelphia, 62 Pa. Super. Ct. 84; Tribune Printing

& Binding Co. v. Barnes, 7 N. D. 591, 75 N. W. 904; Clay County v. Simonsen, 1 Dak. 387, 46 N. W. 592, adopted in 2 Dak. 112, 2 N. W. 260.

The answer affirmatively shows the jurisdiction of the governor. Re Guden, 151 N. Y. 529, 64 N. E. 451.

A public officer appointed for a fixed term subject to removal, generally for cause, may be removed without notice and hearing. People v. Welty, 75 Ill. App. 514; Hertel v. Boismenue, 229 Ill. 474, 82 N. E. 298; People ex rel. Platt v. Stout, 19 How. Pr. 176, 11 Abb. Pr. 17.

Where an answer contains a denial of a material allegation essential to plaintiff's right to relief it is error to sustain a demurrer to the answer as a whole, on the ground that the answer does not state facts sufficient to constitute a defense, although the answer contains an attempted affirmative defense. Hill v. Walsh, 6 S. D. 421, 61 N. W. 182. This case is approved in Redwater Land & Canal Co. v. Reid, 26 S. D. 466, 128 N. W. 706; Purdon v. Shock (Okla.) 184 Pac. 125; Marshall Mfg. Co. v. Dickerson (Okla.) 155 Pac. 224; Johnson v. J. R. Watkins Medical Co. (Colo.) 182 Pac. 879; Ray v. Shemwell, 174 Ky. 54, 191 S. W. 662; Daugherty v. Daugherty, 152 Ky. 732, 154 S. W. 9; Tuxworth v. Barber (Ga. App.) 94 S. E. 1042; Bostick v. Haney (Tex. Civ. App.) 209 S. W. 477.

The only sort of defense which may be attacked by demurrer is a defense consisting of new matter. Comp. Laws 1913, § 7452; Onderdonk v. Peale, Peacock & Kerr, 93 N. Y. Supp. 506; Moreley v. Cole, 38 S. D. 564, 162 N. W. 367.

Where the averments of an answer are incomplete, ambiguous, or defective the remedy is a motion to make more definite and certain. Lamoure v. Lasell, 26 N. D. 647, 145 N. W. 577.

The defendants in the case at bar are required by law to audit the salaries and compensation of members of the bureau. N. D. Sess. Laws 1919, § 4, ¶ 3, chap. 162; State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; State v. Archibald, 5 N. D. 383, 66 N. W. 234; Chandler v. Starling, 19 N. D. 149, 121 N. W. 198; State v. McDonald, 41 N. D. 389, 170 N. W. 874.

Where charges embodying facts that in law constitute a cause for removal are preferred to the Governor, notice is given to the officer

charged and the Governor acting on the charges removes the officer, his act is final and cannot be reviewed or held for naught by the courts. And it is immaterial whether or not the Governor erred in exercising the power conferred on him. State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; Atty. Gen. ex rel. Taylor v. Brown, 1 Wis. 513; Wilcox v. People, 90 Ill. 186; Re Guden, 171 N. Y. 529, 64 N. E. 451; State ex rel. Churchill v. Hay, 45 Neb. 321, 63 N. W. 821; State ex rel. Rawlinson v. Ansel, 76 S. C. 395, 57 S. E. 185, 11 Ann. Cas. 613; Householder v. Morrill, 55 Kan. 317, 40 Pac. 664; Cameron v. Parker, 2 Okla. 277, 38 Pac. 14; Keenan v. Perry, 24 Tex. 253; Gray v. McLendon, 134 Ga. 224, 67 S. E. 859; State ex rel. Atty. Gen. v. Johnson, 30 Fla. 433, 18 L.R.A. 410, 11 So. 845; State ex rel. Dayries v. Yoist, 25 La. Ann. 396; Atty. Gen. v. Jochim, 99 Mich. 367, 23 L.R.A. 699, 41 Am. St. Rep. 606, 58 N. W. 611.

Laureas J. Wehe and *Theodore Koffel,* for respondent.

The new matter attempted to be set out is not properly admissible in an answer to the return of the writ of mandamus, and, therefore, demurrable, even though it had been stated in full, definite, and complete legal form. State ex rel. Butler v. Callahan, 4 N. D. 491, 61 N. W. 1025; State ex rel. Atty. Gen. v. McDonald, 41 N. D. 389, 170 N. W. 874; Chandler v. Starling, 19 N. D. 144, 121 N. W. 198.

The issuing of a warrant for salary is a mere ministerial act and will be compelled by mandamus. State v. Albright, 11 N. D. 22, 88 N. W. 729; State ex rel. Langer v. Kositzky, 166 N. W. 534; Howard v. Burns, 14 S. D. 383, 85 N. W. 920.

Removal from office can only be exercised by the Governor after notice and a hearing on specific charges preferred against the state officer, whose term of office is prescribed by statute, and the statute prescribes that he may be removed for cause. Throop, Pub. Off. §§ 359, 364, pp. 360, 364; Mechem, Pub. Off. §§ 450–452; Dubee v. Voss, 19 La. Ann. 210, 92 Am. Dec. 526; Page v. Hardin, B. Mon. (Ky.) 672; Dullam v. Willison, 53 Mich. 392, 19 N. W. 112; People v. Brooklyn, 106 N. Y. 64; State v. St. Louis, 90 Mo. 19; Dill. Mun. Corp. 4th ed. § 250; Mead v. Ingham Co. 36 Mich. 415; State ex rel. Hastings v. Smith, 35 Neb. 29, 16 L.R.A. 413, 52 N. W. 875; 15 Utah, 12, 48 Pac. 747; State ex rel. Holmes v. Shannon, 7 S. D. 320, 64 N. W. 175; Field v. Com. 32 Pa. 648.

BIRDZELL, J. The plaintiff filed a petition in the district court of Burleigh county for a writ of mandamus to compel the defendants to issue a warrant for $208.33 as the plaintiff's salary attaching to the office of Workmen's Compensation Commissioner for the month of April, 1920. Upon the petition the district court issued an order to show cause. On the return day an answer was filed in which it was alleged that the plaintiff had been removed from his office by the Governor acting under chapter 162, Sess. Laws 1919. The answer also alleges the proceedings in connection with the removal in substance as follows:

Prior to the 19th day of April, 1920, charges were made to the governor that the plaintiff was carrying on a private law practice contrary to the provisions of the Workmen's Compensation Act; that he was incompetent and lacked the kind of qualifications which were necessary to the discharge of the duties of his office; that the Governor investigated the charges and suspended the plaintiff on April 19th, serving upon the defendant notice to that effect. The notice was contained in a letter written by the Governor and directed to the plaintiff. The letter apprised the plaintiff that evidence had been presented to the Governor to the effect that since his appointment and qualification he had been carrying on a private law practice, utilizing the stenographic help employed by the bureau in connection therewith; that he used office supplies of the bureau; that such practice had resulted in delaying the work of the bureau, particularly in the adjustment of claims; that through lack of executive ability, irascibility, incompatibility of temperament, lack of comprehension of the spirit of the Workmen's Compensation Law, and general inefficiency, he has been a detriment to the bureau and particularly to the claim department; that at a public hearing conducted by the minimum wage commission, held during the month of February, he conducted himself in a manner detrimental to the public interest, was tactless in his examination of witnesses, and disrespectful and offensive to a number of them; that on account of his temperament and his intolerance toward employees of the bureau, several efficient employees had tendered their resignations and declined to remain in the employ of the bureau if plaintiff was continued as a commissioner. Plaintiff was apprised that the charges, if true, were of such a nature as to require complete

severance of his connection with the bureau; and that, failing to receive any statement from plaintiff or his resignation on or before the 22d of the same month, the Governor would consider it his duty to remove plaintiff summarily. He was notified of his suspension, to continue until final determination.

The answer further alleges that on April 20th, the Governor caused to be served upon the plaintiff a notice in writing directing him to show cause before him at the Governor's office on April 23d, why the suspension should not be made permanent. That at the time set for the hearing on April 20th, plaintiff appeared and objected to the jurisdiction of the Governor and caused to be served upon him a statement of his objections to the jurisdiction, which statement states the objections in substance as follows:

The Governor has no power to suspend the respondent for any cause or upon any grounds; that no specific charges have been served upon respondent, setting forth any cause for his removal; that the Governor's letter of April 19th was too indefinite and uncertain to apprise respondent of the making of charges against him or to enable him to make preparation to contest and disprove any charges; that on account of the vague character of the charges as stated in the letter, respondent demanded to be apprised more fully; and that the time of notice was too short and the proceedings summary and arbitrary.

The answer then proceeds to allege that on April 23d the determination was made by the Governor removing the plaintiff from the office on the grounds stated in the previous letter of April 19th; that a voucher for plaintiff's salary for the period of April 1st to 23d, 1920, had been allowed in the sum of $159.85.

A demurrer was interposed to the return upon the ground that it did not allege facts sufficient to constitute a defense to the petition. The demurrer was sustained and the defendants have appealed from the order. The only question presented upon this appeal is whether or not the answer or return states facts which prima facie in law justify the removal.

Section 4 of chapter 186, Session Laws 1919, the Workmen's Compensation Law, provides:

"A workmen's compensation bureau is hereby created in the Department of Agriculture and Labor consisting of the Commissioner of

Agriculture and Labor and two workmen's compensation commissioners, to be appointed by the Governor, who shall devote their entire time to the duties of the Bureau," and, "prior to April 1, 1919, the Governor shall appoint, and may remove for cause, two workmen's compensation commissioners," . . . etc.

This is not a proceeding to review the action taken before the Governor, and we cannot pass upon the sufficiency of the evidence to prove the existence of a legal ground for removal. The evidence upon which the Governor acted is not before us. We can only pass upon the sufficiency of the facts alleged in the answer to constitute a defense to the application for a writ of mandamus. The respondent relies upon the familiar principle that where offices are created with definite terms and the incumbents are removable for cause, sufficient legal cause must exist to warrant the removal. Also that officials not removable at pleasure are entitled to a hearing for the purpose of ascertaining whether or not sufficient cause for removal exists, and that the hearing must be one at which they are given reasonable opportunity to be present, to know the nature of the charges against them, to cross-examine witnesses, and to adduce testimony to disprove the charges. Throop, Pub. Off. §§ 362, 365; Mechem, Pub. Off. § 454. We do not question any of these propositions, but we do not deem them determinative here. The answer alleges that notice was given to the petitioner of the character of the charges against him. These charges, if substantiated, in our opinion, amount to legal cause for removal. This would hardly seem to be debatable. It also alleges that a time and place was set when the petitioner would be given an opportunity to present his answer to the charges. It states the facts as to his appearance in response to the notice and of the steps taken by him at the time to protect his rights. His response was an argument against the jurisdiction of the Governor to exercise removal powers and a statement that the charges were too vague and indefinite to admit of response. Presumably, the petitioner placed his defense to the attempted removal proceedings before the Governor upon the strongest grounds he had. Had he desired to take any other steps to preserve his rights, that was the time and place to take them. The reasonable inference to be drawn from his statement of the objections to the proceedings before the Governor is that he did not demand to know the identity of his accusers,

to know the character of evidence presented against him, nor to exercise the right to cross-examine those responsible therefor. Neither did he seek to introduce affirmative evidence to disprove the charges. On the contrary, he chose the procedure as indicated above, of objecting to the jurisdiction and to the lack of definiteness in the charges made. As to the indefiniteness of the charges, it would seem that they were about as specific as laymen are apt to make charges in matters of this kind. If drawn by lawyers accustomed to the niceties of criminal pleading by indictment or information, they might have been made to conform more nearly to the petitioner's notion of definiteness; but we fail to see wherein they did not charge with substantial clearness grounds which amount to legal cause for removal.

More specific reference to the answer may conduce to a more perfect understanding of our views. This proceeding, being here upon a demurrer to the answer and no evidence having been taken in the district court, we have no means of knowing the proceedings before the Governor except as they are alleged in the answer. Paragraphs 8 and 9 of the answer read as follows:

"Defendants allege that on or about 3 o'clock, P. M. on said 23d day of April, 1920, which was the hour designated for said hearing on said order to show cause, the said Laureas J. Wehe appeared at the said office of the said Governor Lynn J. Frazier, and objected to the jurisdiction of the said Governor Lynn J. Frazier in said proceedings, and then and there Laureas J. Wehe caused to be served on the said Governor Lynn J. Frazier a written statement of his objections to the jurisdiction of the said Governor Lynn J. Frazier in said proceedings, copy of which said writing is hereto attached, made a part hereof, and marked, for identification, 'Exhibit C.'

"Defendants alleged that thereafter on said 23d day of April, 1920, *a determination was duly made* by said Governor Lynn J. Frazier removing said Laureas J. Wehe from the office of Workmen's Compensation Commissioner," etc.

Manifestly, if the defendant in the removal proceedings on the 23d day of April, 1920, filed his objections to the proceedings, as alleged, and departed, the Governor could proceed to a determination of the matter upon the merits upon whatever evidence was before him. And it is equally clear that if the defendant filed the objections above re-

ferred to and demanded a ruling which was met by a refusal to rule, the hearing would have been terminated at that moment without giving the defendant an opportunity to defend. But the allegation in paragraph 9 is that thereafter "a determination was duly made." This allegation cannot be true if the defendant was denied a ruling on his objections and an opportunity to be heard. It is a rule established by the Code that in pleading a determination of an officer of special jurisdiction the determination may be stated to have been duly given or made. Comp. Laws 1913, § 7460. It being specifically alleged here that the determination was duly made, the answer is not open to objection on demurrer unless from the other facts pleaded the loss of jurisdiction affirmatively appears. The answer does not show the nonexistence of any prerequisite steps to a valid determination, and we are of the opinion that they should not be found by implication.

In view of the record made, there is no merit in the contention that the time of notice was too short, and there is no analogy between this case and the case of Eckern v. McGovern, 154 Wis. 157, 46 L.R.A. (N.S.) 796, 142 N. W. 595, relied upon by the respondent.

While the foregoing opinion sufficiently indicates the views of the majority with reference to the issues raised by the demurrer to the answer, it may be well to mention the doubt entertained by the court as to the right of the petitioner to test the legality of his removal in a proceeding to compel ministerial officers to issue a salary warrant. In an opinion prepared by Mr. Chief Justice Christianson it is held that the plaintiff is not entitled to the writ for the reason that no ministerial duty devolves on the defendants to issue a salary warrant in favor of one against whom a removal order has been made. The majority, though agreeing to the result to which that opinion leads, does not adopt it, and our opinion is not to be construed as an implied holding on the question. In view of the discussion contained in that opinion, however, we deem it proper to say that we do not regard the question as settled by the cases of State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025, and State ex rel. Langer v. McDonald, 41 N. D. 389, 170 N. W. 873. The holding in these cases is merely to the effect that an incumbent whose term has expired cannot justify his failure to perform the ministerial act of delivering the office to a successor who presents a valid certificate of election, and when the rem-

edy of mandamus is resorted to by the successor the court will not countenance the withholding of possession pending the trial of title to the office but will promptly issue the writ. If the opinion of the Chief Justice is sound, a claimant armed with an executive appointment and an executive order of removal fair on their face would be entitled to invoke the remedy of mandamus to gain immediate possession as against an officer who has not been legally removed, since that opinion gives to the removal order the same weight as it gives to a certificate of election. There is no adverse claimant in the case at bar. Recent authorities indicate a trend towards greater liberality in regard to the issues that may properly be tried in mandamus proceedings affecting public officers. 2 Bailey, Habeas Corpus, § 248; 18 R. C. L. 260, 264, 265. And there is much to be said in favor of this measure of protection against executive usurpation. We express no opinion upon this question.

It must be apparent that the majority in this case does not attempt to determine the ultimate right of the relator to the office. It cannot do so upon this appeal because the matter is not here. It only determines the sufficiency of the answer as against the demurrer and this is all that can properly be decided. It would seem to be equally apparent that the concurring opinion of the Chief Justice goes much further in the direction of supporting executive usurpation, such as was condemned in the case of Eckern v. McGovern, supra, than does the opinion adopted by the majority.

The order appealed from is reversed.

ROBINSON, BRONSON, and GRACE, JJ., concur.

CHRISTIANSON, Ch. J. (dissenting). The relator says that he is one of the workmen's compensation commissioners of this state, and entitled to receive, and that the respondents should be compelled by writ of mandamus to issue and deliver to him, a warrant for his salary as such commissioner for the month of April, 1920. The respondents say that the relator was removed from office by the Governor on April 23, 1920, and has not since been, and is not now, a workmen's compensation commissioner. A copy of the order of removal is attached to and made a part of the respondents' return.

Our statute (Comp. Laws 1913, § 8457) provides that "the writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person."

"The legal right of plaintiff or relator to the performances of the particular act, of which performance is sought to be compelled (by writ of mandamus) must be clear and complete." 26 Cyc. 151.

The prevailing rule of law is that "mandamus will not lie to determine, either directly or indirectly, a disputed question of title to a public office." Throop, Pub. Off. § 825. That is the established law in this state. State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; State ex rel. Langer v. McDonald, 41 N. D. 389, 170 N. W. 873; Chandler v. Starling, 19 N. D. 144, 121 N. W. 198.

In State ex rel. Butler v. Callahan, supra, this court ruled that a person, who holds a certificate of election to an office and has qualified for such office by taking and filing the required oath of office and undertaking, is entitled to a writ of mandamus to compel admission to such office; that in such mandamus proceeding the court will not go behind the certificate of election; and that the prima facie title of the holder of such certificate cannot be defeated by averments in the return which involve the ultimate, or actual, title to the office; nor will the court "try and determine the question whether the facts set out in the answer do or do not involve the title." This ruling was reaffirmed in State ex rel. Langer v. McDonald, 41 N. D. 389, 170 N. W. 873. In Chandler v. Starling, this court applied the same rule to a certificate of appointment by the Governor. That is, this court ruled that in mandamus such certificate of appointment is entitled to the same credence and must be given the same prima facie effect as a certificate of election; and that the court will not go behind it to determine whether the holder actually has title to the office.

While ordinarily mandamus is the proper remedy to compel the issuance of a salary warrant, where the salary is fixed by law and the proper authorities charged with the performance of such duties refuses

to perform the same, the writ will issue only where "the legal right of the relator to the performance of the duty sought to be compelled is clear and complete." 26 Cyc. 151. It will not issue where the right of the relator is doubtful. "Where, by reason of a complication of extraneous circumstances not specifically provided for by the statute, a well-founded doubt arises, either as to the right of the applicant to receive the fund, or the duty of the officer to pay it out, mandamus is not the proper remedy." 18 R. C. L. p. 225.

The respondents in this case were confronted with this situation: A person claiming to be the incumbent of a certain office made demand upon them to issue to him a warrant for his salary as such officer; but the Governor, who is vested with express authority so to do, had declared the person demanding such salary warrant to be removed from, and no longer an incumbent of, such office. If the Governor actually had done what he asserted he had, viz., removed the relator from office, then the relator had neither prima facie nor actual title to the office. Of course, in order to issue a salary warrant to the relator the respondents must ignore the order of removal, or in effect take upon themselves the authority to adjudge it to be invalid. In these circumstances, can it be said that the law specially enjoined upon them, as a duty resulting from their offices, to issue a salary warrant to the relator? That in the last analysis is the question here. And in my opinion that question must be answered in the negative.

Logically my remarks ought to end here; but inasmuch as I differ from my associates both as to what issues may properly be tried in this proceeding, and the construction to be placed upon the return of the respondents, I deem it proper to indicate my views on these propositions.

Under the holding of the majority members the ultimate and actual title to the office is to be litigated and determined in this mandamus proceeding. This in my opinion is directly contrary to the principle established in State ex rel. Butler v. Callahan; State ex rel. Langer v. McDonald; and Chandler v. Starling, — supra.

The majority members hold that the return of the respondent sets forth facts sufficient to show that the relator, after due proceedings had before the Governor, was legally removed from office. While I do not believe that the question of the ultimate title of the relator to the

office is properly triable in this proceeding, I do not agree that the facts set forth in the return show that the relator was legally removed.

It will be noted that a workmen's compensation commissioner is appointed for a definite term, and the Governor is given no right to remove him from office except *for cause.* The majority members concede that it is "a familiar principle that where offices are created with definite terms and the incumbents are removable for cause, sufficient *legal cause* must exist to warrant the removal. Also, that officials not removable at pleasure are entitled to a hearing for the purpose of ascertaining whether or not sufficient cause for removal exists, and that the hearing must be one at which they are given reasonable opportunity to be present, to know the nature of the charges against them, to cross-examine witnesses, and to adduce testimony to disprove the charges." Immediately following this statement, the majority members cite, Throop, Pub. Off. and Mechem, Pub. Off. § 454. Hence, I take it, that the majority members indorse what Mechem says on the subject, viz.: "Where the appointment . . . is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority, that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing, but that *the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given* to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense." Mechem, Pub. Off. § 454.

The supreme court of Wisconsin has said that the jurisdictional requisites in such cases are: "(1) Reasonable notice of time, place of hearing, and of charges constituting a proper subject for investigation; (2) reasonable opportunity to defend, characterized by full disclosure of adverse evidence according to the established principles of fair judicial investigation to determine the justice of the case; (3) a decision upon proofs of record supporting it in some reasonable view." Ekern v. McGovern, 154 Wis. 157, 46 L.R.A.(N.S.) 796, 142 N. W. 595.

Does the return in this case show that the relator was afforded these rights? The majority members say it does for the reason that in paragraph 9 of the return it is averred *inter alia* that on April 23d, 1920, "a determination was duly made by said Governor Lynn J. Frazier

removing said Laureas J. Wehe from the office of workmen's compensation commissioner;" and that this was, under the statute, a sufficient averment of a valid order of removal. The statute referred to reads as follows: "In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination *may be stated to have been duly given or made.* If such allegation is controverted, the party pleading shall be bound to establish on the trial the fact conferring jurisdiction." Comp. Laws 1913, § 7460. It will be noted that the statute is permissive. It says a party "pleading a judgment or other determination" *may* state, etc. It does not purport to be exclusive. A party may still, if he desires, plead the facts conferring jurisdiction. If he chooses to pursue the latter method, the statute does not apply. The respondents in this case have not sought to avail themselves of this statute. They have not contented themselves with making a general averment that the removal order was duly made or given by the Governor. They have elected to set out the proceedings had by and before the Governor in detail. They, in effect, say, "We do not care to rely upon a general averment, we prefer to set forth all the facts, and here they are."

The return or answer of the respondents alleges that on April 19, 1920, the Governor wrote a letter to the relator, commencing as follows: "Evidence has been presented to me to the effect" (here follows a statement in general terms of the alleged charges against the relator set out in the majority opinion). The letter continues: "In the light of this evidence, I feel it my duty to inquire what, if anything, you desire to state in your defense. As the charges, if true, are of such nature as to require the immediate severance of your connection with the Workmen's Compensation Bureau. An immediate reply is requested. Failing to receive any statement from you, or your resignation on or before the 22d instant, I shall consider it my duty to remove you summarily from office. You are hereby notified that I have suspended you from the office of workmen's compensation commissioner, such suspension to continue until the final determination of this matter."

It further alleges that on April 20, 1920, the Governor issued the following notice to the relator: "You are hereby directed to show

cause before me at my office on Friday, April 23d, 1920, at 3 o'clock in the afternoon of said day, why your suspension from office as workmen's compensation commissioner should not be made permanent."

It is further averred in said return that at the time appointed in the notice the relator and his counsel appeared before the Governor and filed written objections, among which were the following:

"That no specific charges have been made, filed with, or served upon the respondent setting forth any cause or causes, for his removal from office.

"That the letter of the Governor dated April 19th, is too indefinite and uncertain to apprise the respondent of the nature of the charges against him or to enable him to make due preparation to contest and disprove any charges that may have been filed or made against him as such official."

"That the alleged charges, insinuations, and accusations attempted to be set out in said letter are so indefinite, uncertain, vague, and general, consisting of recitals and conclusions, that a person of common and ordinary understanding cannot ascertain therefrom the nature of the charges or complaint attempted to be set forth and that, therefore, *this respondent demands to be apprised more fully herein.*"

As I construe the return or answer it was upon these proceedings, and these alone, that the Governor made the order of removal. He heard no witnesses, and received no evidence. If the order rests on anything at all it rests upon the *"evidence"* which the Governor referred to in the letter of April 19th. But the relator could be removed only for legal cause, *the existence of which must* be determined after notice. Mechem, Pub. Off. § 454. "The Governor," said the supreme court of Wisconsin (Ekern v. McGovern, supra) "had no right to act upon personal information not disclosed so as to afford fair opportunity to meet it. All should have been disclosed to appellant and made a matter of record."

In the majority opinion it is said: "His [relator's] response was an argument against the jurisdiction of the Governor to exercise removal powers and a statement that the charges were too vague and indefinite to admit of response. Presumably, the petitioner placed his defense to the attempted removal proceedings before the Governor upon the strongest grounds he had. Had he desired to take any other

steps to preserve his rights, then was the time and place to take them. The reasonable inference to be drawn from his statement of the objections to the proceedings before the Governor is that he did not demand to know the identity of his accusers, to know the character of evidence presented against him, nor to exercise the right to cross-examine those responsible therefor. Neither did he seek to introduce affirmative evidence to disprove the charges."

With all due deference to the views of my associates, it seems to me that those conclusions are wholly erroneous and contrary to the very principles they concede to be applicable to cases wherein it is sought to remove officers like the relator. When did it become the law that a party who makes an objection to the jurisdiction of a court, board, or officer; or to the sufficiency of a pleading or notice will be deemed by means of such objections to have placed his defense on the "strongest ground he had?" Manifestly, a party who makes such objections, should be and is entitled to a ruling on the objections, and if the objections are overruled, he is entitled to an opportunity to present a statement or pleading embodying his defense on the merits. He is also entitled to have the charges established by proofs of some sort, after notice. The officer empowered to remove may not determine in advance of the hearing that the charges are true, and ask the officer to disprove them. The incumbent of the office is presumed to be competent and to have performed his duties properly. That presumption must be overcome by evidence, after notice. As I construe the return there is no contention that that was done in this case.

The majority members say: "Had he [relator] desired to take any other steps to preserve his rights, then was the time and place to take them." Just exactly what would the majority members have had the relator do? He interposed certain written objections, and asked, among other things, "to be apprised more fully herein." The Governor did not say I overrule your objections, and refuse your request "to be apprised more fully herein." According to the return, the only answer the Governor made was to make the order removing the relator from office. The relator had a right to make objections to jurisdiction, and to ask that the charges be made more definite and specific. He was entitled to have those objections and requests ruled on. He was justified in believing that if the Governor overruled his objec-

tions and refused his request he would be afforded an opportunity to defend on the merits. He was justified in believing that he would and could be removed only after it had been established, before the officer conducting the hearing, by due proof and after notice, that legal cause for removal existed. As I construe the return it does not show that the relator was afforded, but rather that he was denied, the hearing which the majority members concede he was entitled to have.

WILLIAM LEHDE, Respondent, v. NATIONAL UNION FIRE INSURANCE COMPANY, of Pittsburgh, Pennsylvania, a Corporation, Appellant.

(180 N. W. 56.)

Insurance — after unexecuted accord insured held entitled to maintain action on original policy.

In an action upon a policy of crop insurance to recover losses sustained where the plaintiff received from the insurance company a repayment of the premium, and signed a release and settlement in full upon the representations made that the company was insolvent, and that he would receive further payment if likewise further payment were made to other policy holders, and where, from the evidence, it appears that the insurance company was not insolvent, and did make further payments to other policy holders, it is *held* that the settlement made constituted an accord, unexecuted by the insurance company, and that the plaintiff was entitled to maintain his action upon the original contract of insurance.

Opinion filed November 16, 1920.

Action upon a policy of crop insurance in District Court, Morton County, *Crawford*, J.

From a judgment in favor of the plaintiff and from an order denying a judgment *non obstante*, or, in the alternative, for a new trial, the defendant has appealed.

Affirmed.

Barnett & Richardson, for appellant.

"What constitutes a reasonable time within which to declare a rescission is ordinarily a question of fact. It may, however, be a ques-

tion of law, if the circumstances are such as to demonstrate unreasonable delay." Mfg. Co. v. Troll, 69 Mo. App. 480; Publishing Co. v. Hull, 81 Mo. App. 280.

"What is to be regarded as a reasonable time is, when the facts are clear, a matter of law. Where the proof is conflicting, it is a mixed one of law and fact." Wiggins v. Burkham, 77 U. S. 129; Cookingham v. Dusa (Kan.) 21 Pac. 95.

Nuchols & Kelsch and *Jacobsen & Murray,* for respondent.

If this policy of insurance is a liquidated claim, then the plaintiff was not required to restore, as a condition precedent to the maintenance of this action. Helvetia Copper Co. v. Hart-Parr, 171 N. W. 272.

A party repudiating a release cannot be required, as a condition precedent, to return the amount paid upon a specific liquidated demand, justly owing, simply because it was paid as part of the transaction of settlement. Swan v. G. N. Ry. Co. (N. D.) 168 N. W. 657; Ross v. Gold Ridge Min. Co. (Idaho) 95 Pac. 821; Farmers & M. Life Asso. v. Caine, 79 N. E. 957; Springfield F. & M. Ins. Co. v. Hull, 37 N. E. 1116; Sheanon v. Pacific Mut. L. Ins. Co. 53 N. W. 874; Isaacs v. Wishnick (Minn.) 162 N. W. 297; 12 C. J. p. 356, § 58.

Plaintiff's complaint is not only based upon the insurance policy, it is also based upon fraud, and for damages by reason of such fraud. In such a case, a restoration is not necessary. Home Ins. Co. v. Howard, 13 N. E. 104; Swan v. G. N. R. Co. supra; Mathias v. Farmers Mut. Hail Ins. Co. (N. D.) 168 N. W. 664.

BRONSON, J. This is an action upon a policy of crop insurance. The defendant, an insurance company, has appealed from a judgment in favor of the plaintiff and from an order denying judgment *non obstante,* or, in the alternative, for a new trial. The complaint alleges the issuance of a policy of insurance against the failure of crops from hail or any other causes except fire, flood, and winter kill, for the season of 1917, in the sum of $1,001 upon farm lands of the plaintiff, in Morton county; the partial destruction of the crops during the season through hail, dry weather, or hot winds; the adjustment of the plaintiff's loss in the sum of $481.50. Further, that the defendant fraudulently represented that it was in hard financial straits, unable to pay the plaintiff more than the amount of the premium, namely $100.10;

that, if it could not receive a settlement from the policy holders on the basis of the return of the premium, then the company would go into bankruptcy; that the plaintiff, relying on such representations, was induced to accept a return of the premium, and to sign a release to the defendant upon the false representations that the same was merely a receipt for such premium. That such representations were false; the company was not in hard financial straits or bankrupt; the company was able to pay its losses and that most of the policy holders received and collected from the defendants 100 per cent thereof, and that thereafter the plaintiff, having become aware of the falsity of such representations, canceled the alleged release and offered to restore the amount paid to him upon the condition that the defendant should restore to him the policy and release. Judgment was demanded for the amount of the adjustment less the amount paid by the defendant. The answer admitted the issuance of the policy and the payment of the premium. It admitted that it was not bankrupt, and that certain of the policy holders did not accept return of the premium and settle for merely a return of the premium paid by them. It alleges that the paper signed by the plaintiff was intended and understood to be a settlement of plaintiff's loss and a release in full; further, that the plaintiff represented at the time of making the application that the crops were of a good stand and in good condition, all of which was not true. That, through misrepresentation, fraud, and concealment concerning the condition of the crop at the time of making the application for insurance, the policy became void; that by reason thereof, the defendant denied liability and offered to pay the plaintiff the premium, and that such offer was accepted. The answer further alleges, as an affirmative defense, a full settlement between the parties of all the claims and demands against the defendant under such policy.

There is evidence in the record by the plaintiff and by the party who was the agent of the defendant at the time the insurance was written and the adjustment made, to the following effect:

In June, 1917, an application was solicited and received by this agent from the plaintiff for such crop insurance upon 143 acres of plaintiff's land. The policy of insurance was issued on June 28, 1917. At the time when the application was made and the policy was issued, the land was in good shape, it was well seeded and the crop prospects were good. Later, in July, dry weather and hot winds occasioned a

partial failure of crops. Subsequently, the crops were threshed, excepting the flax, which was not cut nor threshed owing to its poor condition. The plaintiff, in August, 1917, gave notice of crop loss under the policy, claiming the sum of $498.50. The amount of plaintiff's loss is determined under the policy by a fixed valuation per acre, deducting the value of the crops, as produced, pursuant, likewise, to a fixed value per bushel. This amounted to $481.50. The adjuster of the defendant came to the office of its agent; there the plaintiff was called. He was advised that the company was in straightened circumstances and could not pay the claims of the farmers, but that they would be willing to pay back the amount of the premium if plaintiff so desired. The agent advised him to receive back his premium, and that he would pay it to him if he would sign a receipt. They further represented that it was best for plaintiff to take his note back, and that, if they were compelled to pay others more, he would receive more. Accordingly, the plaintiff signed a paper that was a release in full to the defendant. He did not know it was a release in full. Through this release he received the amount of his premium by a draft issued by the defendant to him. The agent testified that he was authorized to write the insurance and to make the adjustment. That he advised the plaintiff to receive his premium back and to sign a receipt. That he told him that the company was broke and could not pay; that he advised him if any others received any more money after awhile, he, the plaintiff, would get the same. Later, the plaintiff discovered that the company was not bankrupt; that it had paid more to other policy holders; thereupon he instituted this action. Through his attorneys he offered to return the premium money so received by him, with interest, upon condition that the company return to him the policy. In open court the plaintiff offered to tender a check for $112 for the amount of such premium so received. This was objected to by the defendant upon the ground that it was not timely, nor prompt, nor in accordance with the rules pertaining to tender, and immaterial and insufficient in law. This agent further testified that the company was not bankrupt as he discovered, and settlements were made with others not upon the basis of returning the premium note.

Decision.

Plaintiff's cause of action is based upon the contract of insurance.

He seeks to recover the difference between the amount of loss sustained under the policy and the amount paid thereon by the defendant. The defendant contends that the record does not support the cause of action alleged, nor the fraud as alleged, and further, that, as a matter of law, the plaintiff did not rescind the settlement and restore and offer to restore the consideration received upon the settlement, pursuant to the requirement of the statute in such case provided. Comp. Laws 1913, § 5936. Particularly the defendant asserts that the plaintiff cannot recover upon the alleged cause of action, for the reason that, upon the plaintiff's own testimony, the evidence discloses that he understood that he was making a settlement with the company when he signed the release in question, by reason of his testimony to the effect that his loss was settled unless other people received more money than the company was paying to him. We are unable to adopt defendant's contention. It is unnecessary to pass upon the sufficiency of the evidence to form a question of fact for the jury upon the question whether the plaintiff understood that he was signing a release or a settlement. It is clear, upon the evidence in the record, that, pursuant to defendant's contentions, in any event, the settlement constituted merely an unexecuted accord and satisfaction.

It is undisputed that the defendant was not bankrupt nor insolvent at the time of the alleged settlement. The defendant, in its answer, admits that all the policy holders did not settle with the defendant upon the basis of the return of the premium. There is evidence in the record that some of the policy holders received more than the return of their premium notes. At least one had an agreement to receive 100 per cent thereof. Accordingly, it appears that the defendant had not executed its part of the accord. The obligation of the defendant, therefore, was unextinguished. The plaintiff was entitled to maintain and has maintained his action thereupon. Comp. Laws 1913, § 5826; Strobeck v. Blackmore, 38 N. D. 593, 165 N. W. 980; 1 C. J. 534. Under such circumstances the principles concerning rescission of a contract and the restoration of the consideration received do not apply. The cause of action and the judgment rendered are sustained by the evidence. The judgment and order are affirmed.

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

GRACE, J., disqualified, did not participate.

STATE OF NORTH DAKOTA, Respondent, v. SAM ROSS, Appellant.

(179 N. W. 993.)

Receiving stolen goods — information held sufficiently to aver ownership.

1. In a criminal action for buying and receiving stolen property, it is *held* that the information sufficiently avers the ownership of stolen property and alleges a public offense.

Receiving stolen goods — possession raises presumption of guilt — instruction as to presumption from possession held not erroneous.

2. In such action, where the court charged the jury that "the finding of stolen property in the possession of another shortly after said property has been stolen raises the presumption of guilt as against the person in whose possession the same is found, but this presumption, however, is a rebuttable one, and if the possession is explained to the satisfaction of the jury then this presumption is overcome and should not be considered as any evidence of the guilt of the accused," it is *held* that such instruction, considered with other instructions, was not erroneous.

Opinion filed November 1, 1920. Rehearing denied November 23, 1920.

Criminal action upon an information for buying and receiving stolen property, in District Court, Mountrail County, *Leighton,* J.

From a judgment of conviction, the defendant has appealed.

Affirmed.

F. F. Wyckoff, Dudley L. Nash and *E. T. Burke,* for appellant.

On trial of an indictment for receiving stolen goods the ownership of the goods, if known, must be alleged and proved as alleged. Miller v. People (Colo.) 21 Pac. 1025; State v. McAloon, 40 Me. 134; Com. v. Finn, 108 Mass. 466; State v. Williams, 2 Strobh. 229; State v. Palk (Mo.) 79 S. W. 980; Arcia v. State (Tex.) 12 S. W. 599;

NOTE.—There is apparently quite a conflict of authority on the question that the possession of goods recently stolen at a burglary, where such possession was not satisfactorily explained, and the burglary and larceny were proved, was held to be prima facie evidence of guilt, as will be seen by an examination of the cases collated in a note in 12 L.R.A.(N.S.) 199, on possession of recently stolen property as evidence of burglary.

On presumption of guilt from possession of goods recently stolen, see note in 72 Am. Dec. 169.

Brothers v. State (Tex.) 3 S. W. 737; Kirby v. United States, 174 U. S. 47, 43 L. ed. 890, 19 Sup. Ct. Rep. 574; Com. v. McGuire, 108 Mass. 469.

The thing stolen must be described in the same manner as in larceny. 2 Bishop, Crim. Proc. § 982.

The *corpus delecti* in larceny is constituted of two elements,—that the property was lost by the owner and that it was lost by felonious taking. 17 R. C. L. § 69, subject, Larceny.

R. E. Swendseid and *O. B. Herigstad,* for respondent.

The grounds relied upon for the demurrer must be specifically pointed out. State v. Longstreth, 19 N. D. 268; People v. Hill, 3 Utah, 334, 3 Pac. 75; Flahr v. Territory, 14 Okla. 477, 78 Pac. 565.

The sufficiency of the allegations of an information when raised by a motion in arrest of judgment will be construed with less strictness than when raised by a demurrer. State v. Johnson, 17 N. D. 554, 118 N. W. 230; State v. Wright, 20 N. D. 216, 126 N. W. 1023; State v. Uhler, 32 N. D. 483, 156 N. W. 220; Wharton, Crim. Code & Pl. 8th ed. § 760; Wharton, Crim. Proc. 10th ed. § 760; United States v. Demmish, 117 Fed. 352; Bishop, Crim. Proc. 707.

"When a person is found in possession of recent stolen property it raises a presumption against the accused which will justify conviction if he does not meet it by a reasonable explanation." 25 Cyc. 133; (Colo.) 48 Pac. 502; State v. Wilson (Iowa) 64 N. W. 266.

"The possession of stolen property almost immediately after the larceny raises a presumption of guilt, which, if not rebutted, will warrant a conviction of larceny. Higgins v. People, 135 Ill. 243, 25 Am. St. Rep. 357; Keating v. People (Ill.) 43 N. E. 724; Smith v. People, 103 Ill. 82; Unger v. State, 42 Miss. 642; Foster v. State, 52 Miss. 695; Tucker v. State, 57 Ga. 503; Brown v. State, 59 Ga. 456; State v. Turner, 65 N. C. 592; Com. v. Randall, 119 Mass. 107; Knickerbocker v. People, 43 N. Y. 177; State v. Gurre (Utah) 120 Pac. 209, 39 L.R.A.(N.S.) 320.

BRONSON, J. The defendant was convicted upon an information charging him with buying and receiving certain stolen meat and pork. He has appealed from the judgment of conviction. The evidence has not been sent to this court. The defendant demurred to the informa-

tion and made a motion in arrest of judgment. The body of the information charges the commission of a crime as follows:

"That at said time and place the said Sam Ross did knowingly and feloniously buy and receive certain stolen property, to wit, two hind quarters and one front quarter of dressed stag beef fresh weighing about 75 pounds each, and one piece of dressed fresh side pork weighing about 10 pounds, from a party or parties unknown, not the property of said Sam Ross, knowing the same to have been stolen, and with the intent to deprive the owner thereof, then and there of the value of $50; the same being a part of the beef and pork stolen as follows, to wit: That at the said time and place an unknown person or persons did wilfully, unlawfully, and feloniously take, steal, and carry away two dressed beeves and one dressed hog from the slaughterhouse used by Sjol Brothers, near Van Hook, North Dakota, then and there the property of Sjol Brothers, and not the property of the person or persons unknown; with the intent to deprive the owner thereof; then and there of the value of $200."

The defendant challenges the sufficiency of this information to constitute a public offense, upon the grounds that there is no direct allegation that the stolen meat was the property of Sjol Brothers; that it does not allege that the unknown parties were guilty of the theft, nor does it negative lawful possession or ownership in such unknown parties; that the defendant may have had the right to use the slaughterhouse "then and there the property of Sjol Brothers." We are of the opinion that the information cannot be challenged upon any such grounds. Although the phrases might have been differently arranged, and placed perhaps in closer apposition to the words which some of them modify, nevertheless, it is clear, upon reading the entire information, that the phrase, "then and there the property of Sjol Brothers, and not the property of the person or persons unknown; with the intent to deprive the owner thereof," clearly applies and refers to the meat alleged to have been stolen. See 34 Cyc. 521; State v. Johnson, 17 N. D. 554, 118 N. W. 230. The objection raised concerning the allegation about the parties unknown is without merit. See State v. Denny, 17 N. D. 519, 117 N. W. 869; State v. Pirkey, 22 S. D. 550, 118 N. W. 1042, 18 Ann. Cas. 192. Among the instructions given to the jury the court charged as follows:

"The finding of stolen property in the possession of another shortly after said property has been stolen raises the presumption of guilt as against the person in whose possession the same is found; but this presumption, however, is a rebuttable one, and if the possession is explained to the satisfaction of the jury, then this presumption is overcome and should not be considered as any evidence of the guilt of the accused. The finding of property in the possession of the defendant, which has been stolen, is, of course, not in itself sufficient to warrant a conviction, but is merely a circumstance to be considered by the jury in passing upon his guilt or innocence."

The defendant challenges this instruction as erroneous on the ground that it raised a presumption as a matter of law that he was guilty.

We are of the opinion that this charge was not erroneous; otherwise the court charged the jury that in order to find the defendant guilty they must determine beyond a reasonable doubt that at the time he received the property he knew it to be stolen, and that at the time it came into his possession he bought or purchased the same with the intent to deprive the true owner of the meat.

The application of this presumption as an evidentiary presumption in larceny cases is well known. 25 Cyc. 133. It is an evidentiary presumption of guilt deducible from the unexplained possession of property. Ibid. See notes in 12 L.R.A.(N.S.) 199, and 70 Am. Dec. 447. It is not unfair nor improper to apply this presumption, an evidentiary presumption deducible from the possession of property, equally as well to a person charged with unlawfully receiving stolen property knowing it to be stolen, as to one charged with its original taking. See People v. Weldon, 111 N. Y. 569, 19 N. E. 279; Goldstein v. People, 82 N. Y. 231; Martin v. State, 104 Ala. 71, 16 So. 85; Boyd v. State, 150 Ala. 101, 43 So. 205; 34 Cyc. 524, 548; State v. Rosencrans, 9 N. D. 163, 164, 82 N. W. 422; State v. Guild, 149 Mo. 370, 73 Am. St. Rep. 400, 50 S. W. 909; State v. Richmond, 186 Mo. 71, 84 S. W. 880; Jenkins v. State, 62 Wis. 49, 21 N. W. 238; State v. Lamb, 39 S. D. 307, 164 N. W. 69; State v. Hoshaw, 89 Minn. 307, 310, 94 N. W. 873. The charge as a whole upon this question, in our opinion, properly submitted to the jury this presumption

as an evidentiary presumption, and therefore was not prejudicially erroneous. The judgment is affirmed.

BIRDZELL and ROBINSON, JJ., concur.

CHRISTIANSON, Ch. J. (concurring especially). I concur in an affirmance of the judgment of conviction, and agree with what is said in the opinion prepared by Mr. Justice Bronson as to the sufficiency of the information.

While I am not prepared to give my unqualified approval to the phraseology of the instruction which is assailed as erroneous, a careful consideration of the entire charge, and an examination of the authorities bearing thereon, have led me to the conclusion that the instruction is not prejudicial. There is no question but that the presumption which arises from the unexplained possession of recently stolen property is one of fact, and not one of law. While the instruction assailed is not couched in the most happy language, it did, in effect, if construed as a whole, inform the jury that the presumption is one of fact. For, in the instruction assailed, it is said: "This presumption, however, is a rebuttable one, and, if the possession is explained to the satisfaction of the jury, then this presumption is overcome and should not be considered as any *evidence* of the guilt of the accused. The finding of property in the possession of the defendant, which has been stolen, is, of course, not in itself sufficient to warrant a conviction, but is merely a circumstance to be considered by the jury in passing upon his guilt or innocence." The jury is specifically told that, "if the possession is explained to the satisfaction of the jury, the presumption is overcome, and should not be considered as any *'evidence'* of the guilt of the accused." The sentence immediately following is in effect that the presumption is not one of law, but "is merely a circumstance to be considered by the jury in passing upon" the guilt or innocence of the accused. The jury is further informed that this circumstance is not of sufficient probative force, standing alone, to overcome the presumption of innocence.

It should, also, be noted that the court informed the jury fully as to the averments of the information, and, among others, gave the following instruction: "In order to find the defendant guilty you must

find beyond a reasonable doubt: First, that the defendant Sam Ross, did, knowingly and intentionally, buy and receive two hind quarters and one front quarter of dressed fresh stag beef weighing about 75 pounds each, and one piece of dressed fresh side pork weighing about 10 pounds, or some portion thereof; second, that at the time the said defendant received the same he knew it to be stolen; third, that at the time the same came into his possession he bought or purchased the same with the intent to deprive the true owners of said meat; fourth, that said meat was in fact the property of Sjol Brothers, and not the property of the persons from whom he received the same, if, of course, you find he received it; fifth, that if these acts were done they were done in Mountrail county, and at some time within three years prior to November 4, 1919, and also find that said meat was of some value."

The jury was required to fix the value of the property in its verdict, and fixed such value at $50.

GRACE, J. (dissenting). This is an appeal from a judgment adjudging the defendant guilty of buying and receiving stolen property, and sentencing him to be confined in the state penitentiary at Bismarck, for the term of one year and three months, and to pay costs in the sum of $225.45. The judgment was entered upon a verdict of guilty returned by the jury. The defendant was charged with the commission of a public offense, by amended information which, omitting formal parts and those about which no controversy exists, is as follows:

"That at said time and place the said Sam Ross did, knowingly and feloniously, buy and receive certain stolen property, to wit, two hind quarters and one front quarter of dressed flesh stag beef weighing about 75 lbs., each, and one piece of dressed fresh side pork weighing about 10 lbs., from the party or parties unknown, not the property of said Sam Ross, knowing the same to have been stolen, and with the intent to deprive the owner thereof; then and there of the value of $50; the same being a part of the beef and pork stolen as follows, to wit; That at the said time and place an unknown person, or persons, did, wilfully, unlawfully, and feloniously, take, steal, and carry away two dressed beeves and one dressed hog from the slaughterhouse used by Sjol Brothers, near Van Hook, North Dakota, then and there the property of Sjol Brothers, and not the property of the person, or persons, un-

known; and with the intent to deprive the owner thereof; then and there of the value of $200."

The defendant demurred to this information, on the ground that it did not state facts sufficient to constitute a public offense. This was overruled and the defendant excepted. He then entered a plea of not guilty. Upon trial, the defendant having been convicted, and a judgment having been entered as above stated, he made a motion in arrest of judgment, which was denied.

On this appeal, four errors are assigned: (1) Overruling the demurrer; (2) overruling motion in arrest of judgment; (3) error in giving the following instructions: "The finding of stolen property in the possession of another, shortly after said property had been stolen, raised the presumption of guilt as against the person in whose possession the same is found;" (4) in pronouncing judgment upon the verdict returned by the jury, and in sentencing said defendant to imprisonment in the state penitentiary.

Section 10,686, Comp. Laws 1913, is as follows: "Things as to which allegation must be certain and direct. The allegations of the information or the indictment must be direct and certain as regards (1) the party charged; (2) the offense charged; (3) the particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

The demurrer is to the effect that the information does not charge a public offense. The information, if it does not charge that the property stolen, to wit, the beef and pork, were the property of Sjol Brothers, would not, we believe, state a public offense.

An inspection of that part of the information above set forth will disclose there is no allegation which, if given the most liberal construction, states that the property alleged to have been stolen, at the time of the alleged larceny, was the property of Sjol Brothers.

The statement in the information, "then and there the property of Sjol Brothers, and not the property of the person, or persons, unknown," may just as readily be understood to refer to the ownership of the slaughterhouse as to the ownership of the alleged stolen property. The words following those just quoted, "and with the intent to deprive the owner thereof; then and there of the value of $200," are just as readily understood as referring to the slaughterhouse as to the property alleged to have been stolen.

The arrangement of the language and the sentences are so entirely out of order, the modifying clauses are so far removed from the main sentences, which, perhaps, they were intended to modify, that all connection between them is lost. They are so arranged following other principal sentences, that it is impossible to determine which sentence they were intended to modify.

We think that ownership is a circumstance which, in this kind of case, should be clearly alleged in the information. In this case, it should clearly appear, by a proper allegation, that the property alleged to have been stolen was owned by Sjol Brothers. This would negative the proposition that the property was owned by the defendant; for, if he owned the property, or had an interest in it, he would be entitled to take it, or receive it, etc.

The whole information is so uncertain, in the charging part, that it is difficult to see how the defendant could understand with what offense he was charged, if any. We think the information in this regard is bad, and that the demurrer to it should have been sustained, and that not to do so was reversible error.

The giving of the following instruction of law, by the court, is assigned as error. The instruction reads thus: "The finding of stolen property in the possession of another, shortly after said property has been stolen, *raises the presumption of guilt as against the person in whose possession the same is found;* but this presumption, however, is a rebuttable one, and if the possession is explained to the satisfaction of the jury, then this presumption is overcome and should not be considered as any evidence of the guilt of the accused. The finding of property in the possession of the defendant, which has been stolen, is, of course, not, in itself, sufficient to warrant a conviction, but is merely a circumstance to be considered by the jury in passing upon his guilt or innocence."

The evidence in the case is not before us. We cannot, therefore, know what, if any, evidence there was showing, or tending to show, that defendant had possession of the personal property in question, or what the evidence was, with reference to the identity thereof. It is certain, however, if there were any, even though it may have been slight, that the giving of the foregoing instruction foreclosed the case against defendant.

The jury could do little less than return a verdict of guilty, for the court in the instruction had told it that the presumption of guilt was raised against the defendant; in other words, that he was presumed to be guilty, as shortly after the property had been stolen, it was found in his possession, unless the possession could be explained to the satisfaction of the jury, when it would not be considered as evidence of guilt.

The instruction was entirely too broad in its language, and must have had a far-reaching and prejudicial effect on the minds of the jurors. If the property were found in the possession of the defendant, shortly after the same was stolen, that was a fact or circumstance, considered in connection with other competent proof and the whole testimony, from which the jury could draw an inference of defendant's guilt. This is a wholly different matter than where it is, in effect, instructed by the court, that the possession of the personal property, shortly after it has been stolen, is a presumption of guilt.

The inference which the jury may draw from the possession of the stolen property is legitimately based upon the power, authority, and duty of the jury to determine questions of fact, and this, independent of any powers possessed by the court.

If there is some evidence of possession of the stolen property, and if the court, in effect, instructs the jury that that fact alone raises a presumption of guilt, it has, to a large extent, invaded the province of the jury, and has determined, for it, an important question of fact; and this it has no authority in law to do. The duties of the court and the jury are entirely dissimilar, separate, and distinct.

What has been said with reference to this error is, we think, sustained by the weight of authority. "When a person is found in possession of recently stolen property, it is usually held that the burden of accounting for such possession rests upon him, or, as it is commonly put, that the possession of itself raises a presumption against the accused which will justify conviction, if he does not meet it by a reasonable explanation."

"Whatever be the law as to the presumption of guilt, it is everywhere agreed that the presumption is one of fact, not of law; the jury must pass on all the evidence. And it is error to charge that there is a legal presumption of guilt, or that the law presumes guilt. And the

weight to be given to such evidence is for the jury alone; under no circumstances is the presumption conclusive." 25 Cyc. 133–135.

The same rule is recognized in the state of Nebraska, in Robb v. State, 35 Neb. 285, 53 N. W. 134. This principle was also recognized in the case of State v. Rosencrans, 9 N. D. 164, 82 N. W. 422, where the court said: "As we have seen, there was evidence both of recent and personal possession of the stolen property in the defendant, and it was for the jury to say whether his explanations removed or increased the inference of guilt deducible from such possession."

To the same effect is the case of Brooke v. People, a Colorado case, 23 Colo. 375, 48 Pac. 502. In the case of State v. Humason, 5 Wash. 499, 32 Pac. 111, the trial court gave the following instruction: "The possession of stolen property recently after the larceny thereof is evidence tending to show such possession to be a guilty one; and if such possession is unexplained, either by direct evidence or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it may be taken by the jury as conclusive evidence of the possessor's complicity in the larceny of the property."

On appeal, the supreme court of that state held this instruction erroneous, and in the opinion uses the following language: "The jury should simply have been told that they were the sole judges of the facts and of the weight to be given to each particular fact; that the possession of this property, by the defendant (if it was necessary to refer to it at all) if it had been proven to them beyond reasonable doubt, that it was stolen property, was one of the facts which they were authorized to consider, with all the other facts and circumstances in the case, in determining the guilt or innocence of the defendant; and that, if from all these facts they were satisfied, beyond a reasonable doubt, that the defendant had participated in planning, aiding, advising, or abetting the actual thief in taking the cattle, their verdict should be that of guilty."

In the case of State v. Walters, 7 Wash. 246, 34 Pac. 938, the court in holding an instruction erroneous, which was of the same general character as the one above referred to, stated in the opinion the following: "The possession of recently stolen property may or may not be a criminating circumstance, and whether it is or not depends upon the facts and circumstances connected with such possession. It is a cir-

cumstance to be considered by the jury in connection with all the other evidence in the given case, in determining the guilt or innocence of the accused; and its weight, as evidence, like that of any other fact, is to be determined by them alone. Any presumption that may be drawn from such possession *is a presumption of fact merely; in other words, it is only an inference that one fact may exist from the proof of another, and does not amount to a rule of law.*"

The cases which we have cited are of that class only, where the person in possession of the property was directly charged with and prosecuted for larceny, and that the rule is properly applied in those cases, we think, must be conceded. We think it needs no argument to demonstrate that, if the rule, as stated, and where the charge is larceny, properly defines the presumption as one of fact, the inference from which is to be drawn and determined by the jury, that, at least, no stronger rule could obtain where the charge against the defendant is not one of larceny, but of buying or receiving stolen property.

STATE OF NORTH DAKOTA, Respondent, v. ANTON KLEMMONS and Birda Ewarts, Appellants.

(180 N. W. 25.)

Assault and battery — evidence sufficient to sustain conviction of simple assault.

Defendants were charged with the crime of an assault with a dangerous weapon with intent to do great bodily harm, and convicted of a simple assault. The sentence of each is to pay a fine of $25 and costs, with imprisonment until the same is paid. The verdict is well sustained by the evidence, and the judgment is affirmed.

Opinion filed November 24, 1920.

Appeal from the District Court of Ward County, Honorable *F. E. Fisk,* Judge.

Affirmed.

E. R. Sinkler, for appellants.

A person may do anything that is necessary to prevent the trespass except use the dangerous weapon. Dinan v. Fitz Gibbon, 63 Cal. 387;

Townsend v. Briggs (Cal.) 34 Pac. 116; People v. Payne, 8 Cal. 341; People v. Flanders, 60 Cal. 2; Sims v. State, 36 S. W. 256.

Although assault and battery may be justified in defense of possession, wounding cannot, and it is only in personal self-defense or in defense of the family that the owner is justified in wounding the trespasser. M'Ilvoy v. Cochran, 2 A. K. Marsh. 271, cited in note in 22 L.R.A.(N.S.) 725.

Wm. Langer, Attorney General, *O. B. Herigstad* and *R. A. Nestos,* for respondent.

That one on trial for assaulting another with a dangerous weapon while trying to gain possession of real estate was the owner of the property is immaterial, since he had no right to resort to force to regain his rights. Hickey v. United States, 22 L.R.A.(N.S.) 728.

The law does not justify the owner of real or personal property in taking possession of it, by his own act, from another, unless he could do so without violence or a breach of the peace. Com. v. Haley, 4 Allen, 318; Corey v. People, 45 Barb. 262; Terrell v. State, 37 Tex. 442; State v. Bradbury, 67 Kan. 808, 74 Pac. 231.

Robinson, J. The information charges that in August, 1919, in the county of Ward, the defendants made an assault on W. H. Sibbald with a dangerous weapon, to wit, a hammer of 2 pounds, with intent to do great bodily harm. The jury found defendants guilty of the crime of a simple assault. The sentence of the court was that each defendant pay a fine of $25 and the costs of the prosecution, taxed at $80.25, and in default of payment be imprisoned for thirty days. The assault is well proven by several witnesses. Mr. Sibbald—an attorney at law—the complaining witness, testified: "On August 6th, at Kemmare, I was at the sheriff's sale held in a room. Klemmons wanted me to get out. Mrs. Ewarts laid her hand on me and tried to shove me out. Klemmons came up behind her and said: 'Knock the brains out of the —of-a—.' He handed her a monkey wrench, saying: 'Take this and knock his brains out.' The deputy sheriff grabbed the monkey wrench and threw it on the floor. Klemmons grabbed a hammer, handing it to her and saying, 'Use this.' She took the hammer, raised it up, threatening to strike him, when the deputy took it from her. The hammer weighed a pound and a half or two pounds." The testimony is corroborated by three witnesses.

The defense is that the assault was made by defendants in defense of their property. In appellants' brief it is said: At the time of the alleged assault the defendant Ewarts was the owner of a certain garage, in which she was conducting a garage business, and defendant Klemmons was working for her in such business. The sheriff of Ward county had advertised a sale and was conducting the sale in the building. The property being sold by the sheriff was the property of Birda Ewarts and one Wallin. The sale was upon an execution against Klemmons, and he did not own the property. Mrs. Ewarts owned the building. The sheriff and those with him were trespassers upon her property. She requested them to get out of the building. They refused to do so. She seized a hammer which the other defendant handed to her, and was about to threaten Sibbald with the hammer in order to get him off the premises, when the hammer was seized by the bystanders.

The assault was the result of an old grudge and bitterness. It was not made in defense of property. Sibbald was not a trespasser. He had a right to be present at the sale. Mr. Sibbald testified: "It is a little more than two years since Anton Klemmons was removed as administrator of the Olmstead estate. I am attorney for the estate. Two years ago I was acting for the estate in handling the case in which this execution was issued that is in evidence. I got that judgment against him."

Klemmons testified: "I have known Sibbald two years. He was a trouble maker. He had me arrested. He has been after me for two years. His coming there that day and selling Mrs. Ewarts's property was part of the same deal. I was the administrator of the Olmstead estate. He started this lawsuit against me. He claimed that I was wasting the estate and had done away with a lot of property. I was removed. He secured a judgment against me. I have been working for Mrs. Ewarts about four years and have been managing her business."

Defendants may well be thankful that the timely intervention of the deputy sheriff prevented the use of the hammer.

Affirmed.

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

GRACE, J., disqualified, did not participate.

BRONSON, J. (concurring specially). I concur in the affirmance of the judgment of conviction. It is the contention of the defendants that they were justified in attempting to use, or in threatening to use, a dangerous weapon to prevent the continued trespass of the complaining witness, after he had been ordered to leave the premises involved, and after he had refused so to do; that the jury, by its verdict, have found the defendant guilty of a simple assault, and not guilty of an assault with a dangerous weapon; that, therefore, such simple assault was justifiable, upon this record, as a matter of law. The jury was warranted in finding the defendant guilty of a simple assault upon the information. Comp. Laws 1913, § 10,890; State v. Johnson, 3 N. D. 150, 152, 54 N. W. 547. In the record there is evidence not only that the defendants had a monkey wrench and a hammer in their hands, but also that the complaining witness was pushed and shoved just prior to the use of these instrumentalities. The question of whether the assault was justifiable was properly a question of fact for the jury.

CHRISTIANSON, Ch. J., concurs.

JOHN LITTLER, Respondent, v. P. J. HALLA, Appellant.

(180 N. W. 717.)

Abatement and revival — trover and conversion — refusal to dismiss on ground of other action pending proper — instruction on damages proper.

1. In an action for the conversion of grain under a croppers' contract, it is *held*, for reasons stated in the opinion, that no error prejudicial to the defendant occurred in the trial of the case.

Landlord and tenant — landowner held not entitled to claim that conversion by cropper would not lie because crop not divided.

2. Where the landowner, under a croppers' contract, has taken possession of the crop and harvested and threshed the same, and where thereafter, upon marketing the same, he has given credit to the cropper for his share of the crop, in a statement rendered, it is *held* that the landowner is not in any position to maintain that conversion would not lie upon grounds of no actual division of such grain.

Opinion filed November 26, 1920.

Action for conversion, in District Court, Ward County, *Fisk*, J.

From a judgment in favor of the plaintiff the defendant has appealed.

Affirmed.

E. T. Burke and *J. E. Burke*, for appellant.

The lessee has agreed that his title to his share of the crop should not vest in him until the act of division was performed by the lessor. The unjust refusal of the lessor to perform this act (division) would not make the lessee the owner of the legal title. McFadden v. Thorpe Elevator Co. 18 N. D. 93; Erronson v. Oppegard, 16 N. D. 595, 114 N. W. 377; Wadsworth v. Owens, 17 N. D. 173, 115 N. W. 667; Simmons v. McConville, 19 N. D. 787, 125 N. W. 304.

W. H. Sibbald, for respondent.

Bronson, J. *Statement.*—This is an action for the conversion of grain. In February, 1918, the plaintiff entered into a croppers' contract with the defendant to farm the lands of the defendant upon shares, during the season of 1918. Accordingly the plaintiff took possession, prepared the ground, and sowed about 104 acres with wheat and barley. After seeding, the defendant was dissatisfied with the crop prospects, particularly concerning the wheat, and desired to have some of the lands resown. The plaintiff did not accede to his demands. The defendant thereupon took possession; upon some of the land already sown in wheat he proceeded to seed flax directly thereupon; some of the land so sown in wheat he plowed up and resowed with oats and barley. The defendant harvested and threshed the crops produced. The plaintiff testified that he was ready to harvest such crops. It appears from the evidence that certain injunctional proceedings between the parties were had, which were still pending, whereby the plaintiff was temporarily restrained from interfering with defendant's possession of the land or of the crop. Upon the land where the wheat and flax were sown a crop of both wheat and flax was produced. There was threshed, in accordance with the thresh bill, some 502 bushels of wheat, 110 bu. of oats, 490 bu. of barley, and some flax. The plaintiff instituted this action in conversion to recover the value of 256 bu. of wheat and 175 bu. of barley, his alleged share of the crop produced from grain sown by him. The defendant interposed a general denial.

At the commencement of the trial the court disallowed a proposed amended answer, alleging the failure of the plaintiff to perform the farm contract and the expenses incurred by the defendant by reason thereof. The court also refused to dismiss this action upon the grounds of another action pending between the same parties. Some evidence at the trial was offered on the part of the plaintiff, to the effect that the plaintiff had performed the terms of his farm contract by preparing and sowing the ground in a farmerlike manner, and that the defendant, without plaintiff's consent, had proceeded to plow and resow some of the ground so seeded. Evidence on the part of the defendant was adduced to the effect that the plaintiff had improperly prepared and improperly sown the farm land pursuant to the terms of the contract; that, after the crop began to grow from the seed sown by the plaintiff, it became evident that it was necessary to resow some of such crop; that the defendant, upon the plaintiff's refusal so to do, proceeded himself to reprepare and resow some of the farm land so seeded. That, furthermore, the plaintiff carelessly sowed some of the seed furnished and used some of the same for his own purposes, and failed further to fulfil the terms of the contract concerning the care of the premises. The defendant further showed by an itemized statement submitted and offered in evidence, that the plaintiff's share of the crop was not sufficient to pay the expenses involved in reprepairing and resowing, harvesting, and threshing such crops, which expenses were properly chargeable to the plaintiff. In this statement a share of the crop of barley, oats, wheat, and flax produced was credited to the plaintiff, and the plaintiff was charged with the plowing, dragging, seeding, harvesting, and shocking of the crop, together with his share of the threshing bill, including charges for hauling the grain to the elevator. The resulting balance showed a credit in such statement, in favor of the defendant.

The trial court submitted to the jury issues permitting to the plaintiff a right of recovery in conversion for his half share of the wheat and barley at the highest market value between November, 1918, and the time of the trial, if they should find that the plaintiff performed his work of farming substantially as called for in the contract, and denying to the plaintiff the right of recovery if the jury found that the plaintiff did not so properly farm the land, and that it was neces-

sary for the defendant to reseed and purchase seed for a portion of the land, and further, if, through plaintiff's abandonment of the farm, it became necessary for the defendant to take possession, harvest, and thresh the crop involved, by reason whereof expenses in excess of plaintiff's share of such crop were incurred on the part of the defendant. The jury returned a verdict for the plaintiff for $746.10. The defendant has appealed from the judgment entered thereupon. He has assigned some fifteen specifications of error. These challenge the action of the trial court in refusing to permit the filing of an amended answer; in refusing to dismiss the action and permitting the introduction of testimony, upon the ground that another action was pending; in receiving testimony of plaintiff's expenses in attendance upon this trial; and in instructing the jury that plaintiff might be allowed, as damages, the value of the grain, at any time between the time of the alleged conversion and of the trial. In addition the defendant contends that the record discloses no actual division of the crop between the parties, and hence, under the provisions of the farm contract involved, no conversion has been shown.

Decision.—We are clearly of the opinion that the defendant has been accorded a fair trial, and that no error prejudicial to the defendant has occurred.

The trial court properly refused to dismiss this action upon the grounds of defendant's motion that there was another action pending between these parties involving the same issues. See Henry v. Maher, 6 N. D. 413, 416, 71 N. W. 127; 1 C. J. 1162.

The proceedings in the injunction action between these parties, apparently still pending, were offered in evidence by the plaintiff, but upon the objection of the defendant were refused.

The defendant's objection concerning the evidence of plaintiff's expenses in attendance upon the trial is without merit. The trial court, upon defendant's motion, struck out such testimony.

Pursuant to § 7168, Comp. Laws 1913, the jury were properly instructed that they might award the highest market value of the grain at any time between the date of the conversion and the time of the verdict. Evidence of this market value, which the jury might adopt as the market value of such grain, was given by the defendant himself.

The defendant is not in a position to contend that conversion cannot

be maintained for the reason that there was no actual division of the grain. The position of the defendant, through his proof and evidence, is predicated upon a division of the grain and the right to deduct from plaintiff's share thereof the expenses incurred in the production thereof,—all pursuant to the farm contract. Through a statement of account made by the defendant, received in evidence, dated February 1, 1919, and about that time served upon plaintiff's attorney, there is shown a division of this grain and a credit of plaintiff's share thereof to the plaintiff by the defendant.

It fully appears in the record that the defendant was accorded full opportunity, under his original answer, to present in the evidence and to have submitted to the jury the issue of his right to deduct from plaintiff's share of the crop expenses that were properly chargeable to the plaintiff, pursuant to the contract. The judgment is affirmed.

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

GRACE, J. I concur in the result.

FIRST NATIONAL BANK OF ASHLEY, NORTH DAKOTA, a Corporation, Respondent, v. WM. H. MENSING, Prudie W. Mensing, and Elizabeth Mensing, Appellants.

FIRST NATIONAL BANK OF ASHLEY, NORTH DAKOTA, a Corporation, Respondent, v. WM. H. MENSING, Prudie W. Mensing, and Harold Mensing, Appellants.

FIRST NATIONAL BANK OF ASHLEY, NORTH DAKOTA, a Corporation, Respondent, v. WM. H. MENSING, Prudie W. Mensing, and R. G. Mensing, Appellants.

(180 N. W. 58.)

Fraudulent conveyances — evidence held not to show debtor's beneficial interest in land purchased after judgment in names of children — judgment creditor has burden of proving fraud notwithstanding grantor and grantee are parent and child — relationship of parent and child not in itself badge of fraud — suspicious circumstances alone are not

equivalent to proof of fraud — insolvent debtor's preference of child is not fraudulent as matter of law.

In three actions brought by a judgment creditor to subject to the lien of the judgment three parcels of land purchased subsequent to the judgment, each in the name of a different child of the judgment debtor, the evidence showed that the children in whose names the lands had been purchased had advanced to their father and mother from time to time moneys in excess of the amounts paid by the father upon the purchase price at the time of purchase; also that the children in whose names the lands were purchased worked away from home, earning money, part of which was turned over to the father, with an understanding that he would repay it at a subsequent time whenever they might desire to invest it. It is *held:*

(1) The evidence fails to show that the lands were purchased in the names of the various grantees in circumstances indicating that they held the title in trust for their father as the beneficial owner.

(2) Where a conveyance is attacked by a judgment creditor as fraudulent, the burden of proving the fraud rests upon the one asserting it.

(3) The relationship of parent and child existing between parties to an alleged fraudulent conveyance does not remove from the creditor the burden of proving fraud.

(4) Relationship of parent and child between the parties to an alleged fraudulent conveyance is a circumstance calling for a close scrutiny of the transaction, but is not itself a badge of fraud; nor does it give rise to a presumption supplanting proof.

(5) Suspicious circumstances alone are not equivalent to proof of fraud, and do not warrant a judgment in the face of satisfactory evidence of bona fide debtor and creditor relations between parent and child.

(6) An insolvent debtor's preference of his child is not fraudulent as a matter of law.

Opinion filed November 16, 1920. Rehearing denied December 6, 1920.

Appeal from District Court of McIntosh County, *Graham,* J.

Reversed.

Cameron & Wattam, for appellants.

"The law presumes that all acts are done in good faith," 10 R. C. L. 875.

"In the ordinary transactions of life, fairness and honesty are presumed, and conveyances, sales, and contracts are generally presumed to have been made in good faith until the contrary is proven." Jones, Ev. Pock. ed. § 13.

"Evidence of fraud will not prevail over the presumption of honesty

unless established by irresistible evidence of double dealings." Snow v. Wathen, 127 App. Div. 948, 112 N. Y. Supp. 41.

"The party alleging fraud must prove the same by evidence that is clear and convincing." Englert v. Dale, 25 N. D. 587, 142 N. W. 169; McKillip v. Farmers State Bank, 29 N. D. 541, 151 N. W. 287.

The fraudulent intent and purpose must be proved as an independent fact. Comp. Laws 1913, § 7223; Wannemacker v. Merrill, 22 N. D. 46.

"Insolvency is exceptional and must always be proved." Darand v. Gray, 129 Ill. 9.

Curtis & Remington and *George & Rohwedder,* for respondents.

On the issue of fraudulent intent, it is relevant to show other voluntary conveyances, conveyances to relatives, or similar transactions with others tending to show a common fraudulent scheme. Jones, Ev. § 143; 11 Enc. of Ev. 791 et seq.

The burden is on the wife to establish by a preponderance of evidence the bona fides of the transfer of the property. Carson v. Stevens (Neb.) 58 N. W. 845; Melick v. Varney (Neb.) 59 N. W. 521; Steinkaus v. Korth, 62 N. W. 1110; N. D. Comp. Laws 1913, § 5365.

Laches, to be available as a defense, should be set up in the trial court. 10 R. C. L. 408; Henshaw v. State Bank (Ill.) 88 N. E. 216; 16 Cyc. 165; Luke v. Koenen (Iowa) 94 N. W. 278.

Birdzell, J. In December, 1911, the Union State Bank of Ashley, North Dakota, obtained a judgment against William H. Mensing and Prudie W. Mensing, his wife, for $2,115.45. Execution was promptly levied upon property of the judgment debtors, and it was sold for $1,340.35, which amount was credited on the judgment, leaving a balance of $775.10. The plaintiff herein, the First National Bank of Ashley, is the successor of the judgment creditor and owner of the judgment. This action was brought against the judgment debtors and Elizabeth Mensing, a daughter, for the purpose of subjecting to the lien of the judgment the northwest quarter of section 17, township 130, range 69, in McIntosh county. The legal title to this property stands in the name of Elizabeth L. Mensing. It is claimed by the plaintiff that the defendants William H. and Prudie Mensing are the equitable owners; that the land was bought with their money and placed in the

name of the other defendant to hinder the plaintiff in the collection of its judgment.

A similar action was brought against William, Prudence, and Harold Mensing (a son), involving the northeast quarter of section 18, township 130, range 69, standing in the name of Harold Mensing, and one against William, Prudence, and R. G. Mensing (another son), involving the northeast quarter of section 7, township 130, range 69, standing in the name of the latter. The three cases were consolidated and tried as one. At the conclusion of the trial, judgment was entered in each case favorable to the plaintiff, except in one particular to be noted. The defendants appeal and ask for a trial *de novo* in this court.

In this action, the one in which Elizabeth Mensing is a defendant, the judgment, however, further provided that the northwest quarter of section 17, township 130, range 69, was the homestead of William and Prudence Mensing, and dismissed the plaintiff's action as to that quarter, awarding costs to the defendants. Both the plaintiff and the defendants appeal from this judgment.

Since the evidence bearing upon each transaction in which the land was purchased in the name of a defendant other than William and Prudence Mensing has more or less of a circumstantial bearing upon the other transactions, it is not practicable to treat each transaction separately. One opinion will therefore suffice for the three cases.

Elizabeth Mensing, who was twenty-seven years of age at the time of the trial of this action, testified that she purchased the northwest quarter of section 17, township 130, range 69, in December, 1916, for $2,500, $1,000 being paid in cash and the balance embraced in a mortgage assumed by her. The cash payment was advanced by her father, William Mensing, who has also paid the interest on the mortgage. She further testified that since the year 1906 she had worked away from home in various employments, and had paid to her father from $10 to $15 per month, as a consequence of which payments he was indebted to her at the time of purchase to the extent of about $1,500. The money was to be repaid to her at any time she wanted it for investment. William Mensing testified that he owed his daughter Elizabeth more than the $1,000, which he advanced, and that he acted as her agent in the purchase of the land. There was no accurate record kept of the amount advanced by Elizabeth to her father.

The Mensing family lived upon the land, which stood in the name of Elizabeth, and the son, Harold, who was twenty years of age at the time of the trial, farmed it. Most of the machinery belonged to the father, and he received a share of the crop for its use.

The northeast quarter of section 18, which stands in the name of Harold, was deeded to him by his sister Lina Hite, before her marriage, in consideration of $1,201, $1,200 of this consideration representing a mortgage which was assumed by Harold. Lina Hite is not a party defendant in the action involving this quarter section. The material facts with reference to its original acquisition by her, however, according to the testimony, are as follows:

In July, 1917, she took title by warranty deed from C. A. Wenzel and wife. The consideration paid was $1,000. Five hundred dollars she obtained from her father, $300 was taken from the proceeds of a loan of $1,200, secured by a mortgage on the land, and $200 she obtained on her mother's note in the Security State Bank of Wishek. This note was later paid by her father. The $900 remaining of the $1,200 loan was turned over to her father. William Mensing testified that he advanced $500 on the purchase price of this Lina-Harold Mensing quarter, and that it represented money that he owed his daughter on account of money she had previously turned over to him while teaching school. There is some discrepancy between the testimony of the two Mensings and the testimony of the bank cashier with reference to the net amount of the proceeds of the loan that was deposited to the credit of William after the purchase price of the land was paid. But the amount was either $900 or $700. From all of the testimony, however, it clearly appears that William received back from this loan all of the money which he had advanced. If this quarter, then, is considered at the time of the purchase as Lina's, so far as this record shows none of her father's money is invested in it, and he would still owe her any money she might have advanced to him while teaching school.

The R. G. Mensing quarter, the northeast quarter of section 7, township 130, range 69, was purchased in October, 1917, from one J. F. Frazier for the consideration of $2,000. Of this $2,000, $1,000 was paid in cash, $500 being obtained from William Mensing, the other $500 being paid by a check drawn by R. G. Mensing on his father's account in the Ashley State Bank.

William Mensing, however, testifies that $500 was paid "as an option" at the time of purchase, and that the balance was all paid at one time. He professes to have no knowledge of the $500 check which the son claims to have drawn against his account. He stated that the $500 which he advanced to his son was money which he owed the son for deposits the latter had made with him from time to time. At the time of the purchase, and at the time the check was supposed to have been drawn upon his father's account, the son was under age. As to the amount of money advanced by this son, R. G. Mensing, to his father, the son testified that he had made deposits in the bank for the benefit of his father to the extent of about $350, that he kept no duplicate deposit slips and had no accurate record of the amount. He was able to produce some canceled checks showing that at least $225 had been turned over to his father and mother during the year 1917, and there were also some checks subsequent to the purchase. He stated that he had paid some grocery bills for the family and settled his father's account at the drug store; paid a note at the bank, and paid for a drill purchased by the father in 1918 for $190. He stated that he began turning over money to his father in October, 1914; that from that time to the following spring he averaged $20 a month and that summer (1915) he worked in a drug store, paying his father from $20 to $25 a month. The next fall he worked in an elevator, during which time he gave his father practically $50 a month. Up to the time of the purchase of the land his approximate figures on what his father owed him were $925, and since the purchase he had worked for his father, earning the balance of the $1,000. This son went into the Army, and the land was farmed by his brother Harold, who, according to the testimony, was to receive the crop for two years in consideration for his payment of the taxes and breaking the land.

There is some testimony which has a general bearing upon the attitude of the father toward the crops grown on this land. It appears that the crops were generally sold in his name, and that on one occasion in the year 1918 he gave a crop mortgage to the Ashley State Bank upon three fourths of all the crops grown or planted upon these three quarter sections of land. There is also some testimony to the effect that Elizabeth had at times been hard pressed for money, and on such occasions had borrowed from a bank and from individuals. As no

reason is assigned for her not withdrawing or collecting the money her father owed her, it is contended that this is a strong circumstance indicating that he was not indebted to her. We do not so regard it.

All of the testimony above referred to is practically undisputed. Owing to the nature of the transactions this would necessarily be so, for there would ordinarily be little opportunity to obtain evidence from sources other than the parties to the transaction. The questions for our consideration may briefly be stated as follows: (1) Under the evidence in this record, does it appear that the lands, or any of them, were purchased in the names of the various grantees in circumstances indicating that they held the title in trust for their father as the beneficial owner? or (2) Were the conveyances, or any of them, fraudulent as to the judgment creditor? We are of the opinion that the evidence clearly fails to sustain the affirmative of either of these propositions as to any of the transactions involved. The burden of proving the beneficial ownership in the judgment debtor is upon the judgment creditor, as is also the burden of proving fraud. 20 Cyc. 751. According to the weight of modern authority, this rule is not changed by reason of the relationship of parent and child existing between the parties to the alleged fraudulent transfer. 20 Cyc. 753; 12 R. C. L. 488; Bigelow, Fraud. Conv. Knowleton's Rev. ed. p. 222; Bump, Fraud. Conv. 4th ed. § 67; 1 Moore, Fraud. Conv. p. 407; Wait, Fraud. Conv. 3d ed. § 242; Oberholtzer v. Hazen, 92 Iowa, 602, 61 N. W. 365; Steinfort v. Langhout, 170 Iowa, 422, 152 N. W. 612; Shea v. Hynes, 89 Minn. 423, 95 N. W. 214; Vogt v. Marshall-Wells Hardware Co. 88 Or. 458, 172 Pac. 123 (grantee wife of grantor); Towan v. United States Fidelity & G. Co. 105 Wash. 432, 178 Pac. 473. This rule has previously been regarded with favor in this court. Fluegel v. Henschel, 7 N. D. 276, 280, 66 Am. St. Rep. 642, 74 N. W. 996; Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 318, 83 N. W. 245. Neither is this burden sustained by proof of circumstances which merely give rise to suspicion. For, as it has been well stated:

"Suspicious circumstances are not the equivalents of proof; and unless all the facts and circumstances of the case, when taken together, are strong enough to generate a clear, rational conviction of the existence of the fraud charged, that conclusion ought not to be adopted which will destroy a prima facie good title to property, and

blacken the characters of the parties concerned." McDaniel v. Parish, 4 App. D. C. 213–216. Judgment cannot go upon mere suspicion. Mayers v. Kaiser, 85 Wis. 382–393, 21 L.R.A. 623, 39 Am. St. Rep. 849, 55 N. W. 688.

The relationship between the parties is not a badge of fraud; it creates no presumption of fraud; neither, standing alone, does it warrant a judgment based upon suspicion. It calls for a closer scrutiny of the transactions than would be the case between strangers. But, applying a closer scrutiny to the transactions narrated in the testimony in the case at bar, we fail to see wherein there is any substantial testimony to prove fraud or a trust for the benefit of the father.

Instead of proving fraud or that the conveyances were in trust, we think the record in this case rather establishes a course of dealing between the father and the children whereby their earnings were turned over to the father from time to time with the understanding that they should remain theirs. The creditor, of course, has no claim upon the earnings of these children. Seiler v. Walz, 100 Ky. 105, 29 S. W. 338, 31 S. W. 729; Caldwell v. Deposit Bank, 18 Ky. L. Rep. 156, 35 S. W. 625. Concerning the earnings during minority, the children were in effect emancipated. Flynn v. Baisley, 35 Or. 268, 45 L.R.A. 645, 76 Am. St. Rep. 495, 57 Pac. 908. In these land transactions the father was but discharging obligations previously incurred by him in favor of the children. It is not shown that he put his own property beyond the reach of creditors by transferring it to his children, but rather that he recognized his obligation to them and advanced no more of his own money than was necessary to discharge these obligations, if indeed he advanced sufficient money for that purpose.

It follows from the above that the judgments rendered in the three cases must be reversed and judgment entered for the defendants in each case, dismissing the action, with costs. In the Elizabeth Mensing suit, in which the plaintiff has also appealed, the respondent has awarded no costs on appeal.

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

BRONSON, J. I concur in result.

GRACE, J. (specially concurring). The evidence, or the record here,

is insufficient to show that the lands purchased by the grantees, the defendants herein, was other than a bona fide purchase, in good faith, and for their use and benefit, or that it was held by them in trust for the benefit and use of the father.

The evidence is also insufficient to show that the conveyance of the land to them was tainted with fraud, or that such conveyance was in fraud of creditors.

JACOB L. GORDER, Respondent, v. LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, Appellant.

(180 N. W. 514.)

Insurance — war clause limiting liability applies only to death in consequence of military or naval service.

Under the war clause in an insurance policy, the insured was required to obtain permission from the company to engage in military or naval service in time of war and to pay an extra premium. In the event of his failure to do so, it was stipulated that in case of the death of the insured in consequence of such service, the liability of the company should not be greater than the legal reserve on the policy. Without obtaining the permit, the insured entered the military service and died of pneumonia about seven days after debarkation at Liverpool, England. It is *held:*

1. The clause above referred to does not limit the liability of the company except where death occurs *in consequence of* military or naval service.

Insurance — insurer has burden of establishing facts upon which limitation of liability by war clause depends.

2. Where an insurance company relies upon a provision in the policy limiting its liability to less than the amount of the insurance, it has the burden of establishing the facts upon which the limited liability depends.

Insurance — whether insured died in consequence of military service within war clause held a question of fact.

3. Whether or not the death of the insured in a particular case was in consequence of the military service within the above war clause is a question of fact to be determined upon all of the evidence of the circumstances surrounding the insured at the time of his death.

NOTE.—For authorities discussing the question of validity, construction, and effect of provisions in life or accident policy in relation to military service, see notes in 4 A.L.R. 848; 7 A.L.R. 382; and 11 A.L.R. 1103.

Insurance — statistics alone will not support a holding that insured died in consequence of military service.

4. Where a death is occasioned by a disease which was epidemic at the time among both the civilian and the military population, the court cannot find from statistics alone, which apparently show greater mortality in the army as a whole than among the civil population, that the insured died in consequence of military service.

Insurance — burden of showing that death of insured resulted from military service held not sustained.

5. The burden resting upon the defendant to establish that death resulted from military service is not sustained where no evidence is introduced showing sanitary conditions in the various camps in which the insured was stationed and upon the army transport upon which he sailed, nor in the military unit to which he was attached.

Opinion filed December 6, 1920.

Appeal from the district court of Bottineau County, *A. G. Burr,* J. Affirmed.

Pierce, Tenneson & Cupler, for appellant.

On the question of the proof that the insured came to his death while subjected to the hazard of naval service, it is clear that such is not the case. He was in an inland city, and not subject to any risks not common to civilians with whom he was constantly associated. Myli v. American L. Ins. Co. 175 N. W. 631; Kelly v. Fidelity Mut. L. Ins. Co. 172 N. W. 153.

If the terms of the contract be clear, and not fairly susceptible of two constructions, an ambiguity cannot be assumed, and the plain intention of the parties nullified by construction. Hormel & Co. v. American Bonding Co. 128 N. W. 14, 33 L.R.A.(N.S.) 513.

W. H. Adams, for respondent.

BIRDZELL, J. This is an action to recover the face amount of a life insurance policy. By stipulation it was tried before the district court of Bottineau county without a jury and a judgment was rendered for the full amount of the policy, interest, and costs, amounting in all to $2,179.67. The policy was issued on March 31, 1917, to Arthur Norman Gorder, age twenty-two years. The beneficiary was Jacob L. Gorder,

his father, the plaintiff in this action. On June 14, 1918, the insured entered the military service of the United States under the Selective Service Law. He was stationed in various training camps and cantonments prior to his embarkation for overseas duty. At the time of embarkation he was a member of Battery F, 125th Field Artillery, and sailed with this unit on September 24, 1918, on the army transport "Saxon." He is reported to have been transferred on October 7, 1918, to the base hospital at the port of debarkation, Liverpool, England, where he died on October 14, 1918, of pneumonia.

The defense relied upon by the appellant arises under the provision of the policy which was stated under the heading "Conditions as to Residence, Travel and Occupation." The provision reads as follows:

"This policy is free from restrictions as to residence, travel and occupation after one year from date of issue, except military or naval service in time of war, for which permission must be obtained from the company and an extra premium, at the established rate, shall be paid. In case of death of the insured in consequence of such service and without the company's permit, the liability of the company hereunder shall be for an amount not greater than the legal reserve on this policy."

The insured had paid the annual premium stipulated in the policy of $48.76 but he had not paid the extra premium which would cover the risk of military service fixed by the actuaries at $100 per thousand, or $200 per annum on this policy. Nor had he obtained permission from the company as required by the clause above quoted. The trial court found that the death of the insured was not in consequence of his military service.

It is contended that the insured had subjected himself to greater hazard by becoming a member of the military forces and by submitting to conditions of life prevailing in military camps and upon transports, thereby being subjected to contagious diseases prevalent in armies. It is stated that such diseases as typhoid, measles and influenza are more prevalent in the army than in civil life and that even during times of warfare a greater number of soldiers have died from contagious diseases than were killed in actual combat. The appellant argues from this that a death from one of these diseases while in military service is necessarily a death resulting from the service just as

much as though it had resulted from a wound from an enemy bullet. Reading the clause in question in the light of such facts, it is contended that it is not ambiguous, and that its purpose is to stipulate against all increase of risk due to military service.

We cannot adopt this construction of the provision for the reason that it is expressly stated therein what the effect of the failure to obtain the permit and pay the extra premium shall be. The provision is in two parts; one part provides for the payment of an added premium to cover all risk incident to military service, and the other stipulates for a limited liability where the insured, without contracting for the added risk, dies "in consequence of such service." The limitation is not to be construed liberally to reduce liability. There is a vast difference between a death *in* the active military service (Miller v. Illinois Bankers' Life Asso. 138 Ark. 442, 7 A.L.R. 378, 212 S. W. 310; Reid v. American Nat. Assur. Co. 204 Mo. App. 643, 218 S. W. 957; Ruddock v. Detroit L. Ins. Co. 209 Mich. 638, 177 N. W. 242) and a death *in consequence of such service.* Malone v. State L. Ins. Co. 202 Mo. App. 499, 213 S. W. 877; Kelly v. Fidelity Mut. L. Ins. Co. 169 Wis. 274, 4 A.L.R. 845, 172 N. W. 152; Benham v. American Cent. L. Ins. Co. 140 Ark. 612, 217 S. W. 462; Nutt v. Security L. Ins. Co. 142 Ark. 29, 218 S. W. 675. A further reason why the limitation should only operate to reduce liability in the instances where the death occurred *in consequence of* military service is that the normal premiums continue to be payable. These premiums are presumably calculated on the basis of average mortality in civil life. To give to this war clause the construction for which the appellant contends would be to discriminate in this respect against all who entered the military service. It is well known that the ravages of influenza-pneumonia resulted in many thousands of deaths among those in civil life, and to hold that the insurance is not applicable where a soldier dies from the same cause would be to exempt for a hazard that would have been insured against had the soldier remained in civil life. With respect to soldiers, therefore, it would place the insurance company upon a better footing than it occupied with respect to civilians generally.

The provision differs materially from the one before this court in the case of Myli v. American L. Ins. Co. 43 N. D. 495, 11 A.L.R. 1097, 175 N. W. 631. In the policy there considered it was stipulated:

"If, within five years from date hereof, the death of the insured shall occur while engaged in military or naval service in time of war without having previously obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid hereon for the three years from date of issuance and thereafter to the legal reserve on this policy," etc.

Had that provision stood alone, it would have been extremely doubtful whether the beneficiary could have recovered insurance where the insured had been inducted into the active military or naval service. Malone v. State L. Ins. Co. 202 Mo. App. 499, 213 S. W. 877; Miller v. Illinois Bankers' Life Asso. supra; Reid v. American Nat. Assur. Co. 204 Mo. App. 643, 218 S. W. 957; Ruddock v. Detroit L. Ins. Co. 209 Mich. 638, 177 N. W. 242; Nutt v. Security L. Ins. Co. supra. Language could have been employed which would have rendered more clear the intention to make the status of the insured alone the condition upon which the limited liability would attach. But the other provisions of the policy so clearly provided for double indemnity and disability insurance, except for death or injuries *resulting from* military or naval service, that it was plain status alone was not the condition of the limited liability. Under the facts in that case it was evident that death did not result from the service; also that the insured did not die surrounded by any hazards not common to civilians in equal degree. So, adopting the most favorable construction contended for by the beneficiary (making the character of the service the test), the beneficiary was clearly entitled to recover. He, of course, would have been equally entitled to recover had he contended that it was not shown that death in fact *resulted from* the service.

In the instant case, death occurred while the insured was in the active military service and is attributable to a cause which resulted in many deaths both in civilian and army life. It has been held that a death from such cause cannot be said to have been a death resulting from military service. The supreme court of Arkansas, in the case of Benham v. American Cent. L. Ins. Co. 140 Ark. 612, 217 S. W. 463, said:

"In the case at bar the insured died from influenza, and the record shows that this disease was prevalent throughout the United States, and that soldiers and civilians alike contracted it and died from it.

The death of the insured, then, was in no sense caused by performing any military service, or in consequence of being engaged in military service."

We do not hold that a death from influenza may not, under certain circumstances, be shown to have been in consequence of military service within a war clause such as the one in question. See 18 Mich. L. Rev. 686. We are satisfied, however, that the company has not shown the death in the instant case to have been in consequence of such service.

It is elementary that the burden of establishing the facts which relieve an insurance company from liability for the face of the policy rests upon the defendant. 25 Cyc. 925–930; Malone v. State L. Ins. Co. supra. It is frequently held under clauses somewhat analogous, such as those limiting liability where the death of the insured is caused by the use of intoxicating drink or occurs in consequence of the violation of the criminal law, that the burden is upon the company to establish the fact that the death was the proximate result of the cause and thus to bring the case within the limitation. Cluff v. Mutual Ben. L. Ins. Co. 13 Allen, 308, and a case arising out of the same facts. Bradley v. Mutual Ben. L. Ins. Co. 45 N. Y. 422, 6 Am. Rep. 115; Mutual L. Ins. Co. v. Stibbe, 46 Md. 302; Kerr v. Minnesota Mut. Ben. Asso. 39 Minn. 174, 12 Am. St. Rep. 631, 39 N. W. 312. See also Fellers v. Modern Woodmen, 182 Iowa, 99, 165 N. W. 584.

We have no evidence bearing upon the sanitary condition of the camps in which the insured had been stationed prior to his death, nor with respect to the army transport "Saxon," upon which he sailed. Sanitary conditions varied greatly upon different transports. See The Military Surgeon, October, 1919, p. 399. If any presumption would arise regarding the sanitary conditions surrounding him prior to embarkation, it would be that they were good; for it is not to be presumed that the War Department would designate for overseas duty units that were in poor physical condition or that were likely to become incapacitated prior to participation at the front. Neither is there any evidence of the extent of the prevalence of influenza or pneumonia in the unit to which the insured was attached. Dr. Alyen of Fargo, who was in the medical corps of the United States Army

practically throughout the war, and who had considerable experience in 1918 at ports of embarkation, debarkation, and upon transports, having made four trips upon three different transports—none, however, upon the transport "Saxon"—testified by deposition. He testified that the ships were crowded; that the men were obliged to sleep in quarters with little or no ventilation; that conditions were such as to increase the risks of transmission of communicable diseases to the highest point. In stating his opinion as to the cause of the spread of the epidemic of influenza-pneumonia among the troops, he ascribed it to close contact, constant movement of the troops, age of the individual, rapid movement of the troops, climatic conditions, and the short period of organization after reaching debarkation camps. In addition to this testimony the appellant relies upon statistics showing a much higher mortality rate for influenza-pneumonia in the army than is shown by statistics covering those in civil life. Some statistics offered would seem to show that there were about six deaths in the army from this cause to one in civil life among a similar number of people, and that the disease was much more prevalent in the army than in civil life. These statistics are admitted to be very unreliable; for, as is remarked in the report of the state board of health for the biennial period ending June 30, 1920, "Case reports were most inaccurate and thousands never saw a physician," whereas, in the army every man was under constant observation for pathological symptoms, and no case of disease would be likely to be overlooked. Furthermore, the age of susceptibility to the particular disease in question is greatest and the mortality highest among those of military age, and of these it has been observed that it bore heaviest upon the most vigorous. Therapeutics, Preventive Medicine, Fantus and Evans, vol. 6, 1919, 323; Annual Report of Public Health Service (U. S. Treasury) for 1919, page 179. The removal of so large a number of vigorous persons of this age from civil life would naturally have a tendency both to lessen the mortality rate for civil life and to accelerate it for military life. There is a woeful lack of accurate information concerning the ravages among the civil population of the pandemic of influenza-pneumonia. The United States Public Health Service has estimated the number of deaths at 350,000; the New York Life Insurance Company has placed the number at 460,000, or about 30 per cent greater;

and Major Soper of the sanitary corps of the United States Army, who has given special consideration to the subject, says it is doubtful if this larger estimate is great enough. The Annual Report of the Public Health Service (United States Treasury) for 1919 puts the number at over 500,000 (page 178).

The outstanding fact in this case is that the hazard to the lives of both the military and civil population was increased several fold by the prevalence of the pandemic of influenza-pneumonia. Statistical data thus far compiled show wide variation of mortality in different sections of the country and in different army camps. Both soldiers and civilians suffered from a common disease, whereas the high death rates due to diseases in the armies assembled in former wars were occasioned by diseases more peculiar to military life. Diseases such as typhoid, before the employment of modern preventive methods, would rage in the army because of the peculiar facilities for acquiring it, whereas it would continue to affect only the average number in civil life. Now it is more rare in the army than in civil life, due to efficient preventive measures.

However the policy in question might be construed in reference to diseases that are more peculiarly prevalent in army camps than in civil life, so that a death from such a disease might be regarded as a death in consequence of such service, we are of the opinion that on the record in this case we cannot say that the death of the insured was in consequence of such service. It is our opinion, further, that under the language of the provision in question each individual case is to be determined upon its own facts. For the foregoing reasons the judgment appealed from is affirmed.

NUESSLE, BRONSON, and ROBINSON, JJ., concur.

GRACE, J. I concur in the result.

Mr. Chief Justice CHRISTIANSON, being disqualified, did not participate; Hon. W. L. NUESSLE, Judge of the Fourth Judicial District, sitting in his stead.

RE L. N. TORSON.

(183 N. W. 1016.)

Attorney and client — misappropriation of funds — disbarment.

In this proceeding it is *held* that the findings of the referee to the effect that the accused attorney misappropriated funds which he had collected for, and which belonged to, his client are fully sustained by the evidence; and it is ordered that he be disbarred.

Opinion filed December 14, 1920.

Original proceeding in the supreme court for the disbarment of L. N. Torson.

John E. Greene, on behalf of the State Bar Board, for the prosecution.

No appearance for the respondent.

PER CURIAM. This is a disbarment proceeding. A copy of the charges was served personally upon the respondent, and he was afforded the usual time to prepare and file an answer. He made default. Thereafter, this court appointed J. A. Coffey, one of the judges of the fourth judicial district, referee to take the evidence and make findings and conclusions. The matter was thereupon set for hearing before said referee, and the respondent notified of the time and place of such hearing. He again made default.

The charges were that in February, 1914, the respondent, in a certain action wherein he acted as attorney for the plaintiff, collected the judgment in the case in full, satisfied the judgment, and appropriated all of the proceeds to his own use; also, that in December, 1911, he collected the sum of $1,112 on a certain note secured by real estate mortgage, which had been delivered to him for collection; that he paid to the owner of the note only $566.65, and appropriated the balance of the moneys collected to his own use. The referee found that these charges were true, and concluded that the respondent ought to be disbarred.

In our opinion the evidence is susceptible of only one construction, namely, that placed upon it by the referee. This being so, the conclusion drawn by the referee naturally follows. Comp. Laws 1913, § 800. Hence, it is the order and judgment of this court that said L. N. Torson be and he hereby is disbarred from practising law in the courts of this state.

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

BIRDZELL, J., disqualified, did not participate.

ELIZABETH FENDRICH, Sometimes Known as Beartes or Beta Fendrich, and Anna Tuhy, Appellants, v. BUFFALO PITTS COMPANY, a Corporation, A. Y. More, and John More, Copartners as More Brothers, Respondents.

(180 N. W. 707.)

Appeal and error — stipulations — appellant held not entitled to question execution of mortgage or proof as to power of attorney in suit to determine adverse claims.

In an action to determine adverse claims where the answering defendant has asserted the lien of its mortgage and demanded foreclosure thereof, and where, pursuant to stipulation, an abstract of title has been introduced showing such mortgage and also proof of the indebtedness for which the mortgage is security, and where the possession of the power of attorney has not been alleged in the answer, it is *held*, upon appeal, for reasons stated in the opinion, that the appellant is in no position to question the due execution of the mortgage nor the absence of pleading or proof concerning the possession of a power of attorney.

Opinion filed December 16, 1920.

Action in district court, Dunn county, *Crawford*, J.

From a judgment in favor of the answering defendant, the plaintiff has appealed.

Affirmed.

J. P. Cain, for respondents.

A mortgage properly acknowledge may be introduced in evidence and read without further proof, and, when so introduced and read, it makes a prima facie case, although its execution is denied by a verified answer. Mortgage Co. v. Hegwer (Kan.) 51 Pac. 915; Murray v. Foskett (Minn.) 130 N. W. 14; Tucker v. Helgren, 102 Minn. 382, 113 N. W. 912; Brockman v. Rees, 173 Pac. 525; Bliss v. Waterburg (S. D.) 131 N. W. 721; Akins v. Adams, 256 Mo. 2, 164 S. W. 603.

Appellants cannot abandon the theory upon which they tried the case below and adopt a new and different theory on appeal. Ugland v. Bank, 23 N. D. 536; R. v. R. Com. 31 N. D. 597; Crisp v. Bank, 32 N. D. 263; Hocksprung v. Young, 27 N. D. 322, supra.

M. L. McBride and *T. F. Murtha,* for respondents.

Bronson, J. This is an action to determine adverse claims concerning 160 acres of land. The answering defendant asserts the lien of a mortgage, and prays for its foreclosure. At the trial the defendant offered in evidence certain notes secured by the mortgage, bearing the signature of Beartes Fendrich, one of the plaintiffs, and the abstract of title covering the land. It was stipulated between the parties that such abstract might be considered as evidence in lieu of the record excepting a certain deed mentioned therein. A witness for one of the defendants also identified the signature of Beartes Fendrich, as her signature upon the notes. The trial court, upon findings, rendered judgment decreeing a foreclosure of the mortgage.

From the record it appears that subsequent to this judgment, dated May 13, 1920, the plaintiffs filed their reply which was acknowledged on August 12, 1920.

The plaintiff complains, upon this appeal, that the mortgagee failed to prove in the record the due execution of the notes and mortgage and failed to allege and prove the possession of a power of attorney by the attorney for the mortgagee. These contentions are wholly without merit.

Under the stipulations made, the statutory presumption of the due execution of the mortgage obtains. Comp. Laws 1913, § 5597. Concerning the execution of the notes, proof was produced. No objection was made by demurrer or otherwise concerning the failure of the mort-

gagee to allege the possession of the power of attorney by its attorney. On this record the plaintiffs are not in a position to make such objection even though under § 8075, Comp. Laws 1913, it should be held (which we do not determine), that the possession of such power of attorney should be alleged in an answer demanding a foreclosure, in an action to determine adverse claims. The judgment is affirmed with costs to the respondent.

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

R. A. WARREN, L. T. Berdahl and Knute Nelson, Plaintiffs and Respondents, v. ALBERT S. OLSON, Citizens State Bank of St. Peter, Minnesota, a Corporation and W. D. Lyter, Defendants, ALBERT S. OLSON, and Citizens State Bank of St. Peter, Minnesota, Appellants.

(180 N. W. 529.)

Replevin — defendant held estopped from denying that property was in his possession.

1. Where a defendant in an action in claim and delivery, to prevent the delivery of the property to the plaintiff and to obtain a delivery of the property to himself, gives a forthcoming or redelivery bond under the provisions of § 7521, Comp. Laws 1913, he is estopped, on the trial, from denying that the property was in his possession at the commencement of the action.

Statutes — presumed to operate prospectively only — no part of Civil Code retroactive unless so declared.

2. Statutes are presumed to operate prospectively only. No part of the Code of Civil Procedure of this state "is retroactive unless expressly so declared."

Mortgages — statutes relating to right to receive rent from tenant in possession held not applicable to certificate of foreclosure.

3. For reasons stated in the opinion, it is *held* that chapter 132, Laws 1919, which amends § 7762, Comp. Laws 1913, and purports to alter the rule as to who is entitled to receive rent from the tenant in possession, during the redemption period, of land, which has been sold at foreclosure sale, has no application to certificates of foreclosure sale executed prior to July 1, 1919.

Mortgages — purchaser at foreclosure held to have rights of owner as to grain grown by tenant in possession.

4. Section 7762, Comp. Laws 1913, provides: "The purchaser from the time of the sale until a redemption . . . is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof." Following, Whithed v. St. Anthony & D. Elevator Co. 9 N. D. 224, it is *held* under this section, that where farm lands which are being operated under a contract with the owner which reserves the title and possession of a fixed portion of the grain grown thereon in the owner, as compensation for its use, are sold at foreclosure sale, the purchaser thereof at such sale is entitled to such share as falls due during such redemption period and has the same rights thereto as the owner of the land had, and may invoke the same remedies to enforce them.

Judgment modified.

5. For reasons stated in the opinion, the provision in the judgment allowing a money judgment in a certain sum in case a return of the property cannot be had is modified so as to reduce the amount of such judgment in the sum of $132.50.

Opinion filed November 13, 1920. Rehearing denied December 17, 1920.

From a judgment of the district court of Pierce County, *Buttz*, J., defendants Olson and Citizens State Bank of St. Peter, appeal.

Modified and affirmed.

Flynn, Traynor & Traynor, for appellants.

The owner of the land and tenant are really tenants in common of the crop. This, notwithstanding any provision in the lease vesting the title and ownership of the crop in the landlord until division. That clause being held, when construed in connection with all other provisions of such contracts, as being one merely for security. Mpls. Iron Store Co. v. Branum, 36 N. D. 355; 38 Cyc. 83.

A replevin cannot lie for an undivided interest in personal property. McDonald v. Bailey (Okla.) 107 Pac. 523, 37 L.R.A.(N.S.) 267; Thomas v. Armstrong (Okla.) 151 Pac. 689, L.R.A.1916B, 1182 and note.

A purchaser at a mortgage foreclosure sale cannot, before he obtains possession of the premises, maintain replevin for crops grown thereon by the mortgagor. Lyons v. Adel (S. D.) 164 N. W. 56.

Harold B. Nelson, for respondents.

Amendments may be made to pleadings even though the defendant be in default. Boudur v. LeBours, 7 Atl. 814.

The court may amend, either before or after judgment, when the amendment does not substantially change the claim or defense, has been declared by our supreme court to be the law upon a number of occasions. Finlayson v. Peterson, 11 N. D. 45; Keer v. Grand Forks, 15 N. D. 294.

So long as the general form of the action remains the same, any amendment germane to the original pleading is allowable. 31 Cyc. 412, citing the case of Post v. Campbell, 85 N. W. 1032.

Chapter 132 of the Sessions Laws of 1919, giving to the landlord the right to the rents and profits, would not be controlling here. Hooker v. Burr, 194 U. S. 415; Barntz v. Beverly, 163 U. S. 118; Bronson v. Kenzie, 1 How. (U. S.) 311; Howard v. Bugbee, 24 How. (U. S.) 461; Hollister v. Donahue, 78 N. W. 959; Whitehead v. St. Anthony & D. Elev. Co. 9 N. D. 224.

CHRISTIANSON, Ch. J. The controversy before us involves the ownership or right of possession of certain grain, which was grown during the redemption period on certain lands, purchased by the plaintiffs at a mortgage foreclosure sale.

The case arose upon the following facts:

The defendant, Albert S. Olson, owned the W. ½ section 26, township 157, range 72, in Pierce county, in this state. On November 22, 1915 he made a written contract or lease with the defendant W. D. Lyter, under the terms of which Lyter agreed to farm the land during the following farming season, to-wit: for a term commencing on the date of the contract and ending October 1, 1916. The owner of the land (Olson) agreed to furnish the seed. Each of the parties agreed to pay one half of the twine and threshing bills. Lyter agreed to deliver to the landowner (Olson) free of all charges, at Faro or Rugby, one half of all grain raised. Lyter was to have free use of pasture on the land. No new lease or contract was made, but the lands were cropped each year under the arrangement prescribed in the written contract. This action involves the crop grown in 1919.

It appears that Olson mortgaged the premises. Default was made in the conditions of the mortgage, the premises were sold to the above-

named plaintiffs at mortgage foreclosure sale for a consideration in excess of $5,000, and certificate of such sale executed and delivered to the purchasers, on May 23, 1919. Such certificate was recorded in the office of the register of deeds on June 6, 1919. On June 17, 1919, Olson executed and delivered to the defendant Citizens State Bank of St. Peter, a chattel mortgage on all his right and title to crops then growing on said land to secure a note for $5,500. It was admitted upon the trial that Olson paid for the seed grain from which the crops were grown out of the moneys which he borrowed from the defendant bank; and that such indebtedness was included in the $5,500 note.

The plaintiffs, basing their right to recover upon the certificate of mortgage sale, brought an action in claim and delivery to recover the landlord's share of the crop. The defendant bank, answered and asserted that it had a special property in the grain by virtue of its mortgage. This action was commenced September 3, 1919. The case was tried to a jury, but at the close of all the testimony both parties moved for directed verdicts. The court, after discharging the jury, made findings of fact and conclusions in favor of the plaintiffs. The defendants Olson and Citizens State Bank of St. Peter have appealed from the judgment.

The first assignments of error relate to procedural matters.

It appears that the only defendant who appeared and answered was the Citizens State Bank of St. Peter. The defendant, Olson, although served, defaulted. Upon the trial the attorneys who appeared for the bank prepared an amended answer which purported to be an answer both in behalf of the bank and the defendant Olson. The court refused to permit the answer to be interposed in behalf of Olson. Such refusal is assigned as error. Inasmuch as the assignment is not supported by argument, it should be deemed waived. But if considered, the assignment must be held to be without merit. The defendant Olson was clearly in default. No application to set aside the default was made, and no showing submitted why he should be relieved from his neglect. Clearly, there is no basis for holding that the trial court abused its discretion in making the ruling which it did. The defendant Olson is therefore virtually eliminated from the case, so far as the remaining questions presented on this appeal are concerned.

It appears that on September 3, 1919, the defendant W. D. Lyter,

made application to the district court of Pierce county under § 7594, Comp. Laws 1913, to be permitted to deposit, for the benefit of the rightful claimant, the landowner's share of the 1919 crop, with some suitable depository to be designated by the court. The application recited that "said Albert S. Olson claims to be entitled thereto as owner of the land under and by virtue of said contract; that the said Citizens Bank of St. Peter claims the same by virtue of a chattel mortgage thereon purporting to have been executed and delivered to it by the said Albert S. Olson and that the said R. A. Warren and L. T. Berdahl claim the same by virtue of a sheriff's certificate issued to them upon a mortgage foreclosure sale." The application of Lyter was set for hearing on September 12, 1919. On September 3, 1919, the plaintiffs commenced this action. On September 4, 1919, the sheriff took the grain in controversy into his possession.

Appellants contend that the effect of Lyter's application was to place the grain in *custodia legis;* and that, hence, it was not subject to claim and delivery proceedings. We are of the opinion that the contention is without merit. It will be noted that Lyter had merely noticed for hearing his application for leave to make deposit. The matter had not come on for hearing or been determined. And upon the trial of this action it was specifically admitted that no deposit was made. The record shows that the following colloquy took place between appellants' counsel and the trial judge:

The Court: "It is agreed, is it, that no deposit was ever made of any property under order of this court?"

Defendants' Counsel: "Yes, I think that is true."

The Court: "And there was nothing more done about the question of the deposit?"

Defendants' Counsel: "No deposit was ever made, I know that."

Appellants further contend that the grain was not in the possession of either Olson or the bank at the time the action was commenced, or at any time prior to the seizure thereof by the sheriff, and hence that an action in claim and delivery will not lie.

In our opinion appellants are precluded from raising any such question. The sheriff seized the grain on controversy on September 4, 1919. Shortly thereafter the appellant bank gave a redelivery bond

under § 7521, Comp. Laws 1913. The grain was delivered to the bank, by virtue of such bond, and it sold the grain and received the proceeds thereof. While the redelivery bond has not been transmitted to this court, we must assume that its provisions were no more favorable to the defendant than such bonds ordinarily are. We must assume rather that the bond was in the usual form, and contained the usual recitals and conditions. Such bonds usually contain a recital to the effect that the property rebonded has been taken from the possession of the defendant by the sheriff. The rule seems well settled that "one who gives a forthcoming bond in an action of claim and delivery is estopped from denying that the property was in his possession at the commencement of the action. In such a case the plaintiff has a right to rely on the plain and distinct admission that the officer has taken the property described in the plaintiff's affidavit and requisition, and he need take no further steps towards proving the point as to the possession by the defendant of the very property described in the requisition." 23 R. C. L. p. 899; see also Martin v. Gilbert, 119 N. Y. 298, 16 Am. St. Rep. 823, 23 N. E. 813, 24 N. E. 460; Buesch v. Waggner, 12 Colo. 534, 13 Am. St. Rep. 254, 21 Pac. 706.

It should, also be remembered that in this case the defendant Citizens' State Bank of St. Peter, Minnesota, in its answer asserted that it was entitled to the possession of the grain and prayed that the court adjudge that it was entitled to such possession. In so far as such demand is concerned, the defendant must be deemed the actor. 24 Am. & Eng. Enc. Law, 484; see also subd. 3, § 7635, Comp. Laws 1913; 18 Enc. Pl. & Pr. p. 605.

This brings us to the merits of the controversy.

The rights of the plaintiffs are predicated upon § 7762, Comp. Laws 1913, which provides: "The purchaser from the time of the sale until a redemption . . . is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof."

Appellants contend that this statute is no longer in effect, and call attention to the fact that it was amended by chapter 132, Laws 1919, to read as follows: "The debtor under an execution or foreclosure sale of his property shall be entitled to the possession, rents, use, and benefit of the property sold from the date of such sale until the expiration of

the period of redemption." It is contended that the rights of the parties are governed by the statute as amended. In our opinion this contention is wholly without merit. The certificate of sale under which plaintiffs' claim was made May 23, 1919, upon the foreclosure of a mortgage made some years previously. At the time the mortgage was executed and the sale made § 7762, supra, as quoted above was in full force and effect. The amended statute did not become operative until July 1, 1919. It does not purport to be retroactive. The presumption is that the legislature intended that it should operate prospectively only. Comp. Laws 1913, § 7320. We have no hesitancy in holding that the rights of the parties are controlled by § 7762, Comp. Laws 1913, and not by chapter 132, Laws 1919. See E. J. Lander & Co. v. Deemy, post, 273, 176 N. W. 922.

Appellants contend, however, that plaintiffs have established no cause of action under § 7762. They say that there was no rent coming from a tenant in possession; that the share of the crop which Lyter agreed to deliver to the landowner did not represent rent, and that plaintiffs were entitled to recover only the value of the use and occupation of the land.

We are of the opinion that these contentions are all answered by the decision of this court in Whithed v. St. Anthony & D. Elevator Co. 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238. The written agreement in this case is substantially like that in the Whithed Case. In fact there is no contention that there is any difference except that in this case the landowner furnished the seed. In all other respects the written agreement in this case is substantially the same as the agreement in the Whithed Case. The stipulations relating to reciprocal obligations, reservation of title in the landowner, and against subletting are the same. In this contract, as in the contract in the Whithed Case, there is a provision that the tenant will "commit no waste, or damage on said real estate and to suffer none to be done." The contract in this case also provides that in case of a sale of the land before Lyter begins seeding the same the contract shall be null and void and "*possession* of said premises immediately surrendered by said first party." We are entirely satisfied that it was the intention of the parties that Lyter should have the use and posses-

sion of, and hence by virtue of the contract acquired an interest in, the land; and that the share of the crop which he agreed to deliver to the owner thereof was in fact the compensation stipulated to be paid for the use and occupation of the land.

In the Whithed Case this court said: "The statutory right to rent during the redemption period does not limit the purchaser to the recovery of money rent. The word 'rent' is comprehensive, and embraces 'the compensation, either in money, provisions, chattels, or labor received by the owner of soil from the occupant thereof.' 3 Kent, Com. 460; 2 Stephens, Com. 23; Jackson & G. Land. & T. § 38. It is not necessary to technically classify the contract under which the land in question was farmed during the period of redemption. It is sufficient for the purposes of this case that it is the contract which fixed the compensation of the owner of the land for its use, and that the compensation so fixed is the wheat here involved. . . . We therefore hold that the plaintiff by his purchase at the foreclosure sale was substituted to the rights which the owner of the land had in the contract under which it was operated during the period of redemption. . . .

"I do not think that the fact that the owner of the land was in this case to hold the title to the crop destroys the contract as a lease. Rather, to my mind, it has the opposite effect. The express provision was inserted because the parties understood that if it was not inserted the title would be in the lessee, and, as stated *it was inserted as security, and to that extent the provision is in the nature of a mortgage.* But it is certain that the owner intended by the contract to dispossess himself and place the tenant in possession, and that, too, not merely for the time necessary to produce a crop, but for a year certain; and that during the entire term, if the tenant performed his covenants, any interference with his possession by the owner would have been a trespass. Among the results that follow at common law if the contract be considered as a lease is the fact that a conveyance of the reversion carries with it all rents under the lease which have not already become due, and ripened into a right of action for money in the hands of the lessor. . . .

Section 5538, Rev. Codes (§ 7751, Comp. Laws 1913) declares, 'Upon a sale of real property the purchaser is substituted to and ac-

quires all the right, title, interest, and claim of the judgment debtor thereto,' subject, as has been said, to the debtor's right of redemption, and his bare right of possession during the redemption period. With this limitation, every right, title, interest, and claim of the debtor is sold, and passes to the purchaser, in all respects, to the same extent that it would pass by a voluntary conveyance. *All title to crops that was by the lease reserved in the landlord is transferred by the sale to the purchaser, and all the rights of the landlord under his lease to enforce the payment of rent inure to the benefit of the purchaser.* And upon what is the underlying principle that gives to the purchaser all rents not yet due, however much they may be earned, based? It is simply that they constitute a part of the estate that is bought and paid for. They enhance the value of the estate just as certainly as would a growing crop, and just as certainly they form a part of that for which the consideration is paid."

The language quoted is directly applicable here.

Appellants contend, however, that the rule announced in the Whithed Case was changed by the recent decision of this court in Minneapolis Iron Store Co. v. Branum, 36 N. D. 355, L.R.A.1917E 298, 162 N. W. 543. An examination of the two decisions will, we think, disclose that the contention is wholly unfounded. The controlling questions in the Whithed Case were whether the contract was in legal effect a lease; whether the party farming the land thereunder was a tenant in possession; and whether the purchaser at a foreclosure sale might maintain an action in claim and delivery for the share of the crop which the contract stipulated should belong to the landowner. The question presented in the Branum Case was whether one in possession of, and farming, land under a farm contract, reserving title to the crops in the landowner, until the grain was threshed and divided, had a mortgagable interest in the growing crops. This court held that such contract was in legal effect a lease, and that the tenant had an equitable interest in such growing crops which he might mortgage. Instead of detracting from the effect of the Whithed Case, the decision in the Branum Case seems rather to lend support to the rule announced therein, in so far as the questions presented in this case are concerned. Under the Branum Case, Lyter was clearly a tenant in possession of the premises involved in this case. It is also interesting

to note that the Whithed Case in so many words stated that the provision reserving title in the landowner "was inserted as security, and to that extent . . . is in the nature of a mortgage." This, in effect, was the holding in the Branum Case.

The appellants contend, however, that in any event the judgment should be reduced in a sum equal to the value of the seed furnished and the amount of the twine bill and threshing bill paid. In so far, as the value of the seed is concerned we do not believe the contention is tenable. Such seed was furnished before the mortgage foreclosure sale was made; and at the time the sale was made the crops in question were then growing on the land and the purchaser at the sale was justified in believing that he would receive from the tenant in possession of the land the amount of the landowner's share; that is, the amount fixed for rent. Whithed v. St. Anthony & D. Elevator Co. supra. They were, however, charged with notice of, and bound by, the provisions of the contract. They could demand as much from Lyter as Olson could have demanded, but they could demand no more. Whithed v. St. Anthony & D. Elevator Co. 9 N. D. 224, 229, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238. Under the terms of the contract the landowner was required to pay one half of the twine bill and one half of the total threshing bill. In other words, the landowner was required to pay for the twine necessary to bind his share of the grain and pay for the threshing of such share. The purchasers knew at the time they purchased, that these items of expense would be chargeable against their share of the grain. And while it is true that a set-off is not allowable in an action of replevin in the ordinary sense in which it is allowable in other forms of action, still damages growing out of the same subject-matter may be considered in reducing the damages claimed or allowable in the replevin action; "and courts are inclined to give the action such flexibility as to adjust all equities arising between the parties in such action." Cobbey, Replevin, 2d ed. § 794. See also Stavens v. National Elevator Co. 36 N. D. 9, 161 N. W. 558.

It is admitted that the appellant paid the twine and threshing bills or caused them to be paid. It does not appear definitely to whom or when they were paid. But manifestly the threshing bill could not have been paid until at the time, or after, the threshing was done;

and the evidence shows that the sheriff was on hand and seized the grain at the time it was threshed. The only reasonable inference seems to be that the twine bill and threshing bill were both incurred and paid long after the plaintiffs had purchased the land at the foreclosure sale. Under our laws a thresher may file a lien at any time within thirty days after the completion of the threshing. Comp. Laws 1913, § 6855. The lien, however, exists from the commencement of the threshing, and a person who purchases the grain within the thirty-day period takes it subject to the lien, although the statement was not filed at the time of the purchase. Mitchell v. Monarch Elevator Co. 15 N. D. 495, 107 N. W. 1085, 11 Ann. Cas. 1001.

There is no question as to the amounts of the twine and the threshing bills. The amounts were stipulated. Nor is there any question but that these bills constituted valid charges against the share of the grain claimed by the plaintiffs. If these bills are deemed extinguished the plaintiffs are the beneficiaries of the payments to the full amount of the bills. If the bills are deemed to be existing, the appellant should be deemed subrogated to the rights of the original owners of the bills. If plaintiffs receive the grain it is only just that they should be required to pay these claims. The judgment against the appellants while alternative in form is in effect a money judgment, for it is admitted that the appellant bank sold the grain and received payment therefor. In our opinion the judgment should be reduced in the sum of $132.50, the aggregate of the twine and threshing bills; and as so reduced should be affirmed. That will be the order and judgment of this court. Neither party will recover costs on this appeal.

BIRDZELL and BRONSON, JJ., concur.

ROBINSON, J. (dissenting). I dissent on the ground that a purchaser of land at foreclosure sale gets only the land that he purchases. He gets only the land after the year of redemption. It is true that under an execution sale it is provided by statute that the purchaser from the time of the sale until a redemption is entitled to receive from the tenant in possession the rents of the property sold for the value of the use and occupancy. Comp. Laws, § 7762. But that section expressly applies to sales on execution and it does not apply to sales under a mortgage.

It is true that in 1892 our Justice Corliss wrote a decision in which the above statute was stretched and applied to foreclosure sales, and since then the courts have been following that erroneous decision and piling error upon error. The decision is based on some old California cases and on the assumption that a mortgagee by foreclosure waives his mortgage lien and secures a lien upon the premises by a judgment. That is not true. There is no waiver of a mortgage lien, either by a judgment of foreclosure or by a sale of the premises. The lien is not waived until it is satisfied by actual payment. The courts have always shown too much of a tendency to give to him that hath and to take from him that hath not. No person should be devested of his property unless by his own act or by a plain statute.

GRACE, J. (dissenting). As I view this case, the purchasers at the foreclosure sale during the year of redemption were not entitled to any rents nor profits. After the expiration of the year of redemption, and no redemption having been made, they would be entitled to the land.

During the year allowed for redemption, Olson was the owner of the land and entitled to crop the same, and such crops were his, unless he voluntarily mortgaged or disposed of them. He had a right to give a chattel mortgage on the crops thereon to the Citizens' State Bank of St. Peter; and, as we view the matter, that chattel mortgage was a valid and subsisting lien against the crops.

As we understand the majority opinion, it contains nothing which conflicts with the rule laid down in the case of Minneapolis Iron Store Co. v. Branum, 36 N. D. 355, L.R.A.1917E, 298, 162 N. W. 543, where, in substance, it was held that one in possession under a farm contract, reserving title to the crops in the landowner, until the grain was threshed and divided, had a mortgagable interest in the growing crops, and that he and the landowner were tenants in common, and that the tenant had an equitable interest in such growing crops, which he might mortgage.

The majority opinion recognizes the correctness of the rule as stated in that case, and the matter needs no further discussion.

E. R. KEPLINGER, Respondent, v. HANS PETERSON, Appellant.

(180 N. W. 803.)

Replevin — evidence sustaining finding of actual division of wheat.

This is a replevin suit to recover 140 bushels of wheat. The jury found for the plaintiff, found that he owned the wheat, 135 bushels, and was entitled to the immediate possession of it and that its value was $325.55. The defendant has had a fair trial, and the verdict is correct and well sustained by the evidence.

Opinion filed December 11, 1920. Rehearing denied December 17, 1920.

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

Affirmed.

Paul Campbell, for appellant.

Plaintiff not being owner of, nor entitled to possession, cannot maintain this action. 23 R. C. L. 14, 15; 34 Cyc. 1387–1390; Esshom v. Watertown Hotel Co. (S. D.) 63 N. W. 229; Angell v. Egger, 6 N. D. 398; Kemmeth v. Dietrich (S. D.) 119 N. W. 986; Haveron v. Anderson, 3 N. D. 542; Truman v. Dakota Trust Co. 29 N. D. 456; Smythe v. Mari, 34 N. D. 246, and cases cited; Keerbow v. Young (S. D.) 8 L.R.A.(N.S.) 316; Donovan v. Block, 17 S. D. 406.

An offset is not payment of tender until agreed to as such by the creditor, nor it is operative as payment to vest title or right to possession. 21 R. C. L. pp. 45, 83; 30 Cyc. 1187; 24 Cyc. 1191.

Division requires separation coupled with delivery of possession and intent to divide and deliver and pass title and ownership, and right to possession. Simmons v. McConville, 19 N. D. 793; Angell v. Egger, 6 N. D. 398; 26 L.R.A.(N.S.) 30 note; Hawk v. Konouski, 10 N. D. 41; State Bank v. Hurley, 33 N. D. 272; 17 C. J. 382; 8 R. C. L. p. 376; Herman v. Minnekota, 27 N. D. 240; Lallie v. Elevator Co. (S. D.) 127 N. W. 558.

Until division, the farmer or tenant has no ownership, title, or right to possession sufficient for replevin or claim and delivery. Angell v. Egger, 6 N. D. 398; Hawk v. Konouski, 10 N. D. 41; 17 C. J.

382; 8 R. C. L. p. 376, ¶ 19; Simmons v. McConville, 19 N. D. 793; Wadsworth v. Owens, 21 N. D. 255; 24 Cyc. 1472.

Usher L. Burdick and *Ivan V. Metzger,* for respondent.

ROBINSON, J. This is an action in claim and delivery. The complaint avers that in March, 1918, defendant unlawfully took from the possession of the plaintiff, carried away, and converted to his own use 140 bushels of wheat, the property of the plaintiff, of the value of $2.30 a bushel. The defendant rebonded and retained the wheat. The verdict is: "We, the jury, find for the plaintiff, and find that he is entitled to the immediate possession of 135 bushels of wheat, and that the value of the wheat at the time and place of taking by the defendant, and his damages in securing possession of the property, is $325.55." The judgment is that the defendant immediately deliver to the plaintiff 135 bushels of wheat of the grade dark northern, or pay him $325.55, with interest and costs. The pleadings and proof show that the wheat was produced on a tract of land which the plaintiff farmed during the season of 1918 under an agreement with the defendant, and that at the time of the threshing the wheat grown on the land was divided between the plaintiff and the defendant. The 135 bushels was a part of plaintiff's share, and to secure the plowing of 80 acres, more or less, it was put into a bin on the land. In the autumn of 1918 the plaintiff was not able to do the plowing because of an unusual early winter, but he did it in the spring of 1919, and within the time agreed and before the trial of the action. The pleadings present several other matters which are in no way material to this case, because the specific verdict and the evidence show that the plaintiff owned 135 bushels of wheat; that defendant wrongfully took the same from possession of the plaintiff; and that the wheat was worth the sum stated in the verdict. The defendant was given the right to return the wheat instead of paying its value, and he did not return the wheat or offer to return it. Though the pleadings and the evidence contain a mass of immaterial matter, the specific verdict shows that the jury considered only the real issue,—the right of the plaintiff to recover the wheat or its value.

Affirmed.

GRACE and BIRDZELL, JJ., concur.

BRONSON, J. (specially concurring). I concur in the affirmance of the judgment. The defendant principally contends that the record does not disclose an actual legal division of the grain which is the subject-matter of this action in claim and delivery, and, further, that under the croppers' contract existing between the parties and covering this grain, the defendant retained the title and the right to the possession of this grain, until full performance of the conditions therein imposed on the part of the plaintiff, to be performed. Upon an examination of this record, we are fully satisfied that the jury were warranted in finding that there was an actual division of this grain made between the parties about the time of the threshing, and a release thereby, on the part of the defendant, of any title or right of possession that he then had under the contract. The jury's verdict accordingly is determinative of defendant's claims. It is deemed unnecessary to consider in detail the numerous specifications of error made by the defendant. It is sufficient to state upon this record that the court fairly instructed the jury, and did not err prejudicially in the admission of evidence. The judgment as rendered is proper and sustained by evidence in the record.

CHRISTIANSON, Ch. J. (dissenting). I dissent. As stated in the majority opinion, the grain involved in this controversy was produced in the year 1918. It was raised on certain land belonging to the defendant. Plaintiff farmed this land under a contract, which provided, *inter alia,* "until all the covenants and agreements to be performed by the party of the first part (plaintiff) shall have been fulfilled and . . . division made the title and possession of all crops . . . and products raised, grown, or produced on said premises shall be and remain in the party of the second part (the defendant)." It is true, as stated in the majority opinion, that at the time the grain was threshed it was in fact divided by the "separator-man" into two parts, one equal to that which belonged to the defendant, and the other equal to that which would belong to the plaintiff, and which he would be

entitled to receive, upon the performance by him of what he had agreed to perform under the contract. It is undisputed that at the time the grain was threshed plaintiff had not done certain things which he was required to do under the contract. For instance, he had not plowed a certain number of acres which he was required to plow back. At the time the grain was threshed, 250 bushels of plaintiff's share of the wheat was placed in a bin on the land where it was grown. Plaintiff says that it was placed there with the understanding that it was to be held as security for the plowing which plaintiff was obligated to do by the terms of the contract. It is therefore contended, by plaintiff's counsel, that the grain was in fact and in law divided under the terms of the contract, and that title vested in each of the parties to their respective shares; and that the 250 bushels of wheat could be held as security for the plowing only, and not for the performance of any of the other obligations under the contract.

It is true, as stated in the majority opinion, the evidence does show that at the time the grain was threshed, the separator-man divided the grain into two equal parts. The defendants testified that nothing was said at the time in regard to division. There is no basis in the evidence, however, for the claim that defendant intended to turn over to plaintiff all of the grain which the contract stipulated should eventually belong to the plaintiff, or that defendant intended to waive his rights to retain such grain as security for the performance by the defendant of those acts which he had agreed to perform under the contract. On the contrary defendant testified that he never consented to the removal by the plaintiff of such grain. And the evidence shows that, prior to the threshing, there was an understanding between the parties upon this matter. This is not disputed.

Plaintiff testified:

Q. Did you have a talk with him (defendant) there about what was to be done with this wheat when it was threshed?

A. Yes, sir.

Q. Did he ask you to put it in his shack on this place? In his building there, this wheat of yours?

A. He did before we separated. . . .

Q. Did he tell you that he wanted it held out until you had performed the contract and paid him what you owed him?

A. I already knew he would hold it. . . . I asked him if it would be satisfactory with him if I built a bin by the side of the separator and run my share or at least 250 bushels of my share of the wheat into that bin and leave it on his place until I finished the plowing. . . .

Q. And it was understood that he was to hold this grain until you had paid up and performed the contract on your part, was it?

A. It was understood in the contract that I was to leave 250 bushels of wheat.

Q. It was understood at the time that you had this grain poured into your bin and the grain poured into his wagon that that was what was to be done with the part run into your bin, held by him until you performed the plowing specified under your contract and did what you were to do under it?

A. It was understood that that grain was to stand as security for my fulfilment of the contract. . . .

Q. In other words, he was holding it there to fulfil the contract.

A. Certainly. . . . He told me at all times that this grain was to remain in his hands until the fulfilment of the contract.

Q. And he never told you that you could take it or have it at all?

A. Certainly not; I had no desire to take it.

The court instructed the jury: "I also charge you that when grain is separated by the parties or in their presence, and no agreement is made that such agreement shall constitute a division, then such action constitutes a division."

I do not believe that it follows as a matter of law that the mere separation of grain into parts at the time of the threshing constitutes a division thereof under the terms of a farm contract like that under consideration here. Whether there was or was not such a division would depend on what the parties to the contract intended. Manifestly it is more convenient to make physical division of the grain at the time it is threshed, but there is no reason why the grain might not still remain subject to the terms of the contract. That seems to have been the case here. In view of the evidence, which I have quoted above, I am of the opinion that the instruction quoted was prejudicial to the defendant.

In his complaint the plaintiff alleged that he had been damaged,

among other things, in the sum of $75, attorney's fees expended in this action. And upon the trial he was permitted, over objection, to introduce evidence to the effect that he had agreed to pay his attorney $75 for bringing the action. In its instructions the trial court informed the jury that if plaintiff was entitled to recover at all, he might "also recover his necessary expenses in recovering the property." The jury was therefore permitted to allow the plaintiff as part of his damages in this case the attorney fees incurred or charged against him for bringing this action. In my opinion such attorney fees were not a proper element of damages in this case, and it was error to admit evidence relating thereto, and to permit the jury to consider it.

It seems, also, that even under plaintiff's version of the controversy, the action was instituted prematurely. Plaintiff testified that he did not finish the plowing until May 6, 1919. This action was commenced April 12, 1919.

The various propositions to which I have alluded were raised in the trial court. As already indicated, I am of the opinion that the trial court erred, to the prejudice of the defendant, and that the judgment should be reversed and the case remanded for further procedings according to law.

CHARLES A. VERRET, Respondent, v. STATE BANK OF ROLLA, a Banking Corporation of Rolla, North Dakota, Appellant.

(180 N. W. 714.)

Banks and banking — evidence held not to show negligence of forwarding bank or its correspondents in sending check for collection.

In this country there are two different theories as to the liability of banks which undertake the collection of commercial papers at a distance. One has become known as the "New York rule," and the other as the "Massachusetts rule." Under the so-called "New York rule," the bank which receives such paper in the first instance is responsible for the conduct of its correspondents and subagents as fully as though it had performed the entire service itself. Under the "Massachusetts rule" the bank which receives out-of-town paper for collection is responsible only for its own negligence, and not for the negligence of its correspondents or subagents.

In the instant case it is *held* that the evidence does not justify a recovery under either rule.

Opinion filed November 16, 1920. Rehearing denied December 21, 1920.

From a judgment of the District Court of Rolette County, *Buttz*, J., defendant appeals.

Reversed.

Fred E. Harris, for appellant.

The plaintiff has certainly not shown himself to have been injured in any way in the transaction or suffered any damage or loss on account of the same. The plaintiff, therefore, has no standing in court under the undisputed testimony in this case. Balcombe v. Northrup, 9 Minn. 172; Morton v. Stone (Minn.) 39 N. W. 496; Morton v. Hagerman (Minn.) 39 N. W. 497; Steiner Bros. v. Clisby (Ala.) 15 So. 612.

The undisputed testimony shows that at the time the check was drawn the maker had no funds on hand in the Rolette County Bank to meet it; under such circumstances presentment of the check is excused. 5 Cyc. 533; 5 R. C. L. 504.

It must be presumed it was intended by the customer of the bank that the collection would be made in the ordinary and usual manner, and in accordance with the general usage and custom prevailing among banks. If the collection is made in accordance therewith, the bank has performed its undertaking. Farmers Bank & T. Co. v. Newland (Ky.) 31 S. W. 38; First Nat. Bank v. City Nat. Bank (Tex.) 34 S. W. 458; Given v. Bank of Alexandria (Tenn.) 52 S. W. 923; Nebraska Nat. Bank v. Logan (Neb.) 52 N. W. 808.

John A. Stormon and *Charles A. Verret*, for respondent.

Under the New York rule the forwarding bank makes the local agent to whom the collection is intrusted its own subagent, and is liable for any neglect on the part of such subagent. 3 R. C. L. p. 622; Streissguth v. National German American Bank, 44 N. W. 797; note in 52 L.R.A.(N.S.) 612.

The measure of damages is prima facie the amount of the collection and interest, the burden being on the defendant to mitigate damages. Commercial Bank v. Red River Nat. Bank, 8 N. D. 382, 79 N. W. 859.

That the evidence introduced is wholly sufficient to sustain all findings of fact and conclusions of law made by the district court.

CHRISTIANSON, Ch. J. The controversy before us involves the liability of the defendant bank upon a certain check which it received from the plaintiff for collection. The material facts are substantially as follows:

In June, 1918, the plaintiff was the state's attorney of Rolette county in this state. Prior to June 10, 1918, one I. M. Ingebretson was the treasurer of said county. Ingebretson had issued certain fraudulent tax receipts and by means thereof collected moneys from taxpayers of that county. The fraudulent practices were discovered, and on June 7, 1918, or thereabouts, Mr. Ingebretson executed and delivered to the plaintiff a check in the sum of $1,388.60, drawn upon the Rolette County Bank of St. John, North Dakota, the proceeds of which were to be used by the said Verret in reimbursing the persons so defrauded. The plaintiff testified that at the time Ingebretson gave him the check he asked him (Verret) "to take that check to the State Bank of Rolla, and not the other bank, and deposit it." On June 10, 1918, the plaintiff Verret took the check to the defendant bank and, after indorsing it, delivered it to that bank for deposit and collection. He received from the cashier of the bank a duplicate deposit slip of the usual form. Verret testified that he informed the cashier of the defendant bank of the purpose for which the check had been given, and asked him not to put it in his (Verret's) general account, but "to put it in a deposit by itself." It was stipulated as a fact that the defendant bank on the same day forwarded the check to the Capital National Bank of St. Paul for collection and credit; "that the same was received by the Capital National Bank of St. Paul, Minnesota, on June 11, 1918, and on the same day forwarded by the said Capital National Bank to the Federal Reserve Bank of Minneapolis, Minnesota; that said check was received by the Federal Reserve Bank of Minneapolis, Minnesota, on June 11, 1918, and that on the same day, said Federal Reserve Bank of Minneapolis, Minnesota, forwarded same by mail direct to the Rolette County Bank of St. John, North Dakota, the drawee bank therein; that thereafter and on the 20th day of July, A. D. 1918, not having collected said check from

the Rolette County Bank, on which the same was drawn, the said Federal Reserve Bank charged back to the Capital National Bank of St. Paul, Minnesota, the said check, and so advised the Capital National Bank thereof; that on July 22, 1918, the said Capital National Bank of St. Paul, Minnesota, charged back to the State Bank of Rolla, North Dakota, the said check, and so advised said defendant bank of the same; that on the 21st day of July A. D. 1918, a representative of the Federal Reserve Bank of Minneapolis, Minnesota, appeared personally at the Rolette County Bank of St. John, North Dakota, and demanded from the officers of said Rolette County Bank all cash letters of the Federal Reserve Bank of Minneapolis, Minnesota, that were then unanswered, and, among such papers, received the check sued upon in this action; that on July 22, 1918, said representative did duly present the said check for payment to the said Rolette County Bank of St. John, North Dakota, and payment thereof was refused; that on July 26, 1918, the said check was duly returned by the Federal Reserve Bank of Minneapolis, Minnesota, to the Capital National Bank of St. Paul, Minnesota; and that same was immediately forwarded by said Capital National Bank of St. Paul, Minnesota, to the State Bank of Rolla, North Dakota; that on the 30th day of July, 1918, said State Bank of Rolla, North Dakota, notified plaintiff that the said check had not been paid by the Rolette County Bank of St. John, North Dakota, and that same had been on the 30th day of July, A. D. 1918, charged back to plaintiff by defendant." It was further stipulated as a fact, "that the plaintiff in this action was notified verbally by the defendant bank on the 24th day of July, 1918, that the check sued upon in this action had been presented to the Rolette County Bank and payment refused." It was further stipulated "that on the 22d day of July, 1918, the Rolette County Bank was closed by the State Banking Department because of its insolvency, and thereafter a receiver was appointed for said banking corporation by the district court of Rolette county, North Dakota."

The evidence shows that the defendant bank, in the usual course of business, received from the Capital National Bank of St. Paul a card acknowledging the receipt by said latter bank of the check for collection. Plaintiff Verret testified: "On two different occasions between the 10th day of June and the 22d day of July, 1918, I inquired

from the officers of the State Bank of Rolla whether or not this check in controversy had been paid and accepted, and whether or not I could draw and issue checks upon the deposit that I made in that bank and sued upon in this case; that on those two occasions I was informed by the persons in charge of the business of the defendant that I could draw checks on that deposit, and that they would be honored by the State Bank of Rolla, that so far as they knew the check had been paid by the Rolette County Bank on which it had been drawn."

The cashier of the defendant bank testified that he had no recollection of the conversations referred to by the plaintiff. The deposit ledger of the Rolette County Bank at St. John showed that at the time Ingebretson drew his check he, in fact, had no money on deposit at the bank; but that at later dates he made deposits and from and after July 6, 1918, had sufficient money on deposit to care for the check.

The plaintiff Verret testified that he is a banker as well as an attorney, and that he did not expect the defendant bank to present the check to the drawee bank in any other manner than that in which it was done. The testimony, further, is to the effect that the check was forwarded for collection in the usual course, and that ordinarily no further inquiry or tracer would be sent by the forwarding bank.

Manifestly the liability of the defendant, if any, is predicated on negligence,—negligence either on the part of the defendant bank, or on the part of one of its subagents. As pointed out by this court in Farmers State Bank v. Union Nat. Bank, 42 N. D. 449, 173 N. W. 790, there are, in this country, two conflicting doctrines as to the liability of banks which undertake the collection of commercial paper at a distance. One has become known as the "New York rule" and the other as the "Massachusetts rule." Under the so-called New York rule, the first bank is responsible for the conduct of its correspondents and subagents as fully as though it had performed the entire service itself. According to the Massachusetts rule the bank which receives for collection out-of-town commercial paper is responsible only for its own negligence, and not for the negligence of its correspondents or subagents. This court has not, as yet, been required to determine which rule ought to be adopted in this state. Nor do we believe it is necessary to determine that question in this case. Negligence forms the basis of liability under both rules. There

is no liability under either rule, unless there is some negligent act on the part of either the first bank, or one of its subagents, resulting in loss to someone. We do not believe that the facts in this case establish negligence, either on the part of the first bank or on the part of any of its correspondents. The only charge of negligence which plaintiff makes against the defendant bank itself is that its employees told him on two occasions between June 10th and July 22d that, so far as they knew, the check was paid, and that the bank would honor checks drawn by the plaintiff against such special account. The plaintiff did not attempt to designate the dates of the two conversations with any greater particularity than already indicated. Nor did the plaintiff claim that the officers of the bank in such conversations said that the check had been paid, but merely that they said that, so far as they knew, it had been paid. In other words, that they had received no notice that it had been dishonored. This was apparently the sense in which plaintiff understood it, for he went back a second time and made the same inquiry and received the same information. And, apparently, he was not misled by either statement; for while he says he was advised the bank would honor checks drawn against the special account, he refrained from drawing a single check, or in any manner attempting to distribute the funds represented by the check.

The cashier testified that this check was received the same as any other check, and that plaintiff was immediately given credit therefor on the bank books. He further testified: "I may say in explanation, had this check been brought in by a stranger or someone we didn't know he wouldn't have received credit until we found out that the check was o. k., but in case of a responsible depositor we give credit right away, with the understanding, as our pass books read, if checks are not collected they will be charged against the account." It should be borne in mind that at the time plaintiff deposited the check he talked with the cashier. Whatever specific information the bank was given regarding the check was given to the cashier. There is no showing that any other officer was present, or that plaintiff ever informed any other officer as to the purpose of the check. Plaintiff does not say that the two subsequent conversations were with the cashier, but merely with "officers" of the bank. The cashier testified that he had no recollection

of having had such conversations with the plaintiff. Hence, it is at least as likely, if not more likely, that such conversations were had with other officers of the bank, whose information as to the transaction was limited to what was disclosed by the entries in the bank books.

Plaintiff testified that at the time he deposited the check he informed the cashier: "That *I did not want to draw on this deposit until I knew that the check had been paid.*"

On cross-examination, the following question was propounded to the plaintiff, and the following answer given by him:

Q. Did you at that time (when the check was deposited) tell Mr. Butterwick (the cashier) that *you wouldn't draw upon this deposit in the State Bank of Rolla until you found out that the check was collected,* or words to that effect?

A. *To the best of my recollection I did say that or words to that effect,* and that is the reason I put it in a special deposit and didn't put it with my other deposit. . . . *As a matter of fact I didn't know whether that check was any good or not.*

The plaintiff, Verret (who acted as his own attorney on the trial of the case); propounded the following question to Butterwick, the cashier of the defendant bank:

"Q. Do you remember that I told you in that conversation when I left the check with you, that I was anxious to find out as soon as the check was paid so that I could make out checks and pay off the taxpayers the money they had coming, and that *I wouldn't draw on that deposit until I found it was paid?*"

According to plaintiff's testimony he was never advised that the check was paid. He did not so construe the statements made to him by the officers of the bank. He was twice given the same information. The information received the first time was of such nature that he did not feel warranted in drawing checks. The second time he received precisely the same answer that he received the first time. There is no contention that the answers were untrue. There is no foundation in the evidence for any claim that the defendant bank itself owed any duty to make any inquiry regarding, or effort to collect, the check other than was done. We find no evidence of actionable negligence on the part of the bank itself.

Nor do we find any evidence tending to establish actionable negligence on the part of any of the bank's subagents. And on oral argument it was virtually admitted that such negligence had not been shown. It will be noted that the facts stipulated clearly establish that all subagents acted with the greatest possible despatch in forwarding the check. The only subagent to whom negligence could possibly be charged is the Federal Reserve Bank. That bank forwarded the check promptly to the drawee bank (which was the only bank in St. John). Having received no answers to its forwarding letters, it sent a personal representative to the drawee bank on July 21st. There is no contention that such personal representative should have been sent before, or that the Federal Reserve Bank failed to perform any other duty resting upon it.

It follows, from what has been said, that the judgment appealed from must be reversed. It is so ordered.

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

GRACE, J. (dissenting). I am of the opinion that the judgment appealed from should be affirmed. The Federal Reserve Bank of Minneapolis, Minnesota, was a subagent of the defendant, and was, without question, guilty of negligence.

On June 11, 1918, it forwarded the check in question to the Rolette County Bank, the drawee, of St. John, North Dakota, and not receiving payment, on the 20th day of July, 1918, charged the check to the Capital National Bank of St. Paul, from which it had received it. Otherwise, the Federal Reserve Bank paid no attention to the check until the 21st day of July, 1918, when its representative appeared personally at the Rolette County Bank of St. John and received the check; and on the 22d of July, 1918, presented it for payment to the Rolette County Bank, and payment was refused.

On the 26th day of July, 1918, it returned the check to the Capital National Bank, from which it had received it. It is clear that after the check was sent by the Federal Reserve Bank to the Rolette County Bank, the drawee, and while the check was with the drawee, it had sufficient money on deposit to the credit of Ingebretson, from July 6th to July 21, 1918, to have paid it.

We think it is clear that the Federal Reserve Bank was negligent in the matter of the collection of the check. If it had promptly insisted on the payment or return of the check, and neither was forthcoming, it was then its duty to forthwith notify the Capital National Bank of St. Paul, and its duty would have been, in turn, to as promptly notify the defendant, and the duty of the latter would have been to give notice promptly to the depositor, who could have then taken steps to collect the check, there being money in the bank upon which it was drawn to have paid the check, any time after July 6th to July 21st, as above stated, all of which time the check was lying dormant in drawee bank, and this by reason of the negligence of the Federal Reserve Bank.

When a bank undertakes to act as principal, it should be held to the same rule of conduct that applies to the liability of principals, generally; that is, it should be responsible, in damages, for the negligent acts of its agents or subagents, performed within the scope of their employment. If such rule were applied in this case, as the record now stands, the defendant could not escape liability.

PER CURIAM. Plaintiff has petitioned for a rehearing. The petition is in effect a reargument of the case. It assails both the conclusions of fact and of law reached by us in this case. We have given the petition careful consideration. We have again reviewed the evidence, and reconsidered the legal principles involved. We find no reason to doubt the correctness of the former decision in any particular. That decision was handed down after careful consideration of every aspect of the case, and represented the deliberate views of the four members of the court who signed it. Further reflection has not altered, but rather confirmed, the views we then expressed.

Rehearing denied.

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

MIKE HENNESSY, Appellant, v. CHARLES GINSBERG and Harry Ginsberg, Copartners Doing Business under the Firm Name and Style of Ginsberg Brothers, Respondents.

(180 N. W. 796.)

Master and servant — master having knowledge of fellow servant's incompetency liable.

1. Even in cases where the fellow servant rule is applicable, an employer is charged with the duty of exercising ordinary care in the selection of servants engaged in common service; and where he retains a careless or incompetent servant in his employment after a knowledge of such incompetency or carelessness, or when in the exercise of due care he should have known it, he is liable to any other servant who suffers injury through the unfitness of the careless or incompetent servant so retained.

Master and servant — negligence, assumption of risk, and contributory negligence, questions for jury.

2. In the instant case, wherein the plaintiff seeks to recover damages for injuries sustained while unloading a carload of scrap iron, which injuries he claims were occasioned by the negligence of a careless and incompetent fellow servant, whom defendants retained in their employ after knowledge of his carelessness and incompetency, it is *held* that the evidence adduced by the plaintiff established a prima facie case of actionable negligence against the defendants. It is *held*, further, that under such evidence the questions of assumption of risk and contributory negligence were for the jury.

Opinion filed December 2, 1920. Rehearing denied December 31, 1920.

Action for personal injuries in Grand Forks County, *Cole*, J.

From a judgment entered upon a directed verdict and an order denying a new trial, the plaintiff appeals.

Reversed.

NOTE.—That there is a well-established rule that a master is liable to his servant for an injury caused by the incompetency or want of skill of a fellow servant will be seen by an examination of the cases collated in a note in 41 L.R.A. 46, on master's constructive knowledge as to capacity of servants as element of liability to injured servant.

On assumption of risk by servant of dangers from employment of incompetent servant, see note in L.R.A.1916F, 1212.

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

A servant who is injured while obeying a direct command of his master does not assume the risk of such injury, nor is he guilty of contributory negligence in obeying the command. Mellette v. Indianapolis Northern Tract Co. 86 N. E. 433; Hagerty v. Evans, 87 Minn. 435, 92 N. W. 399; Van Duzen Gas & Gasoline Engine Co. v. Schelics, 61 Ohio St. 298, 55 N. E. 998; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876; Offutt v. World's Columbian Exposition, 175 Ill. 472, 51 N. E. 651; Western Stone Co. v. Musical, 196 Ill. 382, 89 Am. St. Rep. 325, 63 N. E. 664; Glucose Sugar Ref. Co. v. McDonnell, 132 Ill. App. 386; Fearington v. Blackwell Durham Tobacco Co. 141 N. C. 80, 53 S. E. 662; Bokap v. Chicago & A. R. Co. 123 Mo. App. 270, 100 S. W. 689; Buckner v. Stock Yards Horse & Mule Co. 221 Mo. 700, 120 S. W. 766; Adolff v. Columbia Pretzel & Baking Co. 100 Mo. App. 199, 73 S. W. 321.

The primary duty of the servant is obedience, and he cannot be charged with negligence in obeying an order of the master unless he acts negligently in so obeying. Rayburn v. Central Iowa R. R. Co. 35 N. W. 606; Sipes v. Michigan Stock Co. 100 N. W. 447; St. Louis v. Morris, 93 Pac. 153; Polaski v. Pittsburgh Coal Co. 14 L.R.A. (N.S.) 952, 114 N. W. 437.

Murphy & Toner, for respondents.

If the injury could not have been reasonably anticipated as the probable result of the act of negligence, such act is either a remote cause or no cause of injury. Crane Co. v. Busdicker, 255 Fed. 664; Homisett v. Light & P. Co. 81 So. 22; R. Co. v. Sears, 210 S. W. 684.

To constitute "actionable negligence" the injury must be a natural and probable consequence of the negligence complained of, and must be such that it should have been foreseen in the light of attending circumstances. Nichols v. Telephone Co. 109 Atl. 649; R. Co. v. Clement, 220 S. W. 407; Donald v. Coal Co. 103 S. E. 55; Hogan v. Bragg (N. D.) 170 N. W. 374; Bona v. Auto Co. 208 S. W. 306.

"If subsequent to the original negligent act a new cause has intervened, of itself sufficient to stand as a cause of the injury, the original negligence is too remote." Bergman v. R. Co. 178 Pac. 68; Northrup v. Eakes, 178 Pac. 266; Dreher v. Mill Co. 98 S. E. 194.

The law of contributory negligence forbids a recovery by one who by his own fault brings an injury upon himself. 29 Cyc. 506–508.

"Contributory negligence is a failure to exercise the degree of care for one's own safety usually exercised by reasonably careful and prudent men in the same circumstances, which failure causes or helps to bring about injury, a result which would not have occurred but for such failure." R. Co. v. Morgan, 192 S. W. 672; Taylor v. Bldg. Corp. 99 Atl. 284; Int. Harv. Co. v. Langermann, 262 Fed. 498.

The servant has the right to assume and to rely upon the assumption that the master has provided a reasonably safe place for him to work, unless such place is obviously and necessarily dangerous. Thompson v. R. Co. (S. D.) 132 N. W. 158; Nelson v. Martinson, 212 Fed. 912.

No recovery can be had for injuries received by an experienced carpenter who was a foreman on the work of constructing a building, for a fall received while crossing from one side of the building to another, using the bottom cord of a truss as a bridge, when he knew and fully appreciated the danger of using the cord, and there was a safe method of going to the other side. Boyer v. Eastern R. Co. (Minn.) 12 Am. Neg. Rep. 496; Hanley v. Grand Trunk, 62 N. H. 274; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492; Cartwright v. R. Co. 228 Fed. 876; Kelly v. R. Co. 9 N. W. 816; Bradshaw v. R. Co. 21 S. W. 346; Carr v. Construction Co. 48 Hun, 266; Kennedy v. R. Co. 17 Atl. 7; Knittal v. R. Co. 33 Ohio St. 468; Bengeton v. R. Co. 50 N. W. 531; Weed v. R. Co. 99 N. W. 827; R. Co. v. Ryan, 29 S. W. 527; Norton v. R. Co. 30 S. W. 599; Liney v. R. Co. 49 N. W. 187; Berlick v. Co. 67 N. W. 712; Buckman v. Coal Co. 77 N. W. 889.

Per Curiam. This is an action to recover damages for personal injuries alleged to have been received by the plaintiff while in the employ, and by reason of the alleged negligence, of the defendants.

The complaint alleges that the defendants are partners engaged in the business of collecting and distributing scrap iron in the city of Grand Forks in this state; that the plaintiff was employed by the defendants as a laborer at their place of business, and that his duties consisted in helping to unload cars and to move and remove scrap iron; that on or about October 8, 1917, and for some time prior thereto, the defendants also had in their employ one Heine, who was engaged

in the same kind of work as that performed by the plaintiff; that on or about October 8, 1917, the plaintiff, while in the employ of the defendants, and while engaged in discharging the regular duties of his employment, was injured while helping to unload a car of scrap iron; that such injury was occasioned by a very heavy piece of iron weighing about 900 pounds which fell upon him, as a result of which plaintiff's right leg was broken, and he sustained permanent injuries; that the accident occurred while the plaintiff and said Heine were engaged in unloading scrap iron from a freight car, and was caused wholly by reason of the negligence of the defendants, in this that said Heine had been in the employ of the defendants for several months, engaged in loading and unloading scrap iron; that said Heine was a grossly incompetent and generally careless worker; that said Heine during all the time that he was employed by the defendants was habitually negligent, careless, and incompetent; that he was unmindful of the danger to his coworkers and fellow servants, resulting from his careless and negligent manner of loading in, and in unloading from, freight cars, the heavy pieces of iron and steel; that he was unfit to work with others in unloading scrap iron; "that the said Heine was ill-tempered, became quickly irritated, and angered if the work did not proceed to his exact liking, that he frequently each day became very angry, and, when he did become angry, jerked pieces of iron and threw them around carelessly and negligently, and in total disregard of the danger to his fellow servants and coworkers incident to such conduct; that on the day and date and at the moment when the injury aforesaid occurred, the said Heine was in a fit of anger and rage, and, while in such fit of anger and rage, so handled the piece of iron which fell upon this plaintiff that it slid upon the plaintiff and caused the injury aforesaid; that because of the negligence and carelessness of the defendants in employing the said Heine, who himself was grossly incompetent and habitually careless and of a violent disposition, the plaintiff suffered injuries as aforesaid; that said iron was so negligently and so carelessly handled by the said Heine that it was caused to negligently and carelessly slide upon the plaintiff and cause the injuries hereinbefore described.

The answer admitted the employment of the plaintiff by defendant; also, that he was injured while in their employ, and engaged in un-

loading a car of scrap iron. It is averred, however, that the injuries were slight and that plaintiff has fully recovered. It is further averred that the injuries "were caused through the carelessness and contributory negligence of the plaintiff himself," and that he "assumed the risk of injury and consequent damages of the character described in the complaint."

At the close of plaintiff's case the defendants moved for a directed verdict on the ground "that the plaintiff has wholly failed to establish the material allegations of the complaint." The motion was granted, and the plaintiff has appealed from the judgment and from the order denying his motion for a new trial.

Under the statutes applicable to this case, "an employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care." Comp. Laws 1913, § 6108. But "an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, *unless he has neglected to use ordinary care in the selection of the culpable employee.*" Comp. Laws 1913, § 6107.

Labatt (Labatt, Mast. & S. § 1079) says: "The obligation of a master to see that the servants hired by him possess the qualifications mental, moral, and physical, which will enable them to perform their duties without exposing themselves and their coemployees to greater dangers than the work necessarily entails, are, in their broad features, similar to the obligations which are incumbent upon him with regard to the other agencies of his business. It is manifest, however, that, in their specific application to human beings, the general principles which define the nature and extent of these obligations must assume a shape somewhat different from that which they bear in their relation to the lower animals, or to inorganic instrumentalities. It is, in fact, apparent that the duty of a master to use care in hiring servants is very closely associated with, if not a special form of, his duty to adopt a safe system in the conduct of his business; that is to say, the duty of seeing that the unreasoning agencies used by him perform their functions. The rule established by the cases . . . may be stated in formal terms as follows: The hiring or retention of a serv-

ant whose unfitness for his duties, whether it arises from his want of skill, his physical and mental qualities, or his bad habits, is known, actually or constructively, to the master, is culpable negligence, for which the master must respond in damages to any other servants who may suffer injury through that unfitness. The essential ground upon which the liability thus predicated is based is that 'the master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service.' "

In considering this question the supreme court of Maine said: "The same care requisite in hiring a servant in the first instance must still be exercised in continuing him in the service; otherwise, the employer will become responsible for his want of care or skill. The employer will be equally liable for the acts of an incompetent or careless servant, whom he continues in his employment after a knowledge of such incompetency or carelessness, or when, in the exercise of due care, he should have known it, as if he had been wanting in the same care in hiring." Shanny v. Androscoggin Mills, 66 Me. 420, 15 Am. Neg. Cas. 264. Similar language has been used by many other courts. See authorities cited in Labatt, Mast. & S. §§ 1079 et seq.

(1) Was the plaintiff injured in consequence of the negligence of Heine?

(2) Did the defendants neglect to use ordinary care in the retention of Heine in their employment, as a co-employee of the plaintiff?

If the evidence adduced upon the trial was of such nature and probative force that reasonable men, in the exercise of judgment and reason, might reasonably have answered both of these questions in the affirmative, then they should have been submitted to the jury as questions of fact.

After a careful consideration of the evidence a majority of the court have reached the conclusion that there was substantial evidence tending to establish affirmative answers to both of these questions. There was evidence tending to establish the following facts: The defendants are junk dealers at Grand Forks. The plaintiff, who is about sixty years of age, was employed by defendants in the summer and fall of 1917. His duties consisted in handling scrap iron, and in loading and unloading carloads thereof. Among the many men employed

by the defendants was one Heine. There is evidence to the effect that he was a careless and incompetent employee; that he was very excitable, and at times would fly into violent fits of rage when anything went wrong with his work; that at times when the wheelbarrow in which he was moving scrap iron upset he threw pieces of iron around in such manner as to endanger others working near him; that on at least one occasion he did, while in such fit of rage, throw a piece of iron which struck one of the other workmen. There was, also, evidence to the effect that the other workmen employed by the defendants frequently discussed Heine's carelessness and incompetency among themselves, and that some of these conversations took place in the presence of one of the defendants. There is also evidence that the foreman, St. George, had notified the defendants of the carelessness and incompetency of said Heine; also, that the plaintiff had made complaint to the defendants of such carelessness and incompetency, and indicated that he did not desire to work with Heine on account of his said incompetency and carelessness.

St. George testified:

Q. Mr. St. George, did you at any time say anything to either of the Ginsbergs before the accident about Heine and his work there in the yards?

A. Yes; I did.

Q. You may state what that was, what you said?

A. I remember telling them the men would not work with him he was careless. . . . I told him, they didn't want to work with him because they were afraid of him is all.

The plaintiff testified:

Q. Now, I ask you, Mr. Hennessy, whether or not you ever said anything to the defendants, or either of them, about Heine's disposition and method of working?

A. Yes, sir.

Q. You may state what you said and to whom?

A. Well, I told Charles himself that I wouldn't work with Heine any longer. . . . Charles Ginsberg, I says, "He is a reckless little bugger and I don't want to work with him," and Charles says, "Mike, pick out any man in the yard you want," and I picked John Foster.

Q. When did you tell Charles this?

A. About four weeks before this accident.

Q. Did you work with Heine after that until the day of the accident?

A. Not until it happened that way. . . .

Q. I ask you, Mr. Hennessy, whether or not you ever heard any of the men that were working there make any complaint or say anything to either Harry or Charles Ginsberg about Heine's method of work and his disposition before this accident happened?

A. I often heard men tell Charles.

Q. Tell us what you heard them tell him?

A. That Heine was a reckless little bugger and they wouldn't work with him.

Q. Do you remember what, if anything, Charles said?

A. Oh, Charles said, Charles says, "I guess he is a little devil."

On October 7, 1917, the plaintiff, while at his work at defendant's place of business, was directed by one of the defendants to proceed together with Heine to unload a box car of scrap iron.

The plaintiff testified:

About 4 o'clock Charles (Ginsberg) hollered down to me to go on up, me and Heine, and start at this box car or he would have to pay demurrage on it; he said it was there so long and he wanted us to start at it to save demurrage, so we went on up and started at this car, and this casting was against the door and we couldn't get it open, so there was another fellow there, Ed. Heinsing, and I says, "Ed, give us a push here on this car door,"—so Ed, he was wheeling away truck from the ground, scattered stuff,—so Ed and me with Heine, the three of us got room enough for Heine to get in the car. Now, I says, "You go in Heine, you are the smallest, and open the top and me and Ed will push at the bottom." So the car door went even, when he was up there it went along and we got it open, and then this casting was crosswise in the door, and we had to pry it one way or the other. So I pried it towards Heine so it would pass the door, and I was on the ground and Heine in on the top at the other end, and I kept working it up towards him, and he was taking it kind of slow, and I says, "What is the matter up there, Heine, you are not *taking this around* very fast," he says, "I

can't get room for my feet," and he was jumping around there. So then I kept pushing, and I says, "Now, watch out, Heine, when it goes don't you raise it, only tilt it so till I get out of the way, give me a chance to get out;" I was right like this with the door, working it this way [indicating], and I got it past there so it come this way, and I hollered, "Now, look out Heine," I says, "It is pretty near ready to go," and it was just coming this way, And he says, "Damn," and gave it a tilt on the other end, and it come down and took me in the leg. . . . I had to pry towards Heine so we could get it past where I was working, get it up that way far enough so I could work it out. . . .

Q. Stand up here and treat this as the door of the car and show them just where you stood.

A. I stood right here [indicating] and I had to work it that way so it would pass and come out here, and Heine was at the other end, and I had to keep prying and working, and he was working at the other end, I would push it to him, and I kept telling Heine all the time, "Look out now, be careful," and I kept watching my end, and when I got it out just as it would pass I says, "Look out now, Heine, be careful," and he says, "Damn," and gives it one tilt and it come out.

Q. When you heard Heine say "Damn it," about how soon afterwards did the iron come out?

A. I don't know how quick it was; I don't remember anything; the iron was on me as soon as he swore.

On cross-examination he said: "Just as soon as I got it out I says, 'Now, look out Heine,' and he gave it a tilt and it come down on me. *He had to shove it out; it wouldn't come out without being shoved out.*"

The foreman, St. George, testified that shortly after the happening of the accident he went over to the office and reported the matter to one of the defendants; and that such defendant then said: "I knew that this is what would happen, that he (Heine) would do something like this."

This evidence we believe is such that it cannot be said, as a matter of law, that plaintiff's injuries were not suffered in consequence of the neglect of the defendants to use ordinary care in the selection of Heine as plaintiff's co-employee.

There can be no question but that there is abundant evidence tending to prove that Heine was a reckless, and unfit workman, and that the

defendants had knowledge of this fact. We also believe that there is evidence tending to show,—evidence of such nature that reasonable men might find,—that the plaintiff's injuries were occasioned by the careless and negligent acts of Heine.

The casting was so situated that it was necessary to move it in order to get it out through the door of the car. Plaintiff was trying to pry the casting so that one end would come into the doorway. Heine was at, and apparently had hold of, the other end of the casting. Plaintiff speaks of Heine "taking this around." Plaintiff says that he cautioned Heine that when the casting *"goes"*—(apparently what plaintiff meant was that when he had succeeded in getting the casting shoved back far enough so that the end would be released from where it was pressing against the door jamb) *"don't you raise it,* only tilt it so *till I get out of the way, give me a chance to get out."* Plaintiff further says that the casting "wouldn't come out without being shoved out;" that "he (Heine) had to shove it out." Plaintiff further says that Heine did exactly what he (the plaintiff) had cautioned him not to do,—raised the casting and shoved it so that it came out and fell upon plaintiff without giving him any opportunity to get out of the way. There is abundant evidence tending to show that plaintiff suffered severe injuries as a result of accident.

We are of the opinion that the evidence adduced by the plaintiff established a prima facie case of negligence, and cast upon the defendants the burden of overthrowing it by a successful defense. Northern P. R. Co. v. Mares, 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. 321. See also Lee v. Michigan C. R. Co. 87 Mich. 574, 49 N. W. 909.

The defendants contend, however, that the plaintiff was guilty of contributory negligence, and that he assumed the risk of the injuries which he sustained, and that for these reasons he is precluded from recovery. It is well to remember that these are affirmative defenses which the defendants have the burden of establishing, and that the verdict in this case was directed at the close of plaintiff's case and before the defendants had put in any evidence whatsoever.

We do not believe that, upon the evidence adduced, the court could say as a matter of law, either that the plaintiff assumed the risk of the injuries, or that he was guilty of contributory negligence. Ordinarily these are questions for the jury. They can be withdrawn from the jury

only when the facts established by the evidence are such that reasonable men, in the exercise of reason and judgment, can reach only one conclusion. If the facts are such that different, impartial minds may fairly draw different conclusions from them, they should be submitted to the jury.

From the evidence above quoted, it will be noted that there was a positive order given by one of the defendants to the plaintiff and Heine to proceed to unload a *specific* car containing scrap iron. The defendant also stated that unless this was done defendants would be subjected to financial loss;—i. e., they would have to pay demurrage. The defendant who gave this order was the same one who had been notified by the plaintiff and by the other workmen of the carelessness and recklessness of Heine. The plaintiff had no means of knowing the character of the scrap iron in the car until it was opened. In order to get the door open it became necessary for Heine (who apparently was a small man and for that reason able to effect an entrance) to go into the car. The first thing that became necessary to do, after the door was opened, was to remove a certain casting. The casting, according to the plaintiff's testimony, was so situated that it would not have fallen out unless Heine shoved it out. The plaintiff gave positive instructions to Heine not to raise the casting. Even though Heine was known by the plaintiff to be of a reckless and careless disposition, it can hardly be said, as a matter of law, that the plaintiff could reasonably have anticipated that Heine would, in direct violation of plaintiff's repeated warnings, proceed to shove out of the car and in effect cast upon the plaintiff a piece of iron weighing some 800 to 1,100 pounds.

The doctrine of assumption of risk rests in contract. The conception underlying the doctrine is that, in contracting to perform certain work, the servant, as an implied part of the agreement, assumes and accepts responsibility for any bodily hurt resulting from the "ordinary risks" incident to the work which he has agreed to perform. In determining whether an injury suffered by a servant is one of those perils which he assumed as a part of his agreement to perform certain work, all the circumstances must be considered, including, in cases like the present, the servant's orders. The plaintiff was not injured while voluntarily engaged in carrying out a general direction as to work. He was injured while obeying a specific command. That command was the oper-

ative influence which led him to do the act and to employ the means which directly caused the injury. Under all the circumstances, we do not believe that a court can say, as a matter of law, that the plaintiff assumed the risk of the injuries which he sustained. Labatt, Mast. & S. p. 3927. The doctrine of contributory negligence rests in tort; i. e., an omission of duty. It is predicated on the theory that the servant, in performing his work, was guilty of imprudence, and that this imprudence, or lack of care, was entirely or partially the cause of his injury.

In determining whether a servant is guilty of contributory negligence "all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical surroundings. Having weighed all these considerations, unless the case then discloses that the risk was such as would not be taken by a man of common prudence, so situated, the court cannot justly declare that the taking of that risk by the servant, in obedience to orders, was negligence. The practical result of such a doctrine, when stated in terms of the servant's knowledge, is that the servant may maintain an action, unless he not only knows what is the risk to be encountered, but also that it will probably be attended with injury which he cannot avoid by the exercise of care and caution." Labatt, Mast. & S. pp. 3930–3933. We do not believe that the evidence in this case shows, as a matter of law, that plaintiff was guilty of contributory negligence.

It follows from what has been said that the trial court erred in directing a verdict in favor of the defendants at the close of plaintiff's case. For this reason alone the judgment and order appealed from must be reversed and the cause remanded for a new trial. It is so ordered.

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

GRACE, J. (specially concurring). This action is one to recover damages for injuries alleged to have been caused by the negligence of the defendants, the nature of which is alleged in the complaint. The defense is contributory negligence and assumption of risk.

We presume, under our statutes, in that regard, those defenses are

available to defendants. The statutes are, as we view the matter, largely declaratory of the common-law doctrine in regard to those subjects. It is very questionable whether it can be said that the common-law rule is based upon any clear principle of justice and right.

Quite an extensive discussion in this regard is contained in the case of Peterson v. Fargo-Moorhead Street R. Co. 37 N. D. 440, 164 N. W. 42. However, considering the question of assumption of risk and contributory negligence proper defenses, under our statutes, in the circumstances of this case it is clear that they are questions of fact for the jury.

Whether defendant neglected to use ordinary care in retaining the services of Heine, and whether plaintiff was injured by the latter's negligence, were, we think, in the state of the evidence, questions of fact for the jury.

BRONSON, J. (dissenting). The gist of plaintiff's cause of action is that the defendants employed an incompetent fellow servant by reason whereof he was injured. The defense is lack of negligence in that regard, contributory negligence and assumption of risk on the part of the plaintiff. At the close of plaintiff's case the trial court, upon a motion of the defendant, directed a verdict in favor of the defendant. The verdict so rendered, and the judgment entered thereupon, operated as an adjudication upon the pleadings and the evidence submitted. Unquestionably, upon this record, if, as a matter of law, there was no negligence of the defendants that proximately caused the injuries, or, if the plaintiff either was guilty of contributory negligence, or assumed the risk, the trial court did not err in so directing a verdict. Although the defenses of contributory negligence and assumption of risk are affirmative defenses, nevertheless it is clear that the defendant was entitled to avail himself upon such motion or for a directed verdict, if the record discloses as a matter of law that plaintiff's cause of action was barred, either by his contributory negligence, or, by his assumption of risk. I am of the opinion that, upon this record, there were no questions of fact to be submitted to the jury upon which reasonably prudent men might differ concerning the defendants' negligence, and the contributory negligence or assumption of risk on the part of the plaintiff. I am further

of the opinion that upon this record the majority opinion in so far as it holds that there are questions of fact in this regard practically abrogates the application of the doctrine of assumption of risk. There is no question that, in the relation of the parties to this action, the fellow-servant rule and the doctrine of assumption of risk apply. It is deemed unnecessary to set forth in detail the evidentiary facts as appearing in this record. Some of them have been recited in the majority opinion. It is sufficient to state that the following facts, in my opinion, appear established in this record, to wit:

1. The plaintiff worked for the defendants as a common laborer from the month of May, 1917, up to the time he was injured on October 7, 1917; his duties consisted in unloading scrap iron; sometimes in loading cars or unloading cars; also in breaking up scrap iron.

2. The plaintiff knew, during the summer, Heine, the alleged incompetent servant; he came there to work after the plaintiff did; he observed him at work lots of times; he knew that Heine would get rattled and fling things around; that he would get angry or mad and swear; he told one of the defendants about it, and said that he would not work with Heine any longer. He told such defendant that he did not want to work with him, and that defendant said for him to pick out any man in the yard he wanted and he picked one John Foster; he did not work with this man Heine after that until the day of the accident.

3. Nevertheless, on the day of the accident and before the accident, this plaintiff, without any direction so to do, as far as the record is concerned, was working with this Heine. He was on top of a steam threshing machine. Heine was picking up and wheeling away, with a wheelbarrow what the plaintiff knocked off. In the afternoon one of the defendants directed the plaintiff and Heine to start work at the box car where the accident occurred, because he wanted to have it unloaded so as to save demurrage.

4. The plaintiff then proceeded to the box car. He requested the aid of another man, named Ed Heining. They got the box-car door open and room sufficient for Heine to get within the car. He directed Heine to get into the car and to open the top, and that he and this Ed Heining would push out the bottom. There was a casting crosswise in the door. It had to be pried one way and the other. The plaintiff pried it towards Heine so it would pass the door. He kept working

it up towards him. Heine was taking it kind of slow, and the plaintiff said, "You are not getting this around very fast." Further evidence in this regard is recited in the majority opinion. The plaintiff, on the ground, was working one and past the door and the man Heine, within the car, was swinging around the other end for the casting to come out. The plaintiff testified that he told Heine it was pretty near ready to go. That Heine said, "Damn," and gave it a tilt on the other end, and it came down and took him in the leg. This casting projected on each side of the car door about 8 inches. It was a big piece of casting, weighing some 800 pounds. The car was loaded about half full. The plaintiff had a bar and was prying this casting to get the end of it around the jamb of the door so he could get it out. The other end was higher and lying upon some scrap iron that was holding it. Before this time the plaintiff had unloaded cars of scrap iron containing castings as big as the one in question. It was customary to do this unloading with two men.

5. Evidence concerning the incompetency of this man Heine is stated in the majority opinion.

If it be conceded that there is evidence in this record that the defendants employed and retained this man Heine, an incompetent fellow servant, it was necessary, nevertheless, to establish in the record that his incompetency was the proximate cause of the injuries sustained. 26 Cyc. 1302. What evidence in the record forms a question of fact for the jury that the incompetency of this man Heine occasioned this injury or proximately caused it?

Assuredly, the act of Heine in tilting this casting as he was directed by the plaintiff to do was not an act of incompetency or the result of his incompetency as a fellow servant. He was doing exactly as the plaintiff had requested him to do. Again the fact that he uttered the word "damn" in connection with this work in trying to pry this casting does not demonstrate, or afford any proof, that this was an incompetent act that proximately caused the injury. Further there is no evidence in this record that this man Heine did push this casting out upon the plaintiff. It is true that the plaintiff testified that Heine had to shove it out, for it would not come out without being shoved out. This was his mere conclusion. He was upon the ground, Heine was within the car. All that the evidence discloses is that Heine was tilt-

ing this casting as he was directed by the plaintiff to do. This was not evidence of Heine's incompetency, rather, if evidence at all, evidence of plaintiff's own incompetency and negligence.

The most that can be said from the testimony of the plaintiff himself is that this man Heine, while trying to get a foothold and trying to work on this casting within the car, used the word "damn," gave the casting a tilt; it came out and injured the plaintiff. Furthermore, the evidence clearly discloses as a matter of law, in my opinion, both contributory negligence and assumption of risk on the part of the plaintiff. Voluntarily, this plaintiff was working with this man Heine before he was directed by the defendant to proceed to unload this car of scrap iron. Then for many months he had known, fully better than the defendant, the incompetency of this man Heine as he testified and as other witnesses testified. While working with this man Heine, one of the defendants directed them to unload this car of scrap iron. Without objection, and without complaining about working with this man Heine, the plaintiff proceeded so to do. In unloading such scrap iron the plaintiff was the director general in the proceedings had. He was the boss on the job, as the testimony well discloses. He directed what each man should do, where Heine should go and what he should do. Assuredly, it appears, as a matter of law, that the injuries sustained by the plaintiff were the result of his own negligence and risks then assumed or created by him. The risk in this work of so unloading the casting, to which the plaintiff was subjected, was a risk created by the plaintiff, and not by the defendants. The risk of directing the man Heine to go within the car and to tilt this casting was a risk that the plaintiff created by his own direction. It was one that he assumed by his own direction, and through the position where he placed himself; it was a risk, likewise, that he could have obviated by his own direction.

In my opinion the trial court did not err in directing a verdict, and its order should be affirmed.

ROBINSON, J., concurs.

On Petition for Rehearing.

PER CURIAM. Defendants have petitioned for a rehearing. In the petition for rehearing it is said: "I contend that the court has wholly

overlooked § 6107, Comp. Laws 1913, although it is quoted in the opinion." That section provides in plain language of unmistakable meaning that *"an employer is not bound to indemnify his employee* for losses suffered by the latter . . . in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care *in the selection* of the culpable employee." This section is in the Civil Code of this state, and § 4331, Comp. Laws 1913, at the beginning of that Code provides that "in this state there is no common law in any case where the law is declared by these Codes."

The common-law rule is that a master must use the same care *in retaining a servant after he has hired* him, as he must use in hiring him in the first place. Clearly the rule under our statute in this particular is not the same as the common-law rule, for the statute by *exclusion* specifically says that the master shall *not* be liable for retaining a careless employee unless he was negligent in the first place in hiring him. Hence there is no object in citing the common-law rule in support of an adverse opinion on this point, because it will not bear analysis.

It will be noted that it is the contention of the defendants that the legislature, in enacting § 6107, Comp. Laws 1913, intended to and did provide a rule even more harsh (from the standpoint of the servant) than the common-law rule. If the statute means what defendants contend it means, then a master may, if he uses due care in hiring a servant, retain such servant regardless of how incompetent and unfit he may subsequently be demonstrated to be, and the master will not thereby violate any duty which he owes to the other servants employed by him as co-employees of such unfit servant. The defendants in effect contend that the word "selection" must be construed to be synonymous with and to mean "hire." We believe the contention to be wholly unfounded. Section 6107, supra, must be read in connection with the sections which precede and follow it. Section 6106, Comp. Laws 1913, reads: "An employer must indemnify his employee, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such or of his obedience to the directions of the employer, even though unlawful, unless the employee at the time of obeying such

directions believed them to be unlawful." Section 6108 reads: "An employer must, in all cases, indemnify his employee for losses caused by the former's want of ordinary care."

These statutes (§§ 6106–6108) recognize that the master owes certain duties to his servants. That, among others, it is the duty of the master to use ordinary care in the selection of servants employed by him. This duty—like the duty to furnish reasonably safe and suitable appliances with which, and a suitable place in which, to work—is a continuous one. Labatt, Mast. & S. §§ 1079, 1009, et seq.

It may be noted that § 6107, Comp. Laws 1913, as well as §§ 6106 and 6108, were originally taken from California. See Cal. Civ. Code, §§ 1969–1971. In Gier v. Los Angeles Consol. Electric R. Co. 108 Cal. 129, 41 Pac. 22, the same contention was advanced as that now advanced by the defendants in their petition for rehearing, but the supreme court of California refused to construe the statute in the manner suggested, and held that "lack of ordinary care may as well be shown by the retention of an unfit employee after knowledge of the fact, as by failure to use due diligence at the time of his selection, and in either case the liability of the employer attaches." 108 Cal. 133.

We adhere to the construction which we placed upon the statute in the former opinion.

It is also contended that we erred in holding that, under the evidence, the questions of contributory negligence and assumption of risk were for the jury. Further consideration of this question has not altered the views which we entertained and expressed in the former opinion.

A rehearing is denied.

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

DAKOTA NATIONAL BANK, a Corporation, Plaintiff, v. J. F. BRODIE, Defendant, E. J. HUGHES, Garnishee and Appellant.

(176 N. W. 738.)

Garnishment — acts of parties held to estop garnishee from questioning adverse judgment on ground that action sounded in tort and not in contract.

In an action, upon issue taken, against a garnishee, to determine the liability for property or money of the defendant, in his hands, it is *held:*—

1. That, where an action, even though sounding in tort, contains allegations sufficient to constitute a cause of action upon a promissory note, and the parties and the court in the main action have so construed such cause of action, and where the plaintiff, in the affidavit for garnishment has stated that the action is founded upon contract, and the garnishee has filed an affidavit denying liability upon which issue is taken, the garnishee is not in a position to question the validity of the garnishee judgment or proceedings upon the ground that the action sounds in tort and not in contract.

Garnishment — requirement of payment of garnishee fees at service of garnishee summons waived by later acceptance thereof on same day.

2. That the statutory requirement for the payment of garnishee fees, at the time of the service of the garnishee summons, was waived by the later payment and acceptance thereof, upon the same day, although the garnishee afterwards returned the same.

Evidence — government bonds are presumed to be worth par value.

3. That bonds of the United States government are presumed to be worth par value unless the contrary be shown.

Garnishment — defendant's agent may be held as garnishee.

4. That an agent of the defendant may be held as garnishee for property or moneys of the defendant in his possession.

Opinion filed January 10, 1920. Rehearing denied March 1, 1920.

From a judgment of the District Court, Stark County, *Crawford*, J., in favor of the plaintiff and against the garnishee, the latter has appealed.

Affirmed.

T. F. Murtha, for garnishee.

Actual service upon the garnishee is required, and failure to comply with the statute in respect to service is not waived by the voluntary appearance of the garnishee so as to confer jurisdiction upon the court. 20 Cyc. 1050 (f); Altona v. Babney, 62 Pac. 521; Phœnix Bridge Co. v. Street, 60 Pac. 221; 2 Sutherland, Pl. § 2751, p. 1753.

J. W. Sturgeon, for respondent.

The declaration in an action for deceit must clearly and distinctly allege all the essential elements of actionable fraud. 20 Cyc. 96, 97, 102.

Money in the hands of an agent to pay debts of the principal to one creditor is liable to garnishment at suit of another creditor. McDonald v. Gillett, 69 Me. 271; Center v. McQuesten, 18 Kan. 476; Jepson v. International Frat. Alliance, 17 R. I. 471, 23 Atl. 15; Smith v. Wiley, 41 Vt. 19; Edson v. Trask, 22 Vt. 18.

Bronson, J. This is an appeal from judgment of the district court in favor of the plaintiff and against the garnishee, the appellant herein. On December 31, 1918, the plaintiff instituted an action to recover the amount of a promissory note made by the defendant, upon grounds of false representations, as alleged, that the defendant was the owner of certain lands, in McKenzie county. Garnishee process was then served upon the appellant herein, as a garnishee. His garnishee fees were not then paid, but, later in the day, were tendered to and received by him, but, afterwards in the evening of the same day, he returned such money to the officer.

About two or three days prior to the service of the garnishee summons, $2,000 in United States Liberty bonds were given to the garnishee by the defendant for the purpose of settling the indebtedness of the defendant to the plaintiff, and for deducting therefrom the sum of $325, a claimed indebtedness existing between the garnishee and the defendant. On December 30, 1918, the garnishee went to the plaintiff bank, and there negotiations were had concerning the settlement to be made. The garnishee offered to deliver the bonds to the bank if the bank would pay to him $600 in a draft to cover his claim of $325 and another purported claim of $325. These negotiations did not proceed to a settlement. The garnishee testified that the same

evening, about 7:30 P. M., he deposited these bonds in the mail in an envelop addressed to the defendant at St. Paul. The next morning the garnishee summons was served. Later, in February, 1919, the garnishee filed an affidavit denying any liability to the defendant concerning any money or property. The plaintiff thereupon took issue with the garnishee. In March, 1919, pursuant to stipulation in open court, judgment was entered in favor of the plaintiff and against the defendant for the amount of the note, amounting, with interest and costs, to $1,763.41. Later, in May, 1919, the issue between the plaintiff and the garnishee came on for trial, and, pursuant thereto, the court made its findings that at the time of the service of the garnishee summons the garnishee had in his possession the Liberty bonds in question of the par value of $2,000, the property of said defendant, subject to indebtedness to such garnishee in the sum of $325, leaving a net indebtedness of the garnishee to the defendant of $1,675. Accordingly, judgment was entered, upon such findings, on July 3, 1919, directing the garnishee to deliver such Liberty bonds to the sheriff, and requiring the sheriff to account for $325 to the garnishee after the sale of such bonds, and further, that, if the garnishee failed to deliver the same, the plaintiff should have judgment against such garnishee for $1,675, together with certain costs. From this judgment this appeal has been taken.

The appellant principally specified error upon the grounds:

1. That the complaint sounds in tort, and not in contract, and therefore the claim was not subject to garnishment.

2. That the evidence discloses that the garnishee was not indebted to the defendant at the time of the service of the garnishee summons, for the reason that previously the bonds had been mailed back to the defendant.

3. That the garnishee, at the time of the service of the garnishee summons, was not paid garnishee fees as required by law.

4. That there is no evidence adduced of the value of the Liberty bonds.

5. That in any event the garnishee was a mere agent of the defendant, acting pursuant to instructions, and not liable as a garnishee.

Although, as contended by the appellant, the complaint may be construed as an action in tort, nevertheless the complaint sets forth facts

sufficient to constitute a cause of action in contract upon a promissory note. The parties to the main action have permitted it so to be construed, and the judgment, in fact, was so entered, pursuant to stipulation of the defendant's attorney. Furthermore, the affidavit for a garnishment in this action, made by the plaintiff's attorney, states that the cause of action is founded upon contract. In February, 1919, the garnishee made his affidavit, denying liability. On January 6, 1919, the plaintiff took issue with such affidavit. Later, in March, 1919, the garnishee made a motion upon the order to show cause for dismissal of the garnishment, upon the ground that the action was not upon contract. This motion was denied by the trial court.

We are satisfied, therefore, upon this record, that the plaintiff and the defendant had the undoubted right to treat this action as an action on contract, and that the garnishee, after disclosure, was not in a position to question the nature of the main action, as treated and construed both by the parties and the court. See notes in 13 Am. Dec. 341, and 100 Am. Dec. 511; 20 Cyc. 1076; Rood, Garnishment, § 182; Ihorn v. Wallace, 88 Ill. App. 562–564; May v. Gesellschaft, 211 Ill. 310, 71 N. E. 1001.

Upon the issue that the property was not in the possession of the garnishee at the time of the service of the garnishee summons, the trial court has found adversely to the contention of the appellant. Without reviewing, in detail, the evidence and circumstances necessary to justify such findings, we are of the opinion that there is presented, upon this record, a question of fact, whether the bonds were in the possession of the garnishee at the time of the service of the garnishee summons, and, upon usual presumptions, that the findings of the trial court, in that regard, should not be disturbed. Upon this record the contention of the garnishee concerning the payment of garnishee fees is without merit. The evidence is fully sufficient to establish a waiver in that regard. Concerning the question of value, the presumption obtains that the bonds of our Federal government are worth par value until the contrary is shown. Comp. Laws 1913, § 7180; Patterson v. Plummer, 10 N. D. 95, 86 N. W. 111; Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. 916. There is some contention made upon this appeal, that the garnishee was a mere agent of the defendant for a certain purpose, and as such could not be subject to garnishment. Under

our statutes an agent may be liable for property in his possession belonging to his principal through garnishment proceedings. Comp. Laws 1913, § 7567; 20 Cyc. 118. See also Shortridge v. Sturdivant, 32 N. D. 154, 155 N. W. 20; Petrie v. Wyman, 35 N. D. 126, 143, 159 N. W. 616.

The judgment is in all things affirmed, with costs to the respondent.

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

GRACE, J. (dissenting). The evidence is conclusive that at the time the garnishee summons was served upon the garnishee he had no property in his possession belonging to the defendant.

On December 30, 1918, the garnishee had, by United States mail, remitted to the defendant the bonds in question. There is no evidence to dispute this fact. He was not garnisheed until the following day.

As we understand the matter, there was no order of the court restraining the garnishee from remitting the bonds as he did, and he had a perfect right to remit the bonds. Hence, at the time of the service of the garnishee summons, he had no property in his possession, or under his control, belonging to the defendant.

J. B. STREETER, Respondent, v. CHARLES E. ARCHER and Hattie Archer, Appellants.

(176 N. W. 826.)

Specific performance — denied where contract without adequate consideration or one obtained by misrepresentations, etc.

In an action by plaintiff to compel specific performance of an alleged optional contract for the sale of land it is *held:* Specific performance should be denied it appearing there was no consideration for the contract; and for this and other reasons set forth in the opinion specific performance is denied.

Opinion filed February 11, 1920. Rehearing denied March 9, 1920.

Appeal from the District Court of Ramsey County, Honorable *C. W. Buttz,* Judge.

Judgment reversed.

L. J. Wehe, for appellants.

A voluntary executory agreement is not enforced in equity, and the fact that the memorandum of the contract states a consideration is immaterial; the fact that no consideration exists may always be shown. 36 Cyc. 544, 608; Comp. Laws 1913, § 5872.

There must be some consideration for the option to render it more than an offer revocable before acceptance, but the amount of the consideration is generally immaterial. 36 Cyc. 626; 9 Cyc. 309; 13 C. J. p. 312.

There is no mutuality of obligation where one party's obligation is not definite and certain. Comp. Laws 1913, § 5857; 1 L.R.A.(N.S.) 445; 9 Cyc. 327; Kaster v. Mason, 13 N. D. 107, 99 N. W. 1083.

Cuthbert & Smythe, for respondents.

"Specific performance may be compelled though contract signed only by one." Biddow v. Flage, 22 N. D. 53, 132 N. W. 637; Nier v. Hadden, 148 Mich. 488, 111 N. W. 1040; Morgan v. Russell, 24 N. D. 490, 43 L.R.A.(N.S.) 1150, 144 N. W. 99.

The defendants claim they entered into the contract, Ex. 1, by mistake or misapprehension; they must prove this by evidence that is "clear, convincing, and satisfactory." See 34 Cyc. 984; Fritz v. Fritz, 94 Minn. 264, 102 N. W. 705; Kinyon v. Cunningham, 146 Mich. 430, 109 N. W. 675; Wilcox v. S. Wicker, 129 Iowa, 151, 105 N. W. 392; Misses v. Baldwin, 262 Ill. 48, 104 N. E. 195; Metropolitan Loan Asso. v. Esche, 75 Cal. 513, 17 Pac. 675.

GRACE, J. This is an action to compel the specific performance of a certain alleged contract, relative to certain real property. On account of the uncertainty as to the real nature and meaning of the contract, it is deemed advisable to set it forth in full. It is as follows:

"For and in consideration of the sum of $1 to me in hand paid, and other valuable consideration received by me from the second party, I, the subscriber, as first party, hereby offer to sell and convey by warranty deed or by contract for deed to J. B. Streeter, of Devils Lake, North Dakota, as second party, the following described premises for

the sum of $11,000, purchase price, on the following terms, *viz.:* Two thousand dollars upon acceptance of this option by second party, balance payable, $2,000, ninety days after date of first payment, and balance of $7,000, if desired, can be on one half of the crop contract now held by me on within described land, which contract provides that I shall turn in one half the crop each year until the land is paid for and draws 7 per cent interest; to wit, the south half of the northeast quarter and lots one and two of section 4, and the west half of the northwest quarter of section No. 3, in township No. 153, N., of range No. 65, in Ramsey county, North Dakota, together with all crops on above-described lands, should first party harvest the crop on within land, said second party or the purchaser of the land is to pay him for work of harvesting, hauling, or whatever work is done by first party in caring for the harvesting and marketing of all said crop.

"An abstract of title to said above-described property showing marketable title in first party, at his own cost and expense, shall upon request be furnished at once to second party.

The said second party shall have at least six months within which to accept this proposal, and thereafter until said first party shall give second party written demand that said proposal be accepted within ten days from date of the service of such demand upon said second party, and unless so accepted this proposal shall become null and void, provided that said abstract, if so requested, shall have been furnished at the time (showing good and marketable title) or prior to such demand.

"On account of second party being to continually large expense in advertising and maintaining his organization and general expenses in his business of getting his proposed buyers for land, said first party agrees to maintain to prospective purchasers the asking price said second party may put on within described property, and to help along said second party's sale of same.

"All payments of purchase price shall be made under this optional offer at the offices of J. B. Streeter, Inc., and as soon as made shall be construed to be an acceptance of this offer by the second party without further notice.

"The second party on making the payment of purchase, as aforesaid, may deduct therefrom the amount of whatever is required to pay off all encumbrances against said premises, and the first party agrees to

execute at once and deliver to the said J. B. Streeter, Inc., to be delivered to the second party, together with said abstract, a warranty deed or contract for deed of said premises, or to whomsoever second party shall direct, as grantee, the consideration expressed in which deed or contract for deed shall be such sum as second party shall direct, and turn over the possession of the same to the second party or his assigns. Said first party also agreeing to assign without cost any and all insurance there may be on within-described property at date of this option or taken out subsequent thereto, assigning same to whoever said second party may direct, and delivering all said insurance papers or policies with the deed or contract as above provided for.

"On acceptance of this offer by the second party, and on furnishing the abstract of title showing good and marketable title in first party, and executing the deed of conveyance by the first party, as aforesaid, and not before, the said J. B. Streeter, Inc., shall pay over to the first party the money paid it as purchase price as aforesaid.

Dated this twenty-eighth day of May, 1918.

"Witnesses:
"E. W. Cunningham.
"C. A. Stotlar."

"Charles E. Archer,
"Hattie Archer."

The defendants had purchased, by contract for deed, from George Meiklejohn, in the year 1912, the land in controversy, for $12,000, $4,700 of which was to be paid down, and $7,300, the balance, to be paid by the delivery to Meiklejohn, of one half of the crops to be raised upon the land in the succeeding years. It was further provided that the defendants could make no valid assignments of the premises or any part thereof, or of said contract, unless the consent of the first party (Meiklejohn) should be indorsed on or attached to the contract or pledge, if any, etc.

J. B. Streeter is a real estate dealer, residing at Devils Lake. There were two corporations bearing his name; namely, J. B. Streeter, Inc., and The J. B. Streeter Corporation.

The alleged contract in controversy is between Charles E. Archer and Hattie Archer, his wife, and J. B. Streeter as an individual. It is signed by the defendants only.

The defendants claim it was procured from them, by the plaintiff,

through fraud and trickery. The defendants, who lived on the farm and farmed it for more than six years, claim that, in May, 1918, while the defendant was seeding, J. B. Streeter, the president and general manager of the two corporations, organized for the purpose of dealing in real estate, came to his farm to list the same for sale. At that time, there was no agreement made. Archer claimed that he told them he would sell the farm for $12,000, and pay commission of $1,000, for sale of the same.

On May 28, 1918, J. B. Streeter sent out one of the employees of the corporation, and got Mr. Archer to come into the office. They went into Streeter's private office, where Archer again told Streeter the terms upon which he would sell. The defendant claims that J. B. Streeter was carrying on a campaign for the sale of real estate, in the name of J. B. Streeter, Inc.; that there was a large electric sign out in front, with that name on it, and the name appeared in large letters on the windows.

He claims from that, and from what Streeter had told him, he thought he was dealing with J. B. Streeter Corporation. Nothing was said as to the time the listing contract would expire. Streeter drew up and prepared a contract, and procured Mr. Archer's signature to it without him reading it over, and on the same day the wife signed it without reading it over. No consideration of any kind was paid at the time of the signing of the contract. The defendant received no copy of the same, and thought he was signing a listing contract.

Sometime prior to July 15, 1918, Archer went to see Streeter, and no buyer for the land, up to that time, had been procured. Between the 15th and 20th of July, 1918, Cunningham and Stotlar, employees of the corporations, brought out the first party to look at the land, neither of whom wished to buy it. It was during some of the conversation, in regard to the price of the land, between these prospective purchasers, and the agents of the corporations, in the presence of Archer, that he became convinced there was something wrong in regard to the listing contract, which he had signed; that is, he claimed they were getting different prices than those agreed to by him.

He claims that he thought he was dealing with J. B. Streeter Corporation, and that Streeter so told him, at the time he signed the con-

tract; that he was deceived as to the character of the contract, and as to with whom he was dealing with.

On about August 10, 1918, J. B. Streeter, as an individual, served notices upon the defendant, that he elected to purchase the farm, and exercise the alleged option, in the alleged contract, to purchase, and at that time, served a notice of an alleged deposit having been made by J. B. Streeter as an individual, with J. B. Streeter, Inc., in the sum of $2,000; that the alleged deposit was made by J. B. Streeter as an individual, with J. B. Streeter as president and general manager of the J. B. Streeter, Inc., by depositing the same in the safe belonging to J. B. Streeter, Inc.

Streeter was the only party in possession of the combination of the safe. If the money were deposited in the safe, it did not remain there all the time; J. B. Streeter took it out, at different times.

J. B. Streeter Corporation kept a separate set of books. but no record or entry was made in any of the books of that corporation, nor is there any evidence, nor entry of any kind in writing, that such deposit had been made with J. B. Streeter, Inc. No other deposit of any kind was made, nor any offer to pay the Archers the expense of harvesting and cutting the crop.

One Richardson claims to have purchased the premises from J. B. Streeter Corporation, under the terms of exhibit 4. The alleged option contract was with J. B. Streeter personally, and it was not assigned to either of the corporations. The Archers had no dealings with Richardson, and refused to have anything to do with him.

Shortly after August 10, 1918, after notice had been served upon Mr. Archer, Meiklejohn, from whom he purchased the land, came to see him, and procured his consent to go in and see if Streeter would deposit $2,000 in some bank, and then go through with the matter. Archer consented to this, and they went to Streeter's office, and Mr. Meiklejohn, the holder of the title of the land, told Streeter, if he would deposit the money in some bank in Devils Lake, they would close the deal. Mr Streeter refused to do this. Meiklejohn refused to have any further dealings with Streeter, and refused to make transfer of the contract, or allow Archer to transfer it. It clearly appears there was no ratification of the contract.

After Archer had finished threshing the crop upon the land, which

amounted to more than $8,000, Streeter commenced this action to enforce specific performance of the alleged contract, J. B. Streeter was not financially responsible, and the corporations were not in much better financial condition than he, though it appears that one of them did have some office furniture and fixtures, and perhaps some other small property,—all of which was mortgaged.

A detailed list of the debts owing by the J. B. Streeter Corporation appears in the testimony. It appears that the safe and adding machine were mortgaged to some of the creditors; it appears that a suit was brought by one Jorgenson against Streeter personally and J. B. Streeter Corporation, and garnishment and attachment proceedings as well; it further appears that one Sheldon went to Streeter, and said that he heard he was going to pieces; that he said, there was the electrical sign, and that he was going to take it, unless he got the difference, meaning, perhaps, what was owing him. He did take the sign. There is no need to refer specifically to all the evidence in regard to the financial condition of J. B. Streeter and the corporations.

We are of the opinion, for several reasons, that specific performance should not be granted.

Section 7198, Comp. Laws 1913, provides, in substance, "that specific performance of the contract cannot be enforced against a party to it, if he has not received an adequate consideration; if it is not, as to him, just and reasonable; if his assent was obtained by misrepresentation, concealment, circumvention, or unfair practice of any party to whom performance would become due under the contract; or, by any promise of such party, which has not been substantially fulfilled, or if his assent was given under the influence of mistake, misapprehension, or surprise."

All of such provisions are applicable to this contract.

The defendants, at the time they signed the contract, received no consideration, and there is no sufficient showing that they received any other valuable consideration. There was no consideration for the contract.

The plaintiff had agreed to do nothing; had in no manner legally bound himself by signing the contract, or agreeing to any of its provisions, in such a manner as to be bound thereby.

The testimony is clear that the defendants agreed to list the land for $12,000. That was their price, while the contract shows it to be $11,000. The defendants had a perfect right to state the amount which they were willing to take for their land, and also the amount which the plaintiff should have for selling the same. Thus, this prior parol agreement was really the inducing and moving cause of the alleged written contract.

In the case of Erickson v. Wiper, 33 N. D. 206, 157 N. W. 596, there was quoted with approval, the following language, which appeared in the decision of the case of De Rue v. McIntosh, 26 S. D. 42, 47, 127 N. W. 532, as used by the supreme court of that state, in construing a statute of South Dakota, identical with § 5889, Comp. Laws 1913.

"This provision of our Code embodies the common law upon the subject of written contracts, and, while the execution of the contract, in writing, whether the law requires it to be written or not, supersedes all oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instruments, nevertheless, as contended by the appellant, there are exceptions to the rule. And one of the exceptions seems to be that agreements or representations made prior to the written contract, under which the party was induced to sign the contract, may be shown; in other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for a written contract, and where he executed the written contract, upon the faith of the parol contract or representation, such evidence is admissible."

From the testimony of the defendant, it is clear he thought he was signing a listing contract, whereas, the alleged contract which he did sign is of the nature of an option contract, and, while laboring under this mistake, he signed the alleged contract, believing it to contain the terms which had been agreed upon.

The plaintiff must have well known that defendant intended a listing agreement, and it was an unfair practice, concealment, and circumvention on the part of the plaintiff, to procure the alleged contract, in view of what the defendant had stated to him, as to the terms upon which the land might be sold, and as to the commissions which he would be willing to pay the plaintiff in case he sold upon those terms.

The alleged contract which plaintiff procured from defendant must be held to be of no effect or validity, either as an option contract or listing agreement; for, though defendant may have intended to give a listing agreement, none was executed, and hence there was no listing of the land, as an option contract it was wholly invalid for the reasons above stated.

It thus was signed under a mistake of fact, and hence there was no free or mutual consent of the defendants to the contract.

Section 5842, Comp. Laws 1913; Orth v. Procise, 38 N. D. 580, 165 N. W. 557.

The office of J. B. Streeter and J. B. Streeter, Inc., and J. B. Streeter Corporation was all one. All the business, if any, was transacted in the one office. In this office, there was a safe used by J. B. Streeter, Inc., and J. B. Streeter. Streeter is the only one who had the combination of the safe. In it, Streeter kept part of his personal papers. He claims he had $2,000; that he called Mr. Smythe down to show it to him, but that Smythe did not count the money; that Streeter put it in an envelop and put it in the safe of J. B. Streeter, Inc., for the purpose of complying with the terms of the alleged contract.

There is testimony to show that the money, if it ever were placed there, did not remain in the safe all the time; that Streeter took it out two or three times, and put it in his pocket, but claims to have returned it.

Smythe testified that, before the commencement of this suit, the $2,000 was turned over to him; that he had brought it with him into court.

J. B. Streeter, Inc., has no record of the transaction in any of its books. No other record seems to have been kept of it, except that it is claimed to have been placed in the safe by J. B. Streeter, as above stated.

We are of the opinion that the evidence, as a whole, shows there was no deposit, in good faith, of the money, with J. B. Streeter, Inc., and we hold there was none. We think it fully appears, from the record, that J. B. Streeter, Inc., J. B. Streeter Corporation, and J. B. Streeter, were all, practically speaking, insolvent.

This bad faith is further demonstrated by the fact that defendant and Meiklejohn were refused the deposit of the money, as above shown.

The testimony further clearly shows that, long before Streeter sought to exercise his alleged option, the defendant had repudiated and canceled it. He testifies that, on the 20th day of July, 1918, he went to the office of J. B. Streeter, Inc., and asked to see the contract; that he saw Streeter and got the contract and read it over, and told him he would like to have a copy of the contract, which he gave him; and that he then told Streeter that that is not the agreement I signed, or that he entered into; that he then told him that he would not be bound by it, and that Streeter said, "All right;" and that he, defendant, understood, from that time, there was not any agreement. We are of the opinion the alleged contract was thus, by the mutual consent of the parties, canceled and terminated. Afterward, when Streeter came out to the place, defendant ordered him off, and also ordered his men off the place. This took place sometime in August.

The testimony shows that nothing more was heard from Streeter until plaintiff had practically harvested the crop and had it practically all threshed, when the written notice was served, by Streeter, upon defendant, notifying him of the alleged deposit of money, and demanding performance, etc.

The trial court, in its memorandum opinion, has placed much stress upon the alleged written contract and the failure of the defendants to read it over, they both being familiar with the English language.

As we view the matter, there was no contract. Where there is no consideration, there is no contract. The minds of the parties never met in a contract. The defendants' assent to the contract was given under mistake and misapprehension, as more clearly appears from what has been stated above. Specific performance of such a contract may not be enforced.

Streeter agreed to nothing in the contract. He did not agree to pay a down payment of $2,000, nor the $2,000 ninety days after the date of the first payment, nor did he agree to assume the balance of $7,000, under the contract. He, in no manner, bound himself absolutely by the payment of any money, or by the making of any promise, in writing or otherwise.

The most that can be said of it, if it had been drawn so as to contain the contemporaneous parol agreement of the parties, with reference to the terms upon which such land might be sold, as testified to by

Archer, is that it would then have been an offer to sell, and to pay the plaintiff a stated sum for making the sale.

The rule is well settled that where written contract is entered into between the parties, and each agree to the matters therein contained, the contract being for a sufficient consideration, and having been entered into without any fraud, deception, circumvention, or deceit having been practised by either party, and where no contemporaneous parol agreement was the inducing cause of the written contract, and which is not therein contained, and where the parties can read, and have opportunity to do so, and thus understand the contract, and where such contract is not void for want of mutuality or free assent of the will to its terms, and where it is complete and its terms unambiguous, it constitutes the highest evidence of the terms of the agreement, and, as a general rule, parol testimony will not be admitted for the purpose of varying the terms of the written instrument.

The plaintiff cannot be heard to assert, against the defendants, the principle of estoppel. The alleged sales of the land by plaintiff, to other parties, in no manner concern defendants, for they were not a party to them, and had no connection with them.

The plaintiffs in this case, after procuring the alleged contract, in the manner above stated, in which he in no manner bound himself to do anything, never attempted to do anything, with reference to making a binding contract, until several months after the date of the alleged contract, when a magnificent crop, of the value of more than $8,000, was securely harvested and threshed by the defendants, and when it was apparent that the crop would be equivalent in value to the greater share of the purchase price mentioned in the alleged contract. It was then, and then only, that he became active, in serving notice that he elected to purchase the land, and became active in the making of the alleged deposit.

The doing of these things, however, as we have seen, availed nothing and this for the reasons above stated. It is clear, for all the reasons above stated, that specific performance of the contract should be denied.

It is denied. The judgment of the District Court appealed from is reversed and the case is remanded, and such action should be dismissed. It is so ordered.

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

ROBINSON and BRONSON, JJ., concur.

BIRDZELL, J. (concurring). I concur in the holding of the court that the plaintiff and respondent is not entitled to a specific performance of the contract, but for reasons other than those stated in the majority opinion. With due respect to the opinion of the majority, I find my views to be at variance with those expressed in the opinion of Mr. Justice Grace, both as to some of the facts and as to the legal conclusions drawn from the facts therein stated. I am of the opinion that the evidence shows the so-called option contract to have been fairly entered into; that it stated the substance of the understanding between the parties with reference to the terms upon which Archer was willing to dispose of his land; and that the purchaser sufficiently manifested his desire to purchase within the time specified in the option or offer.

I am further of the opinion that the facts stated with reference to the financial responsibility of J. B. Streeter or the J. B. Streeter Corporation are foreign to any issue in the case, and should not be considered as having any bearing, for the reason that it affirmatively appears in the record that the plaintiff was able to comply with all of his obligations, and that the rights of the defendant could be amply protected in the decree or judgment. In fact the money due was tendered in court. Even if it should be conceded that the plaintiff is insolvent, this would furnish no reason for denying him specific performance, as this remedy is allowable to all on equitable terms regardless of their financial responsibility.

It is said that all of the provisions of § 7198, Comp. Laws 1913, are applicable to the specific performance of the contract in question, but as I view the facts this section is in no wise applicable. It may be conceded that there was no consideration paid for the so-called option contract, in which event it would not amount to a binding, irrevocable, continuing offer on the part of Archer to sell his land for the price stated. But it would still amount to a continuing offer which would result in a contract if accepted within the time therein limited, and under the evidence it seems to me that it was so accepted. It is therefore

immaterial whether any consideration was paid at the time the option contract—listing agreement or offer (whichever it may in fact be)—was signed by the defendants. See 25 R. C. L. p. 236. There it is said: "By his election to accept and exercise the option, the contract becomes binding on the holder, and any objection to its enforcement on account of want of mutuality is removed." For purposes of the remedy sought by the plaintiff in this case, and for purposes of the application of the statute (§ 7198), the term "adequate consideration" relates only to the consideration for the sale, and not to the consideration for an option preceding the sale, if such existed. "The inadequacy of consideration for an option to purchase real estate cannot defeat the right to performance of the contract to convey after the option has been accepted, if the price to be paid for the land is adequate." 25 R. C. L. 237. Under the evidence in this case there could be no question of the adequacy of the consideration agreed to be paid by the purchaser, for it corresponds exactly with what the sellers understood they were to obtain. They themselves admit it in their own testimony. They were to receive $11,000 net for the land, and if they regarded this as an adequate consideration it should not be otherwise regarded by the court. For manifestly, remedies upon contracts, when fairly made, proceed upon the basic principle that parties are free to make such contracts as they choose. It is well-settled that an option contract is specifically enforceable at the instance of the one who avails himself of the option. 36 Cyc. 625; 25 R. C. L. 237. "In fact," says Pomeroy, "mutuality has nothing to do ordinarily with contracts of option. The option is only a binding offer. The promisor has parted with the right to withdraw his offer. There is nothing to enforce in equity before the exercise of the option, as the promisee has already obtained his right,—to have the offer kept open. Upon the exercise of the option, *i. e.*, the acceptance of the offer—and the filing of the bill by the promisee would be one way of exercising it,—the option ceases as an option, and equity has an ordinary bilateral contract to deal with." 5 Pom. Eq. Jur. § 2195 (§ 773). The promisee thus ordinarily renders himself subject to a like remedy at the suit of the adverse party.

It is equally well settled that specific performance will not be denied merely because circumstances arising subsequently and anterior to the time of its performance render the subject-matter of much greater value

to the purchaser. Pom. Eq. Jur. § 2219 (§ 797); 25 R. C. L. 254; 36 Cyc. 616, 617. It clearly appears in this record that at the time the first negotiations were had the parties looked forward to the contingency of the crop; for it was expressly provided in the contract or offer signed by the defendants that, in case of purchase, the plaintiff or the purchaser was to pay the defendants for the work of harvesting and hauling, or whatever work was done by them in the harvesting and marketing of the crop. Archer himself testified that at the time he listed the land with Streeter, that he (Streeter) wanted him to throw in the crop, and, to use Archer's own words, he said: "'I will throw in half of it,' and he [Streeter] said, 'No, I won't take it that way, it is not worth it, if you will throw in all of it may be I can do something with it,' and I said, 'I do not want to give all the crop, but if you can sell that way I will list it with you.'" It is clear, then, that Archer understood that he was selling both the land and the crop, and any provision in the agreement giving him a right to be reimbursed for the work and expense prior to the sale would be in his favor. Such provision is made in the contract, as above indicated. I am of the opinion that the so-called option contract amply evidenced the true agreement of the parties with respect to the crop. It would follow from what has been stated that, upon acceptance by the plaintiff, there was a mutually binding contract for the sale of the land.

From the fact that a mutually binding contract exists, it does not follow, however, that it is one that should be specifically enforced. While I see no element of unfairness, fraud, hardship, inadequacy of consideration, or lack of mutuality of obligation present, which would deprive the plaintiff of the remedy of specific performance, it is quite apparent, in my opinion, that there is lacking the element of mutuality of remedy, such as is required under our statute as previously construed and applied by this court. Section 7200 provides that an agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt, and § 7193 provides:

"Neither party to an obligation can be compelled specifically to perform it, *unless the other party thereto has performed, or is compellable specifically to perform everything to which the former is entitled under*

the same obligation, either completely or nearly so, together with full compensation for any want of entire performance."

In the case of Knudtson v. Robinson, 18 N. D. 12, 118 N. W. 1051, this statute was construed as preventing specific performance in favor of the purchaser, where the vendor could not have compelled specific performance by reason of his inability to alone enter into a contract for the sale of a homestead. Under the contract in that case Robinson, the defendant, had agreed to sell 960 acres of land, 320 of which was a homestead. In commenting upon the lack of mutuality of remedy under the statutes above quoted, this court, speaking through Chief Justice Morgan, said:

"Since Robinson could not enforce specific performance against Knudtson under the facts of this case, specific performance could not be enforced by Knudtson against Robinson. There must be mutuality of obligation and remedy between the parties before specific performance is enforceable against either, except in cases where there has been performance by the party seeking to enforce specific performance. This is a statutory principle in this state, as laid down in § 6610, Revised Code, 1905 (id. § 7193, Comp. Laws 1913)."

After quoting the statute, the discussion continues:

"The remedy must be reciprocal. Performance by the party seeking to enforce performance under this section of the Code entitles such party to have the contract specifically enforced, although there was no mutuality of remedy when the contract was entered into. So far as the enforcement of contracts that are not mutual, as to obligation or remedy, this section is only a declaration of the common-law rule on this subject. Pederson v. Dibble, 12 N. D. 572, 98 N. W. 411.

"The appellant contends that an offer of performance satisfies the requirement of the statute, and that, by tendering and bringing into court the sum claimed to be actually due under the contract, the nonmutuality of the contract is rendered immaterial. The language of the section is explicit, that performance or the right to compel substantial performance of the contract must be shown before contracts that are not mutual can be specifically enforced. 'Performance' is a word of settled meaning, and means the doing or completing of an act. 'An offer to perform' and 'performance' are not synonymous in meaning. Without performance the party seeking enforcement of the contract is

not within the provisions of the statute when he has tendered performance or simply shown a willingness to perform. Crumbly v. Bardon, 70 Wis. 385, 36 N. W. 19; Lattin v. Hazard, 91 Cal. 87, 27 Pac. 515."

It is clear that in the instant case the plaintiff has not performed. The mere deposit of the money at the office of the Streeter Corporation, at the place where the money was payable, only amounts to a tender, and not to a performance. It does not discharge the obligation to pay. This could only have been done by complying with the statute relating to the extinction of obligations. Section 5815, Comp. Laws 1913, states the requirements in this respect. It reads:

"An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute, and notice thereof is given to the creditor."

This statute was not complied with and it is clear that nothing more was done by the plaintiff than to offer to perform or tender performance. This was expressly held in Knudtson v. Robinson, supra, not sufficient to satisfy the statute.

But the statute obviates the necessity of performance by the plaintiff as a prerequisite, where the defendant is "compellable specifically to perform everything to which "the other party is entitled under the same obligation, with allowance for compensable deficiencies. Archer purported to bind himself under this contract "to sell and convey by warranty deed or by contract for deed to J. B. Streeter," and to place his warranty deed or contract with "J. B. Streeter, Inc.," at once for delivery either to the second party (J. B. Streeter) or to whomsoever the latter should direct, and no portion of the purchase-price money paid to J. B. Streeter, Inc., was to be paid over to the defendant until the "furnishing of the abstract of title showing good and marketable title in first party and executing the deed of conveyance by first party." It is clear, under the facts appearing in this record, that Archer never had a marketable title to the land in controversy. He had only an equitable title under a contract for deed, which, according to its terms, was not assignable without the consent of the owner of the legal title. He expressly contracted to sell more than he had to sell, and it is obvious that he could not be compelled to transfer a title which he could not acquire without the consent of a third party. See Norris

v. Fox, 45 Fed. 406. Under the record in this case it is clear that Archer was not selling his mere equity in the land. Indeed, it appears that the plaintiff is attempting, in this proceeding, to obtain more than Archer's equity; for, though Meiklejohn, the owner of the legal title, is not made a party to the action, an attempt is made, through the filing of affidavits, to direct the application of a portion of the consideration of money to the discharge of his claims. In fact, findings are made which purport to adjudicate rights between Archer and Meiklejohn, the court reserving, however, the right to make the latter a party. The plaintiff has not shown himself to be willing to accept what Archer could transfer. In these circumstances the vendor is not estopped or precluded from asserting his inability to perform to the extent demanded. Whatever might be the case, if Archer had acquired a marketable, legal title before this action was begun, it seems that there is no room to doubt that so long as he did not have the character of title which he was contracting to convey, he could not have compelled Streeter to perform. It follows, then, from the previous construction of the statute referred to, that Streeter cannot compel him to specifically perform, but should be remitted to his action for damages. (For a case parallel on the option feature and somewhat analogous on the question of the remedy, see Smith v. Bangham, 156 Cal. 359, 28 L.R.A.(N.S.) 522, 104 Pac. 689).

What is said above is said in the light of the previous construction of the statute by this court, which treats the rule requiring mutuality of remedy as being one of reciprocity. It may be that, for practical purposes, the rule should be considered as satisfied when, at the end of the suit, the defendant may have the full benefit of the plaintiff's performance of his contract. But the question does not seem to be an open one in this state. I therefore concur in the reversal for the reasons above indicated.

CHRISTIANSON, Ch. J. I concur in the opinion prepared by Mr. Justice Birdzell.

W. D. WENDT, Appellant, v. A. M. WALLER, Respondent.

(176 N. W. 930.)

Schools and school districts — attack on title to office of county superintendent of schools is collateral attack on second-grade professional certificate.

In a proceeding to determine the title to the office of county superintendent of schools, where it appears that the defendant, who had received a majority of the votes at the election, held a second-grade professional certificate required by § 1122, Compiled Laws of 1913, and where it is contended that the certificate could not have been legally issued as the defendant did not possess the necessary educational qualifications to entitle him thereto, it is *held:*

1. The legislature having imposed upon the superintendent of public instruction the duties of determining the existence of the necessary qualifications for a second-grade professional certificate and of revoking those improperly issued, a review of such determination by the court, except for fraud, or an original attempt to impeach a certificate in a judicial proceeding, involves a collateral attack on the certificate.

Schools and school districts — second-grade professional certificate cannot be collaterally attacked.

Following McDonald v. Nielson, 43 N. D. 346, a collateral attack on such a certificate is not permissible.

Opinion filed February 24, 1920.

Appeal from District Court of Ward County, *Leighton,* J.

Affirmed.

Fisk & Murphy, for appellant.

The statute not only provides for a term of two years for county superintendent, but for two years' additional time until a successor is elected and qualified. State v. Fabrick, 16 N. D. 94.

The incumbent of a public office, who has the right to hold over until his successor is elected and qualified, has such a special interest as enables him to maintain an action. Jenness v. Clark, 21 N. D. 150.

Palda & Aaker, for respondent.

"The law presumes that the officers did their duty in issuing a teacher's certificate." Kimball v. School Dist. 63 Pac. 213; Fitzgerald v. School Dist. 31 Pac. 427.

"Teacher's certificate of qualifications can only be attacked for fraud, and such fraud must be set forth." State ex rel. Lindburg v. Grosvenor, 27 N. W. 728; Blanchett v. School Dist. 20 Vt. 423; George v. West F. School Dist. 20 Vt. 495; Doyle v. School Dist. 36 Ill. App. 653; 35 Cyc. 1066, 1067, authorities cited.

BIRDZELL, J. This is a proceeding to determine the title to the office of county superintendent of schools in Ward county. From a judgment finding the defendant entitled to the office, the plaintiff appeals. The plaintiff was the incumbent of the office in 1918, and he and the defendant were candidates for election in the general election of that year. In the election the defendant received a majority of the votes, and on or about the 1st of January, 1919, he qualified for the office in the statutory manner and demanded possession. The plaintiff refused to relinquish possession, whereupon mandamus proceedings were begun in the district court, which resulted in installing the defendant in the office on his prima facie title evidenced by his certificate of election. Thereafter, this proceeding was instituted.

It is alleged that the defendant was not, at the time of the election nor subsequently, elegible to hold the office, for the following reasons: That he was not a graduate of a reputable normal school nor of any higher institution of learning; that the defendant does not lawfully hold a professional certificate of the second grade, as defined by statute; and that he has not had one year's successful teaching experience within the state of North Dakota. It is further alleged that if the defendant has a second-grade professional certificate it was issued to him fraudulently, as he does not possess the educational qualifications required by statute, and did not take an examination as a result of which he was found proficient in the prescribed subjects.

The only question presented, according to the appellant's contention, is whether or not the defendant had the qualifications to hold the office of county superintendent of schools at the time of the general election in 1918. Section 1122 of the Compiled Laws of 1913 prescribes the qualifications of the county superintendent as follows: "No person shall be deemed qualified for the office of county superintendent in any county, who is not a graduate of some reputable normal school or higher institution of learning, or who does not hold at least a second grade professional certificate, and who has not had at least two years success-

ful experience in teaching, one year of which shall have been within this state."

The defendant is not a graduate of a normal school or of a higher institution of learning; but it is admitted that he holds a professional certificate of the second grade, which was issued to him on July 17, 1915, and is good for a period of five years. It recites on its face that it is based upon work done at Iowa College, Grinnell, Iowa, an institution in which the defendant did about two years' work after leaving high school. Five years prior to the issuance of this second-grade professional certificate, a certificate of the first class was issued to the defendant, which appears to have been issued upon examination in certain subjects, the results of which appear upon the face of the certificate. We do not understand counsel to contend that either of the professional certificates have been fraudulently issued to the defendant, but it is argued that the facts with reference to the defendant's qualifications to receive the certificates show that they could not have been legally issued. Obviously, if this argument prevails, this court would be required to pass upon the qualifications of persons to receive the certificates designated in the statutes. The legislature, however, imposed this duty upon the state superintendent of public instruction, and, when that officer has determined the existence of the necessary qualifications to entitle one to a certificate, such determination cannot be reviewed by a judicial tribunal except for fraud. The statutes provide expressly for the revocation of certificates by the authority that issues them. Section 871, Rev. Codes 1905, as amended by chap. 104, Session Laws of 1907, and §§ 1374, 1375, Comp. Laws 1913. It does not appear that any attempt was ever made to obtain a cancelation or revocation of the certificates by the issuing authority. Neither does the certificate appear to be attacked on the ground of fraud in issuing it. We are of the opinion that the attempt to go back of the certificate of qualification given by the proper authority in this proceeding involves a collateral attack on the certificate, such as we have recently held (McDonald v. Nielsen, 43 N. D. 346, 175 N. W. 361) is not permissible.

The judgment appealed from is affirmed.

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

AUSTIN E. PELTON, Plaintiff, v. J. H. ROSEN and Pearl Rosen, Defendants.

(176 N. W. 920.)

Judges — statute held to permit but one affidavit of prejudice at same term.

Chapter 1, Laws 1919, which provides that either party to a civil action may file, before the opening of a term of court, an affidavit of prejudice against the judge to preside thereat, has reference in application, to the term of court to be held, and does not permit the filing of more than one affidavit of prejudice against a judge to preside at such term.

Opinion filed February 24, 1920.

Motion of plaintiff to designate a new trial judge, under a second affidavit of prejudice, filed in a cause pending in District Court, Dunn County.

Motion dismissed.

W. F. Burnett and *Alf O. Nelson,* for plaintiff.

J. A. Hyland and *T. J. Krause,* for defendants.

PER CURIAM. This is an action pending in Dunn county, sixth judicial district. Prior to the commencement of the September, 1919 term of the district court in that county, the defendants filed an affidavit of prejudice against Judge Crawford, to preside thereat.

This affidavit was filed with the supreme court on September 26, 1919. Thereupon Judge Lembke, of the same district, proceeded to hold such term of court, commencing on September 29, 1919, and was designated by this court to try this cause. At the opening of this term, the plaintiff filed an affidavit of prejudice against Judge Lembke. Upon the filing of this affidavit of prejudice in the court is was ordered that the application be denied, it appearing that the same was not filed within the time prescribed in said chap. 1, Laws 1919. The subject-matter is before this court upon motion of the plaintiff for recognition of his affidavit of prejudice filed. The plaintiff contends that, under the statute, permission is granted for each of the parties to file an affidavit of prejudice against a presiding judge, and that the exercise of this

right by one of the parties does not deny its exercise by the other. It is further contended that plaintiff's affidavit of prejudice was filed, in fact, anterior to the opening of the term of court on September 29, 1919; this is denied by the plaintiff.

Chapter 1, Laws 1919, § 1, provides as follows:

"When either party to a civil action pending in any of the district courts of the state shall after issue joined and before the opening of any regular, special, or adjourned term at which the cause is to be tried, file an affidavit stating that he has reason to believe and does believe that he cannot have a fair and impartial trial or hearing before the judge of the district court by reason of the prejudice or bias of such judge, the court shall proceed no further in the action and shall thereupon be disqualified to do any further action in said cause."

The act further provides that such affidavit, with two copies, shall be filed with the clerk of the district court, and that such clerk shall forward to the clerk of this court a copy thereof; that, thereupon, this court shall designate a district judge to act in the place and stead of the judge disqualified; that the judge designated shall proceed with the trial of the cause, and that, after the filing of such affidavits, no juror shall be excused except for good cause. Section 7 thereof provides that not more than one change shall be granted on the application of either party.

The machinery provided for permitting such change of judges by affidavit of prejudice, as well as the verbiage used in the act, do not disclose any intent to grant two distinct and different changes of judges during one term upon a pending cause. No construction can be read into the statute which will permit both parties to a pending cause, at a specific term, to claim and to have the right to disqualify successively a presiding judge by affidavit of prejudice provided in the act. To so do would in a manner destroy the purposes and intent of the act. Under the present practice, the moving party places the pending cause upon the calendar: he, or the adverse party prior to the opening of the term, may disqualify the judge to preside thereat. The plaintiff, in contending for the right of both parties to a change of judges under the statute, admits that, if the adverse party does not file his affidavit of prejudice until just prior to the opening of the term, the exercise of the right by the other is lost; and further, that, if a new judge be not

designated by this court until after the opening of the term, the right of the adverse party to disqualify another judge is again lost unless an affidavit of prejudice may be filed after the opening of the term. It is apparent that these contentions, if upheld, in the interpretation and application of the statute, will simply lead to confusion worse confounded. Its terms and intent are to provide for the allowance of one change of judges. By such construction the cause may regularly proceed at the term, after one affidavit has been filed, through the prompt designation of a new presiding judge by this court.

The act contemplates not a continuance over the term, but a trial of the pending cause during that term by the new designated judge. The statute applies to the right to disqualify a judge during a term. It does not deprive the adverse party of a right to demand a new designated judge through an affidavit of prejudice at a subsequent or another term. It is held, therefore, that chap. 1, Laws 1919, permits only one affidavit of prejudice to be filed against the prospective presiding judge at a term to be held. That furthermore, if, for any cause, the case be continued to another term, whether regular, special, or adjourned, another affidavit of prejudice may be made by the other party. The judge, however, who has once been disqualified by the affidavit, continues disqualified. The motion is dismissed.

E. J. LANDER & COMPANY, a Corporation, Respondent, v. JOHN W. DEEMY, Appellant.

(176 N. W. 922.)

Justices of the peace — district court may take jurisdiction on general appeal without certification.

1. Where an action of forcible detainer is brought into the district court by a general appeal from a judgment rendered by a justice of the peace, the district court has jurisdiction to try and determine the same even though the case is one which the justice of the peace should have certified to the district court under § 9055, Comp. Laws 1913.

Vendor and purchaser — after cancelation of contract vendor may maintain forcible detainer.

2. Where a contract for deed has been canceled by the service of notice as prescribed by §§ 8119–8122, Comp. Laws 1913, as amended by chapter 180, Laws 1915, the vendor may maintain an action of forcible detainer against the purchaser upon his refusal to surrender possession.

Statutes — are presumed to operate prospectively only.

3. Statutes are presumed to operate prospectively only. No part of Code of Civil Procedure of this state "is retroactive unless expressly so declared." Comp. Laws 1913, § 7320.

Vendor and purchaser — statute extending redemption period after default of purchaser in contract for deed is prospective only.

4. For reasons stated in the opinion it is *held* that the provision of chapter 151, Laws 1917, which extends the period of redemption of a defaulting vendee in a contract for deed for a period of five months applies only to contracts made after the law took effect, and is inapplicable to contracts made prior to that time.

Opinion filed February 24, 1920.

From a judgment of the District Court of Ward County, *Leighton,* J., defendant appeals.

Affirmed.

W. H. Sibbald, for appellant.

"Retrospective laws that violate no principle of natural justice, but that, on the contrary, are in furtherance of equity and good morals, are not unconstitutional because retrospective." Cuyahoga Falls Real Estate Asso. v. McCaughy, 2 Ohio St. 152.

The question of reasonable time is one primarily for the legislature to determine. The courts cannot fix a time different from that fixed by the legislature within which suits may be brought, nor, if the legislature fails to fix any time, can the courts supply the legislative lapse. 25 Cyc. 986; Craig v. Herzman, 9 N. D. 140; Merchants Nat. Bank v. Braithwaite, 7 N. D. 358.

The justice's court was without jurisdiction to try this case because the mere service of a notice does not, of itself, effect a cancelation of the contract, and until the contract is canceled the action will not lie. Comp. Laws 1913, § 9069, subd. 5.

Justice's court had no jurisdiction because the pleadings raised, in

good faith, an issue of ownership. Murray v. Burris, 6 Dak. 160, 42 N. W. 25; Hegar v. De Groat, 3 N. D. 354.

The district court had no jurisdiction where the justice's court had none, because the pleadings on which the judgment was entered were the pleadings of the justice's court. Vidger v. Nolin, 10 N. D. 351.

Bradford & Nash and *Murphy & Toner,* for respondent.

The statute in force at the time this contract for deed was entered into became a part of the contract, and therefore the right of the vendor to cancel the contract under that statute became a vested right prior to the taking effect of chapter 151 of the Session Laws of 1917. Mortgage Co. v. Board of Revenue, 81 Ala. 110, 1 So. 30; Von Schmidt v. Huntington, 1 Cal. 55; Ducey v. Patterson, 37 Colo. 216, 9 L.R.A. (N.S.) 1066, 86 Pac. 109; Lane's Appeal, 57 Conn. 182, 4 L.R.A. 45; McCarthy v. Habis, 23 Fla. 508, 2 So. 819; People v. Gage, 233 Ill. 477, 500, 84 N. E. 616; Rogers v. Rogers, 137 Ind. 151, 36 N. E. 895; Knoulton v. Rebendaugh, 40 Iowa, 114; Douglas County v. Woodward (Kan.) 84 Pac. 1028.

In every case of doubt the doubt must be resolved against the retrospective effect of such a statute. People v. Lour, 236 Ill. 608, 86 N. E. 577; Dyer v. Belfast, 88 Me. 140, 33 Atl. 790; Grander v. Milton, 9 Gill, 299, 52 Am. Dec. 694.

The appellant being merely and admittedly a tenant, the question of title was not in issue, and could not be brought in issue or litigated. Comp. Laws 1913, §§ 5343, 5344; Brown v. Persons, 48 Ga. 60; Blinn v. Robertson, 24 Cal. 127; Kendall v. Moore, 30 Me. 133; Hoffman v. Clark, 63 Mich. 175; Stansbury v. Taggert, 3 McLean, 457; Turner v. Thomas, 13 Bush, 518; McCauley v. Waller, 12 Cal. 500.

CHRISTIANSON, Ch. J. In 1916 the defendant purchased of the plaintiff certain real property situated in the city of Kenmare in this state, and received a contract for deed therefor. Under the laws then in force it was provided that in case default is made in the terms or conditions of a contract for the future conveyance of real estate, and the owner or vendor desires to cancel the same, "he shall, within a reasonable time after such default, cause a written notice to be served upon the vendee, purchaser, or his assigns, stating that such default occurred, and that said contract will be canceled or terminated, and shall recite

in said notice the time when said cancelation or termination shall take effect, which shall not be less than thirty days after the service of such notice." Comp. Laws 1913, § 8120. And "such vendee, or purchaser, or his assigns, shall have thirty (30) days after the service of such notice upon him, in which to perform the conditions or comply with the provisions upon which the default shall have occurred, and upon such performance and upon making such payments, together with the costs of service of such notice, such contract or other instrument shall be reinstated and shall remain in full force and effect the same as if no default had occurred therein. If, however, such vendee, or purchaser, or his assigns, shall not complete such performance or make such payment within the thirty (30) days herein provided, then and in that event the contract shall be terminated and shall not be reinstated by any subsequent offer of performance or tender of payment. No provision in any contract for the purchase of land or an interest in land shall be construed to obviate the necessity of giving the aforesaid notice, and no contract shall terminate until such notice is given, any provision in such contract to the contrary notwithstanding." Section 8122, Comp. Laws 1913, as amended by chapter 180, Laws 1915.

Under the terms of the contract in controversy the defendant agreed to pay to the plaintiff $18.27 on February 15, 1916, and $15 per month thereafter on the 15th day of each month, commencing on the 15th day of March, 1916, with interest at the rate of 8 per cent per annum from January 25, 1916. Defendant also agreed to pay all taxes levied upon the premises for the year 1915 and subsequent years. The defendant failed to make the payments due on August 15, 1916, and on the 15th day of each and every month thereafter. He also failed to pay any of the taxes assessed and levied against the premises. The plaintiff thereupon prepared a notice of cancelation as prescribed by the above-quoted statute, and caused the same to be served on defendant on November 28, 1917. The notice stated the default which had occurred and the amount due upon the contract. It further stated that the plaintiff had elected to cancel and terminate the contract, and that such cancelation would take effect thirty days after the service of such notice upon the defendant. The defendant failed to make the payments, or in any manner cure the default existing in the terms of the contract, and on April 30, 1918, the plaintiff caused to be served upon the defendant a notice

to quit, in the form provided by § 9070, Comp. Laws 1913. The defendant having failed to surrender the premises, the plaintiff on May 20, 1918, commenced an action of forcible detainer in justice's court.

The plaintiff filed a written, verified complaint, wherein all the foregoing facts were fully averred. The defendant, in his answer, admitted the allegations of the complaint, but denied that the contract had been canceled, and averred that he was the owner of the land. These allegations were concededly based upon the contention that the notice of cancelation was insufficient for the reason that by virtue of chap. 151, Laws 1917, the time in which a purchaser or his assigns must be afforded an opportunity to comply with the conditions of the contract and cure the default had been extended to six months; and that inasmuch as the notice served in this case afforded only thirty days in which to cure the default it was of no effect. The trial in the justice's court resulted in a judgment in favor of the plaintiff. The defendant thereupon appealed from such judgment to the district court. In the notice of appeal it was specifically stated that it was "the intention of the plaintiff to appeal, as aforesaid, on questions of both law and fact and from the whole of said judgment, and a new trial is demanded in said district court." The trial in the district court resulted in findings and judgment in favor of the plaintiff, and the defendant has appealed from the judgment. No statement of case has been settled, and the case comes before this court upon the judgment roll proper. The trial court, in its findings, found all the facts heretofore stated.

Appellant contends:

(1). That the justice's court was without jurisdiction to try the case, because the pleadings raised the issue of ownership of the premises.

(2). That inasmuch as the justice's court had no jurisdiction, the district court had no jurisdiction, "because the pleadings on which the judgment was entered were the pleadings of the justice's court."

(3). That the mere service of the notice of cancelation did not cancel the contract, and that an action of forcible detainer does not lie until the contract is canceled.

(4). That in any event no sufficient notice of cancelation was served; *i. e.*, that only thirty days' notice was given, while the law required six months' notice.

The propositions will be considered in the order stated.

(1, 2) It is true a justice of the peace has no jurisdiction to hear and determine a case wherein the boundaries of, or title to, real estate comes in question. Const. § 112. But the mere fact that such question is raised does not terminate the action or devest the justice of complete jurisdiction. Our statutes provide: "When such question arises upon a material issue joined . . . or . . . by controversy in the evidence as to a fact material to the determination of the issues in the action, the justice must discontinue the action and forthwith certify and transmit to the district court of his county all the pleadings and papers filed with him in such action. . . ." Comp. Laws 1913, § 9055. And "thereupon the district court shall have the same jurisdiction over such action as if it had been originally commenced therein. . . ." Comp. Laws 1913, § 9056.

It is difficult to see wherein the answer presented any real issue as to title. It admitted all the facts which formed the basis of the action. The denial of title, and argument of ownership, were merely legal conclusions based upon the contention that the notice of cancelation was insufficient. But even though it be conceded that the answer presented an issue of title,—such as would have made it the duty of the justice to certify the case to the district court,—it would by no means follow that the district court was without jurisdiction to try and determine the issues presented by the pleadings. The action was brought into that court by a general appeal, wherein defendant demanded a new trial of all questions of law and fact in the district court. The district court therefore became vested with the same jurisdiction over the action, and it became subject to trial therein in the same manner as though it had been originally commenced in that court. Comp. Laws 1913, § 9172. The appeal accomplished precisely the same purpose, so far as conferring jurisdiction upon the district court is concerned, that would have been accomplished in a proper case by certification by the justice. As was said by this court in Johnson v. Erickson, 14 N. D. 414, 105 N. W. 1104 (wherein it was held that the justice should have certified a case to the district court): "The same result has, however, been accomplished by the appeal, and the case has been transferred to the district court for trial. The district court would have acquired jurisdiction under a regular certificate by the filing of the papers, as

required by Rev. Codes 1899, § 6670. All this has been done under the appeal. . . . The purpose of the amended statute was to prevent dismissals, and to furnish an easy method of transfer of jurisdiction to the district court. We are of the opinion that when a justice has, by disregarding the statute, made it necessary to appeal, the district court acquires jurisdiction, and that it is error for the district court to refuse to entertain the action and to dismiss the appeal."

(3) Section 8122, Comp. Laws 1913, as amended by chapter 180, Laws 1915, clearly contemplates that a contract for the future conveyance of real estate may be canceled and terminated by the method therein prescribed. Not only does that seem to be a reasonable inference from the portion of the statute heretofore quoted, but such intent is also clearly evidenced by the following provision: "In all cases of cancelation by notice of any such contract which has been recorded in the office of the register of deeds, a copy of the notice of cancelation served upon the vendee together with an affidavit of service and an affidavit of vendor or his assigns that the default of the vendee under the terms of the contract were not cured within thirty days from the date of service of such notice, shall be recorded in the office of the register of deeds." Laws 1915, chap. 180.

Section 9069, Comp. Laws 1913, relating to actions of forcible detainer, provides that such action is maintainable, "when a party continues in possession . . . after the cancelation and termination of any contract for deed, bond for deed or other instrument for the future conveyance of real estate or equity therein." Comp. Laws 1913, § 9069, subd. 5.

Hence, we are of the opinion that an action of forcible detainer will lie where a contract for deed has been foreclosed in the manner provided by our statute. This view is in harmony with the opinions of other courts upon similar or kindred questions. See 39 Cyc. 1369; Monsen v. Stevens, 56 Ill. 335; Wilburn v. Haines, 53 Ill. 207; Jackson v. Warren, 32 Ill. 331; Leach v. Ritzke, 86 Ill. App. 483; Clark v. Bourgeois, 86 Miss. 1, 38 So. 187; Moak v. Bryant, 51 Miss. 560; McKissack v. Bullington, 37 Miss. 535; Kerns v. McKean, 65 Cal. 411, 4 Pac. 404; Gregg v. Von Phul, 1 Wall. 274, 17 L. ed. 536; Murphy v. McIntyre, 152 Mich. 591, 116 N. W. 197.

(4) It is conceded that plaintiff served a notice complying with the

provisions of § 8122, Comp. Laws 1913, as amended by chapter 180, Laws 1917, but defendant contends that such notice was insufficient. He invokes chapter 151, Laws 1917, which reads: "Such vendee, or purchaser, or his assigns shall have six months after the service of such notice upon him in which to perform the conditions or comply with the provisions upon which the default shall have occurred and upon such performance and upon making such payments, together with the cost of service of such notice, such contract or other instrument shall be reinstated and shall remain in full force and effect the same as if no default had occurred therein." In other words, defendant contends that he was entitled to six months in which to cure the default, instead of thirty days as provided in the notice.

To this contention plaintiff makes answer:

(1) That chapter 151, Laws 1917, was intended to apply to future contracts only, and that it was not intended to apply to contracts formerly made; and,

(2) That if the statute was intended to apply to contracts made prior to the enactment thereof, it is unconstitutional on the ground that it impairs the obligations of contracts.

By both the Federal and state Constitutions the legislature is forbidden to pass any "law impairing the obligation of contracts." U. S. Const. § 10, art. 1; N. D. Const. § 16. While it is true that, "in placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution," and "left to the states to prescribe and shape the remedy to enforce it" (McCracken v. Hayward, 2 How. 608, 612, 11 L. ed. 397, 399), it is equally true that the legislature may not, under the guise of a statute relating to the remedy, change the substantial rights of the parties (12 C. J. 1067, 1068; 15 Am. & Eng. Enc. Law, pp. 1055, 1056; Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; Cleveland v. United States, 93 C. C. A. 274, 166 Fed. 677). Under the constitutional inhibition against legislation impairing the obligation of contracts, it is immaterial whether the obligation of a contract is impaired by acting on the remedy or directly upon the contract. Impairment in either case is prohibited. 6 R. C. L. p. 356. And "it is a fundamental principle

of constitutional law in reference to the obligation of contract, that the laws in force at the time of making a contract, and the right to a remedy, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms, and that they likewise constitute a part of its obligations." 6 R. C. L. pp. 355, 356.

In his work on the Constitution, Story said: "It is perfectly clear that any law, which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it. The manner or degree in which this change is effected can in no respect influence the conclusions; for whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all the supposed cases. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation." Story, Const. 5th ed. § 1385.

The Supreme Court of the United States has said:

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. . . . One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause; but of encroaching in any respect on its obligation,—dispensing with any part of its force. Planters' Bank v. Sharp, 6 How. 301, 12 L. ed. 447. The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so effects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void." Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793.

"It is also settled that the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. . . . It is competent for the

states to change the form of remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void." Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403.

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced; by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is, to that extent, weakened. The Latin proverb, *qui cito dat bis dat,* he who gives quickly gives twice, has its counterpart in a maxim equally sound, *qui serius solvit, minus solvit,* he who pays too late pays less. Any authorization of the postponement of payment or of means by which such postponement may be effected is in conflict with the Constitutional inhibition." Louisiana v. New Orleans, 102 U. S. 205, 206, 207, 26 L. ed. 132, 133.

In applying these rules the Supreme Court of the United States has held that the law in force at the time a mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of a mortgage; and hence that changes in the laws imposing conditions and restrictions on a mortgagee in the enforcement of his right, and which affect its substance, are invalid as impairing the obligation, and cannot prevail. Von Hoffman v. Quincy, supra; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65, 24 Sup. Ct. Rep. 748. It has also held that a statute which extends the period of redemption, or gives a right of redemption, where no such right previously existed, impairs the obligation of mortgage contracts executed before its enactment. Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; Howard v. Bugbee, 24 How. 461, 16 L. ed. 753; Gantly v. Ewing, 3 How. 707, 11 L. ed. 794;

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Bradley v. Lightcap, supra. See also Hollister v. Donahue, 11 S. D. 497, 78 N. W. 959; Paris v. Nordburg, 6 Kan. App. 200, 51 Pac. 799; Muller v. McCain, 50 Okla. 710, 151 Pac. 621; Solis v. Williams, 205 Mass. 350, 91 N. E. 148. Other courts have held that a statute which alters the rights of the mortgagor and mortgagee as regards the rents and profits, or possession of the premises, during the period of redemption, cannot constitutionally be applied to foreclosures of mortgages executed before its enactment. Travellers Ins. Co. v. Brouse, 83 Ind. 62; Blackwood v. Van Vleet, 11 Mich. 252; Mundy v. Monroe, 1 Mich. 68; Canadian & A. Mortg. & T. Co. v. Blake, 24 Wash. 102, 85 Am. St. Rep. 946, 63 Pac. 1100.

In Bradley v. Lightcap, supra, the court said: "Confessedly subsequent laws, which in their operation amount to the denial of rights accruing by a prior contract, are obnoxious to constitutional objections.

In Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143, the statute objected to gave the mortgagor twelve months to redeem after the sale, and Mr. Chief Justice Taney said: "It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. . . . Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations; and is prohibited by the Constitution."

In Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042, it was held that a state statute which authorized redemption of property sold in foreclosure of a mortgage where no such right previously existed, or extended the period of redemption beyond the time previously allowed, could not apply to a sale under a mortgage executed before its passage; and Mr. Justice Shiras, referring to Brine v. Hartford F. Ins. Co. 96 U. S. 627, 637, 24 L. ed. 858, 862, said:

"But this court held, through Mr. Justice Miller, that all the laws of a state existing at the time a mortgage or any other contract is made,

which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts, . . . that it is therefore said that these laws enter into and become a part of the contract," and that " 'the remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation.' "

Let us apply the foregoing principles to the facts in this case. The contract in this case expressly provided that "in case of the failure of the said party of the second part (defendant) to make either of the payments or perform any of the agreements on his part hereby made and entered into, this contract shall at the option of the party of the first part (plaintiff) be forfeited and terminated. . . . And further it is mutually agreed by and between the parties aforesaid that *time* shall be the essence of this contract." Under the laws in force at the time the contract was made, it could not be canceled except upon the service of a written notice reciting the default and affording the purchaser a thirty-day period in which to cure such default. Both the vendor and the vendee contracted with reference to such statute, and its provisions in effect entered into and became a part of the contract. The purchaser knew that even in case of default the contract could not be terminated and his rights forfeited summarily,—the vendor must either maintain an action or he must pursue the method provided by the statute. In either case it was the policy of the law to afford the vendee the time specified in the statute in which to cure his default. Raad v. Grant, 43 N. D. 546, 169 N. W. 588. The vendor, on the other hand, knew that in case of default on the part of the purchaser he might cancel the contract by service of notice as provided by the statute, and in such case the purchaser would be required to cure the default; *i. e.*, redeem within the thirty-day period. Under the new law (Laws 1917, chap. 151) the vendor is required to give, and the purchaser is entitled to have, a six-month period in which to cure the default. There is no room for doubt as to what the legislature intended. It was clearly the intention to give the purchaser a right which he did not possess under the then existing law. That is, the legislature intended to give a defaulting purchaser six months, instead of thirty days, in which to cure his default. The result is that if the new law is applicable to contracts executed before its enactment it would have the

effect of extending the purchaser's right of redemption, and his right to remain in possession of the premises for a period of five months. In fact the contract rights of the purchaser would be continued for five months after they would have ceased to exist under the provisions of the contract as made.

Did the legislature intend this provision of chap. 151, Laws 1917, to apply to contracts formerly executed? We think not. We believe that the legislature intended that this provision should apply only to, and in effect become a part of, contracts made after the law became effective. Chapter 151, Laws 1917, by its terms amends § 8122, Comp. Laws 1913, and repeals all acts and parts of acts in conflict therewith. Section 8122 is—and of course chapter 151, became—a part of the Code of Civil Procedure. By the express words of our statutes, no part of the Code of Civil Procedure "is retroactive unless expressly so declared." Comp. Laws 1913, § 7320. The statute just quoted is merely a declaration of a well-recognized general rule of construction. For it is well settled "that statutes will be construed to operate prospectively only, unless an intent to the contrary clearly appears. It is said 'that a law will not be given a retrospective operation, unless that intention has been manifested by the most clear and unequivocal expression.' And in another case: 'The rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction.' The rule is supported by numerous cases. The rule is especially applicable where the statute, if given a retrospective operation, would be invalid, as impairing the obligation of contracts or interfering with vested rights. The principle that all statutes are to be so construed, if possible, as to be valid, requires that a statute shall never be given a retrospective operation, when to do so would render it unconstitutional, and the words of the statute admit of any other construction. It is always presumed that statutes were intended to operate prospectively, and all doubts are resolved in favor of such a construction." Lewis's Sutherland, Stat. Constr. 2d ed. § 642. See also 6 R. C. L. p. 78.

The supreme court of Minnesota says: "It is a well-settled rule that laws are not to be construed retrospectively or to have a retrospective effect, unless it shall clearly appear that it was so intended by the

enacting body, and unless such construction is absolutely necessary to give meaning to the language used." Brown v. Hughes, 89 Minn. 150, 153, 94 N. W. 438. See also Adams & F. Co. v. Kenoyer, 17 N. D. 302, 308, 16 L.R.A.(N.S.) 681, 116 N. W. 98; Blakemore v. Cooper, 15 N. D. 5, 19, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; 8 Cyc. 731; 12 C. J. 721; 6 R. C. L. p. 78.

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

BIRDZELL, J., concurs.

BRONSON, J. I concur in the opinion of the Chief Justice.

The main legal question presented upon this appeal is whether chap. 151, N. D. Laws 1917, or § 8122, Comp. Laws 1913, applies to the foreclosure of the land contract involved.

Chapter 151, Laws 1917, which became effective as a law on July 1, 1917, provides for a period of six months after service of a notice of cancelation within which the vendee may redeem from the default or otherwise perform.

Section 8122, Comp. Laws 1913, provides only for a period of thirty days within which such redemption or performance may be had.

The land contract involved was made January 25, 1916. The notice of cancelation thereof was served November 28, 1917.

The defendant did not redeem or otherwise perform within the thirty-day period provided in § 8122, Comp. Laws 1913; the plaintiff predicates his title and right of possession to the land concerned by reason of compliance with the provisions of said § 8122, and the failure of the defendant to redeem under the terms thereof.

Chapter 151, Laws 1917, specifically provides that no provisions in any contract shall be construed to obviate the necessity of the notice of cancelation required (6 mos.), and that no contract shall terminate unless such notice be given, regardless of any provisions in the contract to the contrary.

The prime question involved therefore is,—

Does this act, *concerning this period of redemption,* apply *retroactively,* or *prospectively,* to any land contract then existing, or to any causes of action existing thereupon?

It is well recognized that statutes are presumed to be prospective, not retroactive, in their operation and application unless there be a clear, legislative intent expressed to the contrary. Adams & F. Co. v. Kenoyer, 17 N. D. 302, 308, 16 L.R.A.(N.S.) 681, 116 N. W. 98; Blakemore v. Cooper, 15 N. D. 5, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; Lewis's Sutherland, Stat. Constr. 2d ed. § 641; 8 Cyc. 731; 12 C. J. 721.

Chapter 151, Laws 1917, specifically amends § 8122, Comp. Laws 1913: By its terms, it repeals acts and parts of acts in conflict therewith. By the amendment of § 8122, such chapter 151 became a part of the Code of Civil Procedure. In this Code it is specifically provided (Comp. Laws 1913, § 7321) that no part of it is retroactive unless expressly so declared. See Blakemore v. Cooper, 15 N. D. 5, 19, 4 L.R.A.(N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566.

To the contention that this statute may be considered prospective and applicable to the right of redemption involved herein, upon the ground that such statutory period is merely remedial, and therefore that the statute is applicable, the answer is, that, concerning such period of redemption, the right to redeem or to compel redemption is more than remedial. It is a right connected with the contract, that may substantially impair or lessen its value. See Yeatman v. King, 2 N. D. 421, 424; 33 Am. St. Rep. 797, 51 N. W. 721; Fisher v. Bettz, 12 N. D. 197, 207, 96 N. W. 132; Blakemore v. Cooper, 15 N. D. 5, 17, 4 L.R.A. (N.S.) 1074, 125 Am. St. Rep. 574, 106 N. W. 566; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Wilder v. Campbell, 4 Idaho, 695, 43 Pac. 677; Goenen v. Schroeder, 8 Minn. 387, Gil. 344; O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458; Cargill v. Power, 1 Mich. 365. The question is not, whether a reasonable time has been afforded the parties within which to make or compel redemption, but, whether the statute, as applied concerning this period, would retroactively effect the right of either party to make or compel redemption in accordance with the contract and existing law at the time the same is made.

Under plain rules of construction, therefore, the usual presumption obtains that, this statute, being prospective in its operation with respect to the period of redemption, is not applicable.

The judgment should be affirmed.

GRACE, J. (dissenting). The material facts in the case are as follows: The plaintiff sold defendant lot No. 7 of block No. 7 of Tolley's flat to Kenmare, North Dakota. The terms of the sale were expressed in a written contract for deed, signed by both parties. The purchase price was $868.27, payable, $18.27 on February 15, 1916; $15 on or before March 15; and $15 on or before the 15th of each and every month thereafter until the whole sum was paid. The whole sum remaining due from time to time bore interest at the rate of 8 per cent per annum, payable on the 15th day of February, 1916, and on the 15th day of each and every month thereafter.

The vendee further agreed to pay the taxes and special assessments due at the time of the contract or to become due, commencing with the year 1915. He defaulted in the payment of the sum due August 15, 1916, and the payment due on the 15th day of each and every month thereafter, and failed to pay the 1915 and 1916 taxes and the interest of the principal sum.

Plaintiff served a notice of the cancelation of the contract upon the defendant on the 28th day of November, 1917. It set forth the terms of the contract, the description of the lot, the default which had occurred in the contract, and the cancelation of the contract thirty days after the service of the notice. It does not appear that any payments were made after the service of the notice of cancelation by means of which the contract would be reinstated, and we assume there were none.

On the 30th day of April, the plaintiff served a notice upon the defendant, requiring him to remove from and vacate the premises in question within three days after the service of the notice upon him. The defendant did not remove from the premises.

On the 20th day of May, 1918, by a summons issued out of the justice court of John Lynch, J. P., the plaintiff commenced an action of unlawful detainer against the defendant. An affidavit of prejudice was filed against justice of the peace Lynch, and a change of venue demanded, which was granted, and the venue changed and transferred to the justice court of C. B. Davis.

Plaintiff filed proper written complaint in the action, setting forth the contract, its terms, the default, notice of cancelation, the notice to vacate and remove from the premises, and the failure of defendant to

remove therefrom, and claimed the right of possession and restitution of the premises.

The case came on for trial in the justice court, C. B. Davis, J. P., presiding. The defendant then objected to the jurisdiction of the court to hear and determine the action, upon the grounds that the pleading showed defendant owns the premises in question, that the alleged cancelation of contract was insufficient and illegal, that the title to the premises is at issue, and demanded that the action be transferred to the district court. The motion was denied. The defendant then interposed an answer, in which he admits the allegations of the complaint, but especially denies that the contract has been canceled in any manner whatsoever, or that any other person, except himself, is the owner of the land, and specifically alleges that he is the owner of the land described in the complaint.

Judgment was entered in the justice court on the 12th day of June, 1918, in favor of plaintiff, from which the defendant appealed to the district court in Ward county, where the case was retried, and on the 24th day of March, 1919, a similar judgment was entered in plaintiff's favor, awarding it the possession and restitution of the premises and its costs and disbursements.

From this judgment, the defendant has appealed to this court. The only error specified is that the court erred in ordering the entry of judgment herein.

One of the principal questions presented in the case is the sufficiency and legality of the notice of cancelation. It is one drawn and served in accordance with the provisions of § 8122, Comp. Laws 1913, as amended by chapter 180 of the Laws of 1915.

Under the above section as amended, the cancelation becomes effective thirty days after the notice of cancelation is served upon the defaulting vendee. The fifteenth legislative assembly passed an act which became effective July 1, 1917, entitled "Redemption Land Contract." This act is similar in language to chapter 180 of the Laws of 1915, which amended § 8122, with the single exception that it allows the vendee six months after the service of the notice of cancelation upon him, in which to perform the conditions or provisions of the contract upon which the default occurred, and upon such performance provides

for the reinstatement of the contract or other instrument, and provides that it shall remain in full force and effect the same as if no default had occurred.

The contract in question was executed, and was in force and effect prior to the act which became effective July 1, 1917, and the question presented for our consideration is, Which statute is applicable to the contract in question? The notice of cancelation having been served since the latest act became effective, should the notice have provided the contract would be canceled within six months after the service of the notice of cancelation upon the defendant in accordance with the terms of that law, or was it sufficient to give but thirty days' notice of the cancelation as required by the amended Act of 1915?

We are of the opinion that the notice of cancelation should have been in accordance with the provisions of the law which became effective July 1, 1917.

The statutes under consideration, though they have no reference to actions or the time in which actions must be brought are nevertheless in the nature of statutes of limitations. Under either statute a period of time is specified after the service of the notice of cancelation, at the expiration of which, the cancelation becomes effective. In the 1915 Law, that period was thirty days; in the 1917 Law, it is six months.

That the legislature had authority to lengthen the time when cancelation should become effective, after the service of the notice, from a period of thirty days to a period of six months, there is not the least doubt, and, in doing so, the legislature would not impair any right of the respondent.

Statutes of limitation are constitutional, and do not impair the obligation of contracts, provided reasonable time is given within which to commence actions before the act takes effect. Hawkins v. Barney, 5 Pet. 457, 8 L. ed. 190; Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76; Turner v. New York, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397.

The remedy upon a contract may be altered at will, by the state legislature, so long as reasonable provision for its enforcement is made. Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91.

The legislature of a state may modify existing remedies, and even

substitute others without impairing the obligation of the contract, if a sufficient remedy be left, or another sufficient one be provided. Memphis v. United States, 97 U. S. 293, 24 L. ed. 920.

The existing remedy for the breach of the obligation of the contract may be changed without violating the contract clause of the Federal Constitution, so long as a substantial and efficacious remedy remains, even though the contract, so far as pertains to its obligation, may be of statutory origin. National Surety Co. v. Architectural Decorating Co. 226 U. S. 276, 57 L. ed. 221, 33 Sup. Ct. Rep. 17.

As we view the matter, chapter 151 of the Session Laws of 1917, in no manner contravenes § 10 of article 1 of the Federal Constitution.

The respondent maintains that the 1915 Law being in force at the time of the making of the contract, it became a part of it, and that, as a matter of right, he should be permitted to cancel the contract under the terms of that law.

As we view the matter, the respondent is confusing the subject of right with that of a procedural remedy.

Conceding that the procedural remedy to cancel the contract upon default by operation of law becomes a part of the contract, in the sense that, when a default has occurred, the procedural remedy, by cancelation, becomes operative, in this class of contracts, the procedural remedy which was effective at the time of the making of the contract is not necessarily the one which should be invoked when such default occurs, and it is desired to cancel the contract by reason thereof.

The procedural remedy which provides for the cancelation of a contract upon a default in its terms is, under any circumstances, harsh, and in the interest of justice should be liberally construed.

The law which fixed the time for the cancelation of the contract at thirty days after default and service of notice thereof does not confer a vested right in this class of contracts other than that the procedural remedy which is effective when such default occurs may be considered as within the contemplation of the contract. It should not be forgotten that the alleged right of cancelation of contract in this manner is neither an action nor a proceeding at law. Neither is it a contract right in the sense that it confers a vested right. It is an arbitrary method only for the cancelation of the contract.

As it appears to us, no contract right of the plaintiff is impaired.

If there is a right impaired at all, it is that of the defendant. At the time the defendant entered into the contract, and afterward, he had a legal and equitable vested claim to the property in question, which, except for the law we are considering, could be terminated only by an action in a court of equity. It is very questionable whether an arbitrary law, which defeats defendant's right to have his rights determined in court, can be of any force or validity. A law which provides merely for a notice from the creditor to the debtor that, if he does not pay the amount due upon the contract within thirty days, he, the creditor (and not a court) will cancel and terminate the contract.

The creditor, if he has this right, by a mere notice terminates and disposes of all the vendee's rights in the contract, though the defendant has a vested right in the property, which is the subject of the contract, and also has a further right to have his rights therein determined by a court of competent jurisdiction and power.

The arbitrary cancelation of the contract upon notice is a law which, in its terms and operation, is almost wholly for the benefit of the creditor, and takes but little note of the rights of the debtor. It is a law which enables rapacious creditors, by a mere notice, to confiscate the equity of the vendee in the land. If valid at all, it should receive a most liberal construction, and where such a law is amended, as in the present case, to grant the debtor a longer period of time within which to make payment after such notice of cancelation is served, it amounts to no more than giving the debtor part of the right which he otherwise possesses; that is, the right of having the contract canceled by a decree of a court of equity.

Assume that A owned 320 acres of land and sold it to B for an agreed price of $20,000, payable $1,000 at the date of the contract, and $1,000 on the 1st day of December each year thereafter, until the whole amount was paid.

Assume further that B had, each year, made his payment until he had paid $19,000 upon the contract; that he defaulted in the payment of the twentieth payment, or the last $1,000. Does it seem just and equitable that B should, upon a thirty-day notice of cancelation from the creditor, have all his admittedly vested rights and interests in the land completely wiped out by this mere notice of cancelation?

If B's rights may be thus terminated, is it done by due process of

law? It is not enough to say that B, after the service of a notice of cancelation upon him, could have resorted to a court of equity to protect his rights; that is not the question. It is, whether B's rights may be thus impaired, and valuable and vested rights taken from him without resort first having been had to a court of justice, where B, as well as A, would have his day in court, and where the court, under all the facts, circumstances, and equities of the case, could decree in equity what B should do to make good his default, and how much time he should have in which to do it. It is not necessary to the decision of this case to decide any question, only which of two laws is applicable to this case.

We think the law, which became effective July 1, 1917, was the one under the provisions of which the plaintiff should have served his notice of cancelation. That law is reasonable in its terms; it protects every interest of the plaintiff. It, in fact, takes no right away from him. It is no different from a similar preceding law, to which we have referred, except that it gives the debtor a little more time in which to make good his default. It should, we believe, apply to the cancelation of all contracts where cancelation is sought to be effected, after the time the law became operative.

We are of the opinion that the notice of cancelation, under consideration in this case, is bad, as not having been served in compliance with the provisions of the law in question, which became effective July 1, 1917.

ROBINSON, J. I concur in the opinion as written by Mr. Justice Grace. The plaintiff commenced this action in justice court to dispossess the defendant of certain land which he holds under a contract of purchase. The pleadings raise a question of title to real estate and hence the justice had not jurisdiction. Const. § 112. A purchaser of land, in default, does not become a tenant, and he may not be dispossessed in a summary manner the same as a tenant holding over. The defendant having failed to make payment in accordance with the terms of the land contract, the plaintiff served on him a written notice to terminate the contract in thirty days. The notice is under the Laws of 1915, chap. 180, and not under Laws of 1917, chap. 151, which provides for a notice of six months. It is insisted that the latter stat-

ute cannot apply to contracts made prior to its passage without impairing the obligation of contracts; but each statute contains the provision that the notice thereby required shall not be necessary when the contract is sought to be terminated by an action at law or in equity. And the rule of law is that, while the legislature may not withdraw all remedies, yet a particular remedy existing at the time of the making of the contract may be abrogated altogether without impairing the obligation of the contract, if another and adequate remedy for its enforcement remains. 6 R. C. L. § 354. "This is the rule, even though the remaining remedies be less convenient than that which was abolished." Obviously the statutory procedure to foreclose a land contract is at best a half-way remedy. It does not give possession of the land without a suit in which the court may always protect the rights and equities of the purchaser, regardless of any notice. Every person is entitled to a remedy by due process of law for all wrongs that may be done him in his person or property. And, aside from due process of law, no person has a constitutional right to any statutory remedy. The statutes in question are not unconstitutional, because they do not devest any party of a legal or equitable right, or preclude him from contesting his rights in the courts. If a party does not like the statute, he may disregard it. He does not have to seek its benefits. He has his remedy by due process of law.

STATE OF NORTH DAKOTA EX REL. M. A. RUDD, Petitioner, v. THOMAS HALL, as Secretary of State of the State of North Dakota, Respondent.

(176 N. W. 921.)

Elections — woman may be candidate for nomination as delegate to a national convention.

For reasons stated in the opinion it is *held* that a woman may be a candidate for nomination as delegate to a national nominating convention.

Opinion filed March 3, 1920. Rehearing denied March 4, 1920.

Original application for a writ of mandamus compelling respondent to place the name of petitioner upon the ballot as delegate to Republican National Convention.

Writ awarded.

Foster & Baker, for petitioner.

Wm. Langer, Attorney General, and *Edw. B. Cox,* Assistant Attorney General, for respondent.

PER CURIAM. This is an original application for a writ of mandamus directed to the secretary of state, which shall require the placing of the name of the relator upon the presidential primary ballot as candidate for delegate to the Republican National Convention. The relator is a woman, and it is contended that, by reason of her sex, she is not eligible. This is the sole question involved and decided in this proceeding.

Chapter 208 of the Laws of 1911, being §§ 910–916, both inclusive, of the Compiled Laws of 1913, provides, among other things, for the selection by the qualified electors of political parties of delegates to represent the party in national conventions in presidential years. Persons desiring to be candidates are required to file petitions with the secretary of state not later than the 1st day of March, and each one elected is required to subscribe an oath of office that he will uphold the Constitution and laws of the United States and North Dakota, and that he will "as such officer and delegate, to the best of his judgment and ability, faithfully carry out the wishes of his political party as expressed by the voters at said election." Each is entitled to his expenses, not exceeding $200, out of the state treasury. Section 19 of the Political Code reads as follows:

"Every elector is eligible to the office for which he is an elector, except when otherwise specially provided; *and no person is eligible who is not such an elector.*"

The gist of the respondent's contention is that the position of delegate to the national convention of a political party is a public office, within § 19, above referred to, and being such, and there being no law which specifically authorizes women to participate in the election of delegates, they are therefore ineligible to serve as delegates. Con-

sequently, the respondent contends, a woman is not entitled to a position on the ballot.

At the time § 19 became a part of the political Code, those who occupied official positions in the party organizations were not regarded as holders of public offices. In State ex rel. McArthur v. McLean, 35 N. D. 203, 159 N. W. 847, it was held, even under primary laws which provide for a popular election of precinct committeemen, who in turn take steps for completing the organization of the party machinery, including the election of a chairman of the state central committee, that the latter position was not a public office, and that the occupant performed no governmental functions.

It is our opinion that § 19 of the Political Code relates only to public offices, and does not include officers who are merely political emissaries chosen to convey the sentiment of the electors of their party to a national convention. The position of delegate not being a public office within the eligibility requirement referred to, the matter resolves to the simple proposition of whether or not the legislature has restricted the party electors in their choice of delegates so as to preclude them from electing women. It is obvious that, in the absence of a law or other competent regulation to the contrary, those who would act for the party in a regular convention could place their delegate credentials in the hands of anyone in whose ability and faithfulness they would repose confidence. Our attention has not been called to any statute which so restricts the freedom of choice by the party voters when acting directly in a primary election, as to preclude them from selecting a woman.

Our attention is called to the case of People ex rel. Garretson v. Byers, 271 Ill. 600, 111 N. E. 564, in which the supreme court of Illinois declined to issue a writ of mandamus to compel the printing of the names of candidates for certain offices, including party committeemen and delegates to the national convention, upon the women's ballot to be used in the state primary election. It is claimed that the case referred to is a controlling precedent here by reason of the similarity of the Illinois Woman Suffrage Act (Ill. Rev. Stat. 1915–16, chap. 46, §§ 546–548) and the North Dakota statute (Sess. Laws 1917, chap. 254), patterned after the Illinois act. That case did not involve the right of electors of a party to choose a woman for the office

of delegate or for any of the other offices mentioned in the petition. It involved only the form of ballot which the women electors were authorized to use, and therefore their right to vote for the office named. That is not the question before us. Furthermore, the decision in that case can scarcely be understood without referring to other provisions of the Illinois statutes; such, for instance, as §§ 452, 461, and 494, chapter 46 of Hurd's Revised Statutes of Illinois for 1915–16.

Being of the opinion that the electors of a political party operating under the presidential primary statute have a right to select as delegates persons who do not possess all of the constitutional requirements of an elector, the writ will issue as prayed for.

GRACE, J. I concur in the result.

CARL A. ZIMMERMAN, Respondent, v. PETER LEHR, Appellant.

(176 N. W. 837.)

Partnership — where partnership has terminated, defendant in suit by former partner may counterclaim for simple partnership items not requiring accounting.

In an action brought to recover for seed wheat, which was tried in district court on appeal from justice court, where the defendant counterclaimed; it appearing upon the trial that the evidence was conflicting as to the existence of a partnership arrangement affecting the items embraced in the counterclaims, it is *held:*

Where a special partnership (if such existed) has terminated, and one of the partners sues another concerning a matter independent of the partnership, the defendant may counterclaim for items due him out of partnership transactions where they are few and simple, and there is no occasion for an equitable accounting.

Opinion filed March 17, 1920.

Appeal from the District Court of Logan County, *Graham,* J. Reversed.

George M. McKenna and *Miller, Zuger, & Tillotson,* for appellant.

The district court still had jurisdiction and should have determined their differences on the merits. 15 Enc. Pl. & Pr. 1030, and cases cited under note 4; Coffin v. McIntosh (Utah) 34 Pac. 247; Clarke v. Mills (Kan.) 13 Pac. 569; Wheeler v. Arnold, 30 Mich. 304.

A. B. Atkins, Scott Cameron and *Theodore Koffel,* for respondent.

The question as to whether a partnership existed is one of fact for the jury to determine. Frankel v. Heller, 16 N. D. 387; Sparkling v. Smeltzer, 95 N. W. 571; Johnson Bros. v. Carter, 94 N. W. 850.

BIRDZELL, J. The plaintiff brought an action against the defendant in justice court to recover $32 for seed wheat. The defendant admitted liability for $30, and set up three counterclaims, two of which will be more specifically referred to later. The judgment in the justice court was in favor of the defendant in the sum of $74.88, after allowing plaintiff's claim for the wheat at $30. An appeal was taken to the district court, and the case was, by stipulation, tried to the judge without a jury. In the district court the counterclaims were stricken out by the trial judge, and judgment was entered in favor of the plaintiff for $30 and costs, making a total judgment of $69.70. From this judgment and from an order denying a motion for a new trial or judgment *non obstante,* the defendant appeals to this court. The only question here for consideration is the propriety of the action of the district court in granting the plaintiff's motion for the dismissal of the two counterclaims of $44.88 and $56.50, respectively. The first is based upon a balance which the defendant claimed was owing to him by the plaintiff for threshing in 1918. The second is for money collected by the plaintiff for defendant's use from one Kirshman, in the fall of 1918. The facts concerning these items as they appear of record may be briefly stated as follows:

The defendant, Lehr, was the owner of a threshing rig and the plaintiff, Zimmerman, was a man who was somewhat experienced in the operation of threshing machines. In the fall of 1918 this rig was used to thresh for the plaintiff and the defendant and three other men in the neighborhood, named Jundt, Kirshman, and Kramlich. The defendant testified that he hired the plaintiff at $6 per day to superintend the running of the machine. The plaintiff, on the other hand,

testified that when they started threshing in the fall of 1918 it was agreed that he should receive $8 per day, and that as soon as the defendant's job was finished a new arrangement was made whereby they were to divide equally the profits, plaintiff to pay half for three pitchers and to give the defendant $25 additional. It is claimed by the plaintiff that the rest of the threshing was done under this arrangement. It is not disputed that the plaintiff collected some forty odd dollars from Kirshman for the threshing done for him.

Both during the progress of the trial and after the parties had rested, the plaintiff moved for a dismissal of the counterclaims on the ground that the evidence showed these items to be involved in partnership transactions in the operation of the rig. The motion was allowed at the close of the case.

The pleadings filed in the case do not foreshadow any equitable issues. The claim that an accounting of the partnership transactions would be necessary to determine the balance owing from the plaintiff to the defendant is based upon the plaintiff's evidence. An examination of the record leads us to the conclusion that there would be no occasion for an equitable accounting in this case. Even conceding that the arrangement between the parties was as testified to by the plaintiff, and that it amounted technically to a special partnership, it does not follow that an equitable accounting would be necessary to determine what was owing by one party to the other. It is a well-established principle that one partner may sue another in an action at law where the partnership is terminated, and the claim sued upon is one that can be adjudicated without the necessity of an extensive accounting, as where the transactions are few and simple and the items requiring adjudication are not numerous. Irish v. Shelson, 16 Ind. 365; Clarke v. Mills, 36 Kan. 393, 13 Pac. 569; Frith v. Thomson, 103 Kan. 395, L.R.A.1918F, 1123, 173 Pac. 915. This principle is clearly applicable here, and the trial court should have determined the entire controversy. Since this principle is clearly decisive of the case on appeal, it is unnecessary to consider the points presented upon the argument relative to the equitable jurisdiction of justices of the peace and the derivative character of the jurisdiction of district courts in cases appealed from justice courts.

It follows that the trial court erred in allowing the motion for dismissal of the counterclaims. The case is therefore remanded for fur-

ther proceedings not inconsistent with this opinion. The appellant is entitled to statutory costs on this appeal.

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

BRONSON and GRACE, JJ., concur in the result.

MISSOURI SLOPE AGRICULTURAL & FAIR ASSOCIATION, a Corporation at Mandan, North Dakota, Appellant, v. THOMAS HALL, Secretary of State of the State of North Dakota, Respondent.

(177 N. W. 369.)

Coporations — time for reinstatement of charter after cancelation stated.

1. Under §§ 4518 and 4521, Comp. Laws 1913, as amended (chap. 4, Sess. Laws 1918) the six months' period of time within which a corporation may reinstate its charter of record starts from the time of cancelation provided by statute when the secretary of state shall cancel the charter of the corporation on the records of his office.

Corporations — application for reinstatement of corporation whose charter has been canceled held to be in compliance with statute.

2. In a mandamus action seeking to compel the secretary of state to reinstate a corporation, where the corporation, a fair association, has failed to file its annual reports or pay the annual filing fees required for the years 1911 to 1919, inclusive, and the secretary of state has not given notice of its default in that regard by registered letter, as required by the statute, and did not enter until May 24, 1919, upon the records of his office the cancelation of such charter, and the corporation thereupon, within six months from the time of such statutory act of cancelation of record by the secretary of state, offered to file all of its annual reports required and tendered payment of the filing fees and a reinstatement fee as required within such six months' period, it is *held* that the corporation complied with the statutory provisions above cited.

Opinion filed March 26, 1920.

Mandamus action in District Court, Burleigh County, *Nuessle, J.*, to compel the secretary of state to reinstate a corporation.

From an order sustaining a demurrer to the petition the defendant has appealed.

Reversed and remanded.

Nuchols & Kelsch, for appellant.

Albert Sheets, Assistant Attorney General, for respondent.

BRONSON, J. This is an application for a writ of mandamus to compel the secretary of state to reinstate a corporation. The trial court issued an alternative writ upon a petition alleging substantially as follows:

In 1911 the plaintiff became a corporation of this state, organized as an Agricultural and Fair Association, pursuant to the specific statutory provisions therefor. Until the month of July, 1919, they did not make or file annual reports or pay any annual filing fees as required by § 4518, Comp. Laws 1913. On April 1, 1919, the secretary of state gave notice to the plaintiff that he would cancel the corporate charter unless the plaintiff filed its annual reports, paid the annual filing fees, including a reinstatement fee of $5 and $15 for each year that the corporation had failed to file its reports. On May 26, 1919, the secretary of state further notified the plaintiff that he had canceled its charter of record in his office, and that the corporation would be reinstated only upon compliance with the conditions mentioned in the notice given on April 1, 1919. Prior to this time the secretary of state had not entered cancelation of the corporation charter upon his records. On July 23, 1919, the plaintiff offered to file its annual reports from 1911 to 1919, inclusive, tendered $22.50 for filing fees, being $2.50 annually for nine years, and a reinstatement fee of $5. The secretary of state refused to accept or receive such reports, or the filing and reinstatement fees tendered, and has further refused to reinstate the corporation unless it paid in addition $15 for each year that the annual reports were not filed as required.

To such petition the secretary of state interposed a demurrer, which was sustained by the trial court. The corporation has appealed from such order.

Section 4518, Comp. Laws 1913, requires every corporation to file annually, between July 1st and August 1st, its annual report, accompanied with a filing fee of $2.50; it also provides that failure to so do

shall be prima facie evidence that such corporation is out of business, and, further, that it is the duty of the secretary of state to notify such corporation by registered letter of its default, and, unless such corporation shall within sixty days thereafter file such report and pay such fee, he shall enter upon the records of his office the cancelation of such charter.

Section 4521, Comp. Laws 1913 (as amended by chap. 4, Spec. Sess. Laws 1913), provides that any corporation which is engaged in active business, failing to make the required annual report, may be reinstated, upon the filing of complete annual reports, the payment of the $2.50 fee required, and an additional payment of $5 as a reinstatement fee, at any time within six months from the time of cancelation as provided by § 4518. It further provides that likewise it may be reinstated, at any time after the said six months, upon the filing of its annual reports for all years in default, with a fee of $2.50 for each report, and the payment of $15 for each year the corporation has neglected to file such reports.

The sole controversy involved in this case is whether the corporation, in order to be reinstated, is required to make payment of the fees provided within the six months' period, or to make payment of the fees required after such six months' period.

It is the contention of the secretary of state that there is a period of more than six months between the time of the cancelation of the plaintiff's charter and the time of its tender for reinstatement; that the corporation has been in default ever since 1911; that, upon failure to make reports as required, the charter of the plaintiff became *ipso facto* forfeited without any action on the part of the secretary of state, his duties in this regard being directory, and not mandatory; that in fact the condition of default and the time of cancelation as provided in the statute are practically synonomous terms announcing a rule of evidence, and not in any manner an attempt by legislation to cancel in fact plaintiff's charter.

The plaintiff on the contrary maintains that the default mentioned in the statute and the act of entering upon the records the cancelation of the charter are not synonomous terms, and refer to a different status with respect to the delinquency or the right of reinstatement of the corporation.

There is no contention made that the corporate charter, in fact, has been forfeited. It is unnecessary, therefore, to consider the legal effect of the statutory provisions concerning default and cancelation of record, so far as the same affect the forfeiture of the charter. The question presented involves simply what fees the corporation is required by statute to pay upon reinstatement. Obviously, this is a matter entirely of statutory consideration and interpretation.

Pursuant to § 4518, Comp. Laws 1913, the failure of a corporation to make its annual report and payment of the filing fees creates a prima facie condition that it is out of business. Although it is then in default in that regard, its charter is not then subject to cancelation of record. When such corporation is notified by registered letter of such default, and it then fails within sixty days thereafter to file such report and pay such fee, it thereupon becomes the duty of the secretary of state to enter upon the records of his office the cancelation of such charter. Neither the act of default, nor the act or time of cancelation, are the same or synonomous.

Section 4521, Comp. Laws 1913, as amended, provides for reinstatement of such corporation at any time within a period of six months from the *time of cancelation* upon filing its required reports, the payment of the filing fees, and a reinstatement fee of $5. Manifestly the time of cancelation specified can refer to nothing else than the statutory time or act of cancelation required of the secretary of state.

Accordingly, the plaintiff tendered proper fees for its reinstatement. The secretary of state should have received the reports and accepted the fees tendered upon the record before this court.

The order of the trial court is reversed and the cause remanded for further proceedings consonant with this opinion.

MICHAEL McGRATH, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, a Foreign Corporation, Appellant.

(177 N. W. 383.)

Railroads — railroad under Federal control not liable for conversion committed.

The complaint charges that in November, 1918, at Dunn Center, North Da-

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NOTE.—Authorities discussing the question of Federal control of public utilities are collated in a note in 4 A.L.R. 1680.

kota, the defendant took, carried away, and converted certain cattle, the property of the plaintiff; but at that time and place it conclusively appears the government was in full and absolute control of the railway, and that neither defendant, nor any of its agents or servants, had any control over the operation of the railway, and in the commission of the alleged conversion the railway company did not act or claim to act as an instrumentality or agency of the Federal government. Hence the railway company was in no manner liable for the torts or wrongs or contracts of the government or its Director General, or any other party over whom it had no control.

Opinion filed March 26, 1920.

Appeal from a judgment of the District Court of Dunn county, Honorable *F. T. Lembke,* Judge.

Reversed and dismissed.

Young, Conmy, & Young, for appellant.

The defendant had absolutely nothing to do with the alleged conversion. It is in no manner liable here, and the motion to dismiss should have been granted. McGregor v. G. N. R. Co. (N. D.) 172 N. W. 841; Federal Control Act, March 21, 1918, § 10 (Comp. Stat. § 3113¾j); Haubert v. Baltimore & O. R. Co. 259 Fed. 361; Hatcher & Snyder v. Atchison, T. & S. F. R. Co. 258 Fed. 952.

T. F. Murtha, for respondent.

"Under Federal Railroad Control Act, § 10 (U. S. Comp. Stat. § 3115¾j), authorizing actions to be brought against carriers as provided by law, action could be brought against the carrier in its corporate name, and General Order No. 50 of the Director General, requiring actions to be brought against the Director General, is invalid." Cowan v. McAdoo (Mich.) 173 N. W. 440; West v. R. (Mass.) 123 N. E. 621; Franke v. R. (Wis.) 173 N. W. 701.

ROBINSON, J. This is an appeal from a judgment against the Northern Pacific Railway Company for $315 and costs.

In November, 1918, at Dunn Center, North Dakota, one Bailey made a shipment of stock to Chicago over the line of the Northern Pa-

cific Railway Company. It included several cattle which the plaintiff owned, or claimed to own, and he forbade the shipment, and for the conversion of the cattle the plaintiff obtained a verdict for $315. The verdict is well sustained by the evidence, except on one point, which is that the defendant had nothing to do with the conversion. It did not operate or control its railway at the time of the conversion. The road was then operated by the United States government, and not by the Northern Pacific Railway Company. That point, like Aaron's rod, swallows up all the other points.

Pursuant to the act of Congress and the order of the President, in November, 1918, and during all of that year, under a Director General, all the railroads of the country were controlled and operated by the government. It matters not whether the government control was rightful or wrongful, the facts are that it did have the actual control, and the Northern Pacific Railway Company had no control over its road and nothing to do with its operation. It did not receive the cattle from the plaintiff or from any other person. It did not carry away or convert the cattle. It did the plaintiff no wrong.

But the contention is that under an act of Congress the road became liable for the wrongs of the government and the Director General. Section 10 of the Federal Control Act is as follows:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government."

Now, if the purpose of that section was to make the railway company liable for the wrongs or contract of the government in the control and operation of the railway, then the effect would be to deprive the company of its property without due process of law and to take the property for public purposes without compensation, and of course that is

contrary to the plain words of the Constitution. "Certainly the taking of the property of a corporation to pay the debts or liabilities of the government for which the corporation is in no way liable or responsible violates the provisions of the Constitution and deprives it of the equal protection of the law." Schumacher v. Pennsylvania R. Co. 106 Misc. 564, 175 N. Y. Supp. 89. That is a well-considered case, and the reasoning of the court is entirely satisfactory, if not conclusive. We have not come to the pass when the government can make a corporation or an individual liable for the government's own wrongs or its own contracts. The decision concludes that the Federal Control Act of March, 1918, so far as it authorizes judgment against carrier corporations for the default or liabilities of the government, violates the Federal Constitution, providing against the taking of private property without due process of law.

In a case recently before this court the question here presented was mooted, but not decided. McGregor v. Great Northern R. Co. 42 N. D. 269, 4 A.L.R. 1635, 172 N. W. 844. By Mr. Justice Birdzell, in the majority opinion, it was said: "It is possible that, as a result of the government control of the transportation facilities, the carriers are so far denied the right to direct and manage their own affairs in connection with transportation that they cannot be held liable for the negligence of an employee." Attention was called to the fact "that prior to August 1, 1918, the Director General exercised possession and control exclusively through officers and directors of the railway corporations, and that since August 1, 1918, all administration and transportation has been effected through officers and agents directly appointed by the Director General, and these are not recognized as agents of the corporation." That being true, it is entirely clear that in November, 1918, the defendant had nothing to do with the management or control of its railroad or the carrying away and conversion of the plaintiff's cattle. It is also clear beyond dispute that, in the alleged tort and conversion, the railway company was not an instrumentality or agent of the Federal government. Hence it was in no manner liable for conversion.

Reversed and dismissed.

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

BRONSON, J. (concurring specially). This action was instituted and prosecuted against the Northern Pacific Railway Company alone. No motion or proceedings were had, either by the plaintiff or the defendant, to substitute the Director General as a party defendant under his General Order No. 50. Upon the reasoning of my dissenting opinion in McGregor v. Great Northern R. Co. 42 N. D. 269, 4 A.L.R. 1635, 172 N. W. 847, I fully concur in the reversal and dismissal of this action. See Castle v. Southern R. Co. 112 S. C. 407, 8 A.L.R. 959, 99 S. E. 847; Nash v. Southern P. R. Co. 260 Fed. 280; Peacock v. Detroit, G. H. & M. R. Co. 208 Mich. 403, 8 A.L.R. 964, 175 N. W. 580; also dissenting opinions, State ex rel. Langer v. Northern P. R. Co. 43 N. D. 556, 172 N. W. 335, reversed in Northern P. R. Co. v. North Dakota, 250 U. S. 135, 63 L. ed. 897, P.U.R.1919D, 705, 39 Sup. Ct. Rep. 502, 18 N. C. C. A. 878.

GRACE, J., concurs.

GUILFORD SCHOOL DISTRICT No. 3, of Stutsman County, State of North Dakota, a Political Corporation, Plaintiff, v. DAKOTA TRUST COMPANY, a Corporation, Defendant.

(178 N. W. 727.)

Surety on bond.

1. Sections 86 and 87 of the Constitution of North Dakota constitute a grant of power to the supreme court, and, the language thereof being restrictive, this court has such jurisdiction, and only such, as is expressly or by necessary implication therein granted.

Cases certified — question certified must have been presented to, and ruled on, by court below.

2. In order to confer jurisdiction upon the supreme court in cases certified under chapter 2, Laws 1919, the question certified must have been presented to and ruled upon by the court below.

Opinion filed May 29, 1920.

Case certified by the District Court of Stutsman County, *Coffey*, J.
Proceedings dismissed.
John W. Carr, for plaintiff.
Lawrence & Murphy, for defendant.

CHRISTIANSON, Ch. J. On August 4, 1913, the Medina State Bank was designated as a depositary of the plaintiff school district. The bank furnished a bond in the sum of $5,000, signed by the defendant, Dakota Trust Company, payable to the plaintiff school district, conditioned for the safekeeping and repayment of any and all funds deposited by the plaintiff in said bank, together with the accrued interest thereon. On January 15, 1914, the said Medina State Bank closed its doors and suspended payment upon all of its obligations; and shortly thereafter a receiver was appointed to wind up its affairs. The assets were insufficient to pay all claims of the plaintiff for moneys deposited, and it brought this action against the defendant upon the depositary bond. After the defendant had answered, the parties entered into a stipulation of facts. The stipulation covers some twelve pages of plaintiff's brief. The concluding paragraph thereof recites: "The foregoing states the facts in the above-entitled action. Upon this statement of the facts, three questions are presented to the court for determination:

"(a) Upon this statement of facts, is the defendant, Dakota Trust Company, liable at all for any amount upon its said bond?

"(b) If the defendant, Dakota Trust Company, is liable upon its said bond, for what funds is it liable; that is, is it liable for the demand funds, or for the time deposit funds, or for both?

"(c) If the defendant, Dakota Trust Company, is liable upon either or both of these classes of funds, then for what rate of interest is it liable, and from what date?"

The trial court did not attempt to determine any of the questions, but certified them to this court under chapter 2, Laws 1919, which reads:

"Sec. 1. Where any cause is at issue, civil or criminal, in any district court or county court with increased jurisdiction, in this state, and the issue of the same will depend principally or wholly on the construction of the law applicable thereto, and such construction or interpretation is in doubt and vital, or of great moment in the cause, the judge of any such court may, on the application of the attorney or attorneys for plaintiff or defendant in a civil case, and upon the application of the attorney for the plaintiff and defendant in a criminal cause, halt all proceedings until such question or questions shall have

been certified to the supreme court and it or they have been determined.

"Sec. 2. In all actions, both civil and criminal, the matter of certifying questions shall be in the sound discretion of the trial judge, and the supreme court may refuse to consider the same if it or they are frivolous, or are merely interlocutory in their nature, or otherwise not of sufficient importance to determine the issues in the cause at bar.

"Sec. 3. In all causes certified under this act so much of the record as may be necessary to a clear understanding of the pending issues shall be sent to the supreme court, and briefs as provided in other matters shall be made and filed, and oral arguments, if desired, shall be heard in all cases. In criminal causes the record shall be certified at the expense of the state or county in case of indigent defendants."

We are satisfied that we cannot take jurisdiction in this case. Our Constitution provides:

"The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." N. D. Const. § 86.

"It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same; provided, however, that no jury trial shall be allowed in said supreme court, but in proper cases questions of fact may be sent by said court to a district court for trial." N. D. Const. § 87.

"The district courts shall have original jurisdiction, except as otherwise provided in this Constitution, of all causes both at 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 the other original and remedial writs, with authority to hear and determine the same." N. D. Const. § 103.

There can be no difference of opinion as to the intention of these constitutional provisions. They clearly define the proper sphere of the district and supreme courts. As was said by this court in State ex rel.

Poole v. Nichols, 18 N. D. 233, 236, 20 L.R.A.(N.S.) 413, 119 N. W. 632: "These sections (Const. §§ 86 and 87) constitute a grant of power and are restrictive in their terms. Hence this court possesses such jurisdiction, and only such, as is either expressly or by necessary implication granted to it by said sections." By the plain terms of these sections the supreme court is precluded from exercising original jurisdiction, except in those particular matters wherein the Constitution expressly confers such jurisdiction. The legislature can, of course, neither enlarge nor restrict the jurisdiction fixed in the Constitution.

These constitutional provisions were considered by this court in Christianson v. Farmers' Warehouse Asso. 5 N. D. 438, 32 L.R.A. 730, 67 N. W. 300, wherein the constitutionality of the so-called Newman Law was assailed. After quoting §§ 86, 87, and 103 of the Constitution, the court said: "It is apparent from these constitutional provisions that the decision of the question here raised must hinge largely upon the meaning that must be attached to the words 'appellate jurisdiction' and 'original jurisdiction,' as used in that instrument, because it cannot be admitted for a moment, under the wording of our Constitution, that the legislature has power to impose upon us the exercise of any original jurisdiction whatever not specially authorized by the Constitution.

"It may aid us to first accurately determine just what this court is required to do under the statute that has been attacked. The statute says that this court 'shall try the case anew.' This language, it is apparent, was not used with exact accuracy. The case is not tried anew. There is no new evidence or any evidence adduced in this court. The case must be decided upon a record already prepared by a judicial tribunal. This court simply reviews the record, and the practical and necessary result of such review is to correct the errors, if any, either of the law or fact, into which the court below may have fallen. . . . The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. *In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted in and acted upon by some other court, whose judgment or proceedings are to be revised.* This appellate jurisdiction may be exercised in a variety of forms, and indeed in any form which

the legislature may choose to prescribe; but, still, the substance must exist before the form can be applied to it. . . . Appellate jurisdiction cannot create a cause. It must be first created and *adjudicated* by another judicial tribunal. Those facts existing, the appellate court may exercise its jurisdiction in any form the legislature may prescribe."

The precise question under consideration here was considered by the supreme court of Minnesota in State v. Byrud, 23 Minn. 29. In that case a question was certified to the supreme court under a statute authorizing such practice in certain cases. The court held that it could not take jurisdiction of or determine the question so certified, for the reason that it had not been passed upon in the court below. In the decision rendered in that case the court said: "It does not appear that the question raised was in any way passed upon or determined by the court below. It is indispensable that it should be thus passed upon and determined, because the jurisdiction of this court is (except in certain cases not here important to be mentioned) purely appellate. The exercise of appellate jurisdiction, *ex vi termini,* necessarily calls for something to be appealed from,—that is to say, there must be some action on the part of the inferior tribunal which the appellate court is called upon to review. In the absence of such action, the appellate tribunal, therefore, has no jurisdiction.

"In view of the appellate character of our jurisdiction, the statute itself appears to be open to criticism. When a person is tried and convicted, any question arising 'upon the trial' is necessarily passed upon by the court below, and in such case we see no reason why the determination of the question may not properly be reviewed here upon the certificate provided for. But, as respects a question of law arising upon 'demurrer to the indictment, or to a special plea or pleas to an indictment, or upon any motion upon or relating to an indictment,' the statute does not expressly require, as it should have done, that the question raised shall be passed upon by the court below; as, however, the statute does not forbid the court below to pass upon such question before reporting the case to this court, we think the duty to do so is to be implied. This is in accordance with the presumption in favor of the constitutionality of legislation, and with the rule that when a statute

is susceptible of two constructions, that should be adopted which will effectuate the manifest intention of the lawmaker." 23 Minn. 30, 31.

The reasoning, and even the very langauge employed, in Christianson v. Farmers' Warehouse Asso. and State v. Byrud, is applicable in this case. Here, as already stated, we are asked to consider a lengthy stipulation of facts, and determine what legal conclusions may properly be drawn therefrom. We are not asked to revise or review any ruling made by a trial court upon these matters; but are asked to exercise original judgment and in effect order judgment in the first instance. That this is wholly outside of the constitutional province of this court, we have no doubt. If this court has jurisdiction to determine the questions attempted to be presented for determination in this case, then manifestly it would have jurisdiction to determine, in the first instance, every case submitted by the parties upon an agreed statement of facts. That we have no such jurisdiction, and that it is wholly beyond legislative power to confer it, is, we think, too clear for controversy. We are of the opinion that this court has no jurisdiction of a question which arises in a cause in the district court and certified to this court under chapter 2, Laws 1919, unless it appears that the question has actually been passed upon and determined by the court below. In this connection it is interesting to note that chapter 161, Laws 1903, relating to an action to enforce payment of taxes, provided that a judgment of the district court should be final, "except that upon application of the county, or other party against whom the court shall have decided the point raised by any defense or objection, the court might, if in its opinion the point was of great public importance, or likely to arise frequently, make brief statement of the facts established, bearing on the point, and of its decision, and forthwith transmit the same to the clerk of the supreme court, who shall enter the same as a cause pending in such court." Grand Forks County v. Frederick, 16 N. D. 121, 125 Am. St. Rep. 621, 112 N. W. 839. It will be noted that the only questions which might be certified to the supreme court under chapter 161, Laws 1903, were such as actually had been decided by the trial court.

It is true chapter 2, Laws 1919, does not expressly require that the question certified must be one which has been passed upon in the court below; but it does not say that the trial court shall refrain from deciding a question before certifying it. The statute clearly recognizes

that the trial court shall be something more than a ministerial agent for the purpose of certifying questions when he is requested to do so. It provides that "the matter of certifying questions shall be in the sound discretion of the trial judge." By the plain words of the Constitution the district court is invested with power to determine in the first instance all questions of law and fact arising in causes at law and in equity properly instituted therein. Const. § 103. While as to such causes this court has appellate jurisdiction only. Const. § 86. The presumption is that the legislature was aware of, and intended to enact legislation in harmony with, these provisions. State v. Byrud, 23 Minn. 29; State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583.

It follows from what has been said that this court cannot take jurisdiction and determine the questions certified in this case.

Proceedings dismissed.

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

GRACE, J. I concur in the result.

STATE OF NORTH DAKOTA EX REL. WM. LEMKE, Assistant Attorney General, Relator, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Chicago, Milwaukee, & St. Paul Railway Company, Great Northern Railway Company, Midland Continental Railway Company, Minneapolis, St. Paul, & St. Ste. Marie Railway Company, Northern Pacific Railway Company, and Sam Aandahl, C. F. Dupuis, Frank Milhollan, as Board of Railroad Commissioners of State of North Dakota, Respondents.

(179 N. W. 378.)

Carriers — rate order of railroad commissioners held void for lack of proper board action, and carriers restrained from enforcing increases.

The Board of Railroad Commissioners, pursuant to an application by the carriers, conducted a hearing attended throughout by one member of the board and a part of the time by two members. Several days thereafter a meeting

of the board was held, at which the subject-matter of the application was discussed, but concerning which there was no vote taken on any matter presented in the application, although it is claimed an agreement as to disposition was reached. The minutes of the board do not show what action, if any, was taken. Subsequently, an order was issued under the seal of the board and signed by the secretary, disposing of the application, the secretary stating that such order was released pursuant to an understanding with one member of the board. It is *held:*

1. The purported order is void for lack of proper action by the Board of Railroad Commissioners, and the carriers are restrained from putting into effect rate increases based upon the purported order, and are required to refund increased charges which have been collected pursuant to such purported order.

Opinion filed September 17, 1920.

Original application for writ of injunction.
Writ granted.

Statement by BIRDZELL, J. This is an original application for an alternative writ of injunction restraining the respondent railway companies from continuing to charge rates and fares according to schedules filed under a purported order of the Board of Railroad Commissioners. Upon presentation of the application an order was issued out of this court, requiring the defendants to show cause why they should not be permanently enjoined from charging any increase in intrastate passenger or freight rates, and from further continuing to charge the alleged unlawful increase in intrastate freight and passenger rates put into effect by them on September 1, 1920. Pending the hearing and the further order of the court they were enjoined from charging such rates and fares so put into effect, unless the increased charges be kept separate and apart and be subject to the order of the court.

The petition alleges that on September 1, 1920, the respondent railway companies increased their passenger rates 20 per cent on intrastate commerce and their intrastate freight rates 35 per cent; that said increases are unjust, unreasonable, extortionate, and unlawful; that the increases were made pursuant to the authority of a purported order of the Railroad Commission issued August 24, 1920. The authority of the Railroad Commission to issue the order is denied, and it is further alleged that the same was never presented and adopted at a legal

meeting of a majority of the board; that in fact two of the three commissioners were opposed to the order and to the increased rates, and had never given their consent or approval to the same.

It is also alleged that there had never been a proper hearing before the commission at which the public and shippers were given a fair opportunity to protect their interests; that the levels of intrastate freight and passenger rates of North Dakota are higher than in Minnesota and South Dakota by 40 per cent and 28 per cent, respectively; that the intrastate freight rates are made for the purpose of giving advantage to milling, packing, and other industries in Minneapolis, St. Paul, and other large cities, and, because of unjust discriminations, are destructive to similar industries in this state. The petition avers "that the intrastate rates in force August 31, 1920, were just and reasonable, and not confiscatory, and permit a reasonable profit."

The prayer for relief asks that the defendants be restrained from continuing to charge the higher rates on intrastate traffic which were put in force on September 1st.

To the petition there is attached the affidavits of Frank Milhollan, a member of the Board of Railroad Commissioners, V. E. Smart, rate expert and statistician for the board, and a certified copy of the purported opinion and order complained of. The Milhollan affidavit states in substance that on August 21, 1920, there was a meeting of the Board of Railroad Commissioners, at which the question of increasing freight and passenger rates was discussed; that some notice of the hearing had been given sixteen days prior thereto, but it did not receive general publicity; that there were present at the hearing attorneys for the various railroads, but none representing the interests of the public and the shippers; that no final determination or decision of the matter was reached at this meeting nor at any subsequent meeting; that the affiant was not then, and is not now, satisfied that the railroads are entitled to the increase sought; that no opportunity was given the affiant to read the transcript or to consider the evidence submitted by the railroads as to the reasonableness of the increased rates; that there has been no subsequent meeting of the commissioners, and no legal meeting has been held at which the increases were authorized; that Commissioner C. F. Dupuis, on or about the 24th day of August, caused the secretary of the commission to issue the order granting the increases complained

of; that the rates were subsequently, on September 1, 1920, put into effect without authorization by the Board of Railroad Commissioners, and are contrary to the rates established by law; that neither affiant nor the chairman of the board, Sam Aandahl, ever saw the order until after it was issued; that neither of them signed it, and that, prior to the hearing above referred to, Commissioner Dupuis had held a meeting on August 12th and 13th, at which hearing, he, Dupuis, was the only commissioner present; that affiant is informed and believes that the railroads were represented at that meeting by their attorneys, and that four or five members of different shipping concerns were also present and protested against the increase. The affiant also swears to the disparity between the levels of the intrastate rates in North Dakota as compared with the rates in Minnesota and South Dakota, resulting in unjust discrimination prejudicial to the shipping interests of North Dakota and preferential to those of Minnesota and South Dakota as recited in the complaint.

The affidavit of the rate expert and statistician recites the meeting of August 12th and 13th, at which Commissioner Dupuis presided and at which the other two members of the Commission were not present, except Milhollan, who was there for two or three hours on the latter date; that the representatives of the railroads submitted evidence in support of their request for increased rates which did not convince the affiant of the necessity for the increase being applied to intrastate rates; that there was another meeting of the board on August 21st, at which meeting affiant was present the greater part of the time and at the conclusion thereof, and, so far as affiant knows, the board did not vote on the increase, and that affiant knows of no other meeting since. That during the forenoon of August 23d Mr. Dupuis directed affiant to prepare a tentative report, opinion, and order; that so far as affiant knows this report was never finally adopted at a legal meeting of the Board of Railroad Commissioners. This affidavit also supports the allegations of the complaint respecting disparity between the levels of the intrastate rates in North Dakota as compared with those of Minnesota and South Dakota.

The certified copy of the order identifies the matter pending before the commission as Case No. 1592, received May 18, 1920, heard August 12th and 13th, 1920, and decided August 24, 1920. It re-

cites as appearing for the commission, C. F. Dupuis, vice Chairman, Fred Bremier, director division of utilities, and V. E. Smart, rate expert and statistician. It further recites representation of the carriers by their attorneys and officials, giving the names, and other appearances on behalf of three commercial clubs of the state and the Employers' Association of North Dakota. It is unnecessary to refer at length to the matters recited in the order. Suffice it to say for purposes of this proceeding that the order purports to authorize the increases complained of, although it does not authorize all of the increases for which the carriers asked, such, for instance, as increases in rates on milk and cream and surcharges and sleeping and parlor car fares. It contains the further and concluding provision that the case shall be kept open, and further hearings ordered for the purpose of adjusting discriminations cited in the report and for inquiring into the reasonableness of individual class and commodity rates and passenger fares established by the order. The discriminations referred to are those resulting from the disparity between intrastate class and commodity rates applicable in North Dakota compared with those of adjoining states similar to North Dakota from a transportation standpoint, which the commission recognized and found to exist, further finding that there was urgent need of adjustments to remove the same.

At the hearing held in this court on September 10th, separate answers and returns were made by the carrier defendants and the Board of Railroad Commissioners. The answer of the carrier defendants, other than the Midland Continental Railroad Company, states in substance that the increased rates became effective September 1st, pursuant to the order of the Board of Railroad Commissioners. It alleges that in fact the order is the order of the board, and denies that it was never adopted at a legal meeting of a majority of the members; that two members of the commission are opposed to said order, and that two had never given their consent or approval thereto. It alleges the fact to be that the order was approved by all three members of the commission. It also contains allegations in support of the regularity of the hearing on August 12th and 13th, alleging that public notices had been given, which were published in the newspapers as well as sent to commercial organizations in the principal cities of the state. It denies that the intrastate rates of North Dakota are 40 per cent higher on the

average than those in Minnesota and 28 per cent higher than those in South Dakota. It admits that there are some rates in North Dakota which are higher than the rates on similar commodities in South Dakota and Minnesota, but alleges that it is their purpose to readjust all rates in the states through which they run, so that there shall be no difference in the levels of rates in the different states, except in those instances where there are circumstances or conditions which require different treatment. It recites and relies upon proceedings before the Interstate Commerce Commission in the case known as Ex Parte No. 74, wherein carriers were authorized to advance interstate freight rates 35 per cent and interstate passenger rates 20 per cent, alleging that said proceeding has been held open on the docket of the Interstate Commerce Commission for the purpose of adjusting irregularities in a manner similar to the continued pendency of this case before the state Board of Railroad Commissioners for similar adjustment. They allege that at the hearing on August 12th and 13th, the defendants made the showing required by § 10, chapter 194, Laws of North Dakota 1919, and chapter 192 of the same laws, pursuant to which the Railroad Commission had authority to authorize the increases. But it is further alleged that by virtue of the Act of Congress of February 28, 1920, known variously as the Transportation Act and the Esch-Cummins Law, and of action taken by the Federal government during the period of Federal control, the showing required by the North Dakota statutes last above referred to was not a necessary prerequisite to the exercise of jurisdiction by the board and to the granting of the increases requested.

The answer was accompanied by the affidavit of B. W. Scandrett, which recites the facts anterior to the hearing. From this affidavit it appears that at a conference between the affiant, Commissioners Dupuis and Milhollan, and Director Bremier, it was mutually agreed that the hearing should be held on August 12th: that on August 12th and 13th, the hearing was held, Commissioner Milhollan arriving on August 13th in time to hear part of the evidence and the arguments summing up the testimony.

The Board of Railroad Commissioners appear in this proceeding by the attorney general, and in their answer allege that the order is the lawful order of the board; that the same was in fact approved by all three of the commissioners. It alleges facts concerning notice of the

hearing, to the effect that on August 2, 1920, notices were given by mail to the commercial clubs in the principal cities of the state, to various shippers, and that copies of the notice were furnished two daily newspapers in the state,—one in Bismarck and one in Fargo,—which notice was published and commented upon in both papers. Accompanying the answer of the board are the affidavits of Commissioners Aandahl and Dupuis. In the affidavit of the former it is stated that he did not attend the meeting on August 12th and 13th, but that he did attend a meeting on August 21st, at which there were present all three commissioners; that, in addition to other business transacted at this meeting, the board considered the application of the railroads for increased rates, and that it was unanimously agreed by the members that the board would grant the carriers' application for 20 per cent increase in passenger rates and 35 per cent increase in freight rates, but would deny the application for 50 per cent surcharge on Pullman parlor-car rates and for advanced cream and milk rates pending the consideration of the application of the express companies for similar advances in their milk and cream rates. Also that V. E. Smart was authorized and directed by the board to prepare, under the supervision of Commissioner Dupuis, the formal report and order of the board in accordance with this decision. The affidavit of Commissioner Dupuis corroborates the affidavit of Aandahl in the matters above referred to.

Additional affidavits were filed on the return day which it will not be necessary to review at any length. Suffice it to say that Commissioner Aandahl swears that, so for as he recollects, no motion was put and passed authorizing the increase, but that he agreed to the increase, and is certain that the entire commission agreed to it; that affiant did not see the order as drawn or altered, nor did he know that it was altered prior to its being issued; that since the order has been issued he has carefully read it and that it conforms to the decision; that affiant, in arriving at his conclusion, believed that under the Esch-Cummins Act he could do nothing else than authorize the increase; that affiant did not read the transcript or other evidence submitted by the railroads and their attorneys.

The secretary of the board, J. H. Calderhead, certifies to the minutes of the meeting on August 21st. These minutes contain no reference to the application for increased rates further than the following state-

ment: "The secretary was directed to ask an opinion of the attorney general as to the jurisdiction of the board over the passenger fares in this state." In his affidavit, however, the secretary states that the matter of increased railroad rates was in fact discussed at the meeting of August 21st, but that no regular action was taken upon the matter, and that no meeting has been held since August 21st. In this affidavit the facts are stated relating to the issuance of the order in question as follows:

"That on August 24, 1920, an opinion, report, and order in the matter of application for increased passenger fares and freight rates was placed upon my desk for signature and seal, and that the same was signed and sealed with a full knowledge of the fact that no action had been taken formally by the Board of Railroad Commissioners, in the adoption of said report and order, but upon an understanding from Commissioner Dupuis that same should be released."

The return of the Midland Continental Railway Company states that it has not filed schedules of increases in its freight and passenger rates as alleged, and it is not interested in the subject-matter of litigation, and it asks that the action be dismissed as to it.

Wm. Lemke, Special Assistant Attorney General, for State of North Dakota.

Wm. Langer, Attorney General, and *F. E. Packard,* Assistant Attorney General, for Board of Railroad Commissioners.

C. W. Bunn, M. L. Countryman, A. H. Lossow, D. F. Lyons, and *B. W. Scandrett,* for defendants Chicago & Northwestern Railway Company, Chicago, Milwaukee, & St. Paul Railway Company, Great Northern Railway Company, Minneapolis, St. Paul & St. Ste. Marie Railway Company, and Northern Pacific Railway Company.

G. M. Springer, for Midland Continental Railway Company.

BIRDZELL, J. We have set forth the facts as stated in the affidavits somewhat fully for the reason that they have a direct bearing upon the validity of the order complained of. It was conceded upon the argument that this is the decisive question in the case. Was there, or was there not, an order of the Board of Railroad Commissioners authorizing the increases complained of? In our view of the case the

validity of the purported order does not depend upon the existence of any facts that might be more or less controverted in the affidavits referred to in the foregoing statement. It seems, on the contrary, that the invalidity of the order is established by the facts concerning which there is a general agreement in all the affidavits.

It is elementary that the Board of Railroad Commissioners possesses only the authority conferred upon it by the constitution and the statutes of the state. Railroad Comrs. v. Oregon R. & Nav. Co. 17 Or. 65, 2 L.R.A. 195, 19 Pac. 702. Its action, therefore, concerning any subject-matter within its jurisdiction, to be valid, must be in substantial conformity with the statutes governing its procedure and must be consonant with due process of law. Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Beale & W. Railroad Rate Regulation, § 1142. Testing the action of the board in this instance by these simple, yet fundamental, requirements, we are forced to the conclusion that the order in question is void. A brief statement of the reasons leading to this conclusion should demonstrate its correctness.

The Board of Railroad Commissioners is a governmental body whose members are elected at large by the people. The governmental authority vested in the board combines administrative, legislative, and judicial functions. Within its range, therefore, the board exercises authority of the same kind as that vested separately in the three main departments of the government. It differs only in extent and finality. The statutes governing its procedure bear unmistakable evidence of intention on the part of the legislature to make its action effective upon the subjects committed to it and to clothe its regular action with presumptions of validity. To this end the board is charged with the duty of giving ample opportunity to interested parties to be heard before action is taken. It is required to preserve and transcribe the evidence upon which it acts. Sess. Laws 1919, § 42, chap. 192. See also §§ 4731 and 4741, Comp. Laws 1913. Its findings are likewise required to be filed (Sess. Laws 1919, §§ 42 and 43, chap. 192), and (Comp. Laws 1913, § 4741), and certified copies are made competent evidence in any proceeding, either before the commissioners or in any court, etc.

Appeals from its decisions are provided for. Sess. Laws 1919, §§ 34

and 35, chap. 192. It is inconceivable that upon an appeal from an order of the Board of Railroad Commissioners a court, in arriving at the substance of the matters agreed upon as findings or to be incorporated in an order or decision, should be compelled to extract them from the memory of officers and employees who might produce affidavits or give testimony to informal discussions during meetings of the board. The importance which the law attaches to the hearings, the findings, and the orders of this board, points unmistakably to the negation of any such procedure as this. If resort can be had to this method of arriving at the very substance of the matters agreed upon by the board, reasonable caution would suggest that such action should be deprived of any sort of presumption in its favor. Yet the statutes treating of the effect of decisions of the board are replete with provisions giving them presumptive validity, extending even, in some instances, to conclusive presumptions. Before any presumption could be indulged as to the correctness of the findings and conclusions, it ought at least to be requisite that there be the clearest possible evidence obtainable as to what the findings and conclusions are. Certainly no sort of presumption should arise in favor of a finding that can only be extracted from recollections of informal discussions. And even less should such findings be made a basis for an appeal. These statutes, as well as others which might be cited, render it clear that it was not within the contemplation of the legislature that the board of Railroad Commissioners could act upon any matter pending before it as so many individuals, and that the evidence of its action could be made to rest in the recollection of its members and employees.

A brief statement of the facts in the instant case, concerning which there is practically no dispute, will serve to point out wherein the purported action of the commission falls short of satisfying the above requirements. There is no minute record that any definite proposition involved in the application of the carriers was submitted to a vote of the commissioners and the vote taken thereon. There are no findings signed by a majority of the members. There is no order or decision signed by a majority of the members. The purported order was admittedly promulgated at the direction of one member of the board (whose good faith we have no occasion to impugn), acting, as he believed, under the most favorable view of the facts, in accordance with

the desire and consent of the other two members, such consent being apparently a matter of inference drawn from an informal discussion. Such does not, in our opinion, constitute action by the Board of Railroad Commissioners.

Upon the argument it was suggested that the record of the action of the board was established by evidence of a very satisfactory character; namely, the affidavits of those most familiar with the facts,—the officers themselves. But in our view of the matter it is not a question of verifying an official record. It is a question as to whether or not an official record has been made. We are of the opinion that the undisputed facts show that no official action has been taken on the matter pending before the Railroad Commission.

It follows, therefore, that the injunction should issue as prayed for, and that the excess rates and fares collected and held subject to the further order of this court should be distributed to the various patrons of the roads as they have contributed to the same. It is so ordered.

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

ROBINSON, J. (concurring specially). In the opinion as written by Mr. Justice Birdzell I do concur. I do also concur with myself in commending railway managers to avoid the folly of the widow who killed the goose that laid for her the golden eggs. There must be some limit to the patience of the people who have no guaranty of 6 per cent, or even 1 per cent, and who do not clearly perceive the right or wisdom of robbing Peter to pay Paul.

In this state the railway passenger rates and most of the freight rates are regulated and fixed by statute. Yet, during the war, when constitutions and statutes were practically suspended, and when railroads were taken over and operated by the government, special and excessive war rates were imposed and exacted by the government, and since the termination of the war and the restoration of the roads to their owners the railway carriers have, by sufferance, continued to exact the excessive war rates. In some way they have worked one or more of the railroad commissioners of the state, and have obtained a pretended order permitting them to add to the war rates for passengers, 20 per cent, and for freight, 35 per cent. However, it is entirely clear that

the railroad commissioners had no jurisdiction to make such an order. They cannot in any way vary or amend the laws of the state. Further, it appears that the pretended order of the commissioners was not made at a legal session of the board; it was not made upon proper notice, or any notice served upon the governor or the attorney general, nor after a fair hearing or any hearing. It was merely an arbitrary order, made in an arbitrary manner and without any jurisdiction, and for that reason it is null and void. Hence the carriers must be enjoined from continuing to exact, demand, or receive the excessive rates and charges in accordance with said void order, and all excess charges received must be refunded.

BRONSON, J. (specially concurring). I concur in the opinion of Justice Birdzell to the extent that it holds and determines that no order of the Board of Railway Commissioners was, in fact or in law, made.

I expressly disapprove of the statements made in the opinion of Justice Robinson concerning so-termed excessive war rates, the jurisdiction of the Railroad Commissioners, and the manner in which he states that the order involved was obtained. I am of the opinion that such discussion is not concerned in the consideration of the questions presented to this court in this action.

GRACE, J. (specially concurring). I agree with the conclusion of the opinion of the court, as written by Mr. Justice Birdzell, which holds, in effect, that the alleged order of the Board of Railroad Commissioners, under consideration in this proceeding, was not, in fact or in law, the order of that board, and that the pretended order is invalid and illegal, and of no force nor effect.

After hearing motion for modification.

Filed October 1, 1921.

BIRDZELL, J. The relator filed a motion in this court for a modification of the foregoing opinion and order. In response to the motion the cause was again set down for hearing upon phases not covered by the previous opinion, and a restraining order was issued which restrained the putting into effect of any rates, fares, or charges in excess of those

permitted by our former decision. The additional hearing having been had, we are of the opinion that the equities of the case require the disposition presently to be indicated.

This court assumed original jurisdiction under a petition setting forth various grounds upon which it was alleged that the order complained of was void, and that rates in excess of the legal rates were being put into effect contrary to law. In the decision of the matter it appeared to the court that the purported order was clearly void for the reasons stated in the opinion; and, owing to the probability that our opinion upon the other grounds alleged would be of no practical value, any further expression was deemed unnecessary. It now seems advisable, however, to express our views of the additional equitable considerations which must enter into the final disposition of the case in this court.

Complaint is made that there was not an adequate notice of the hearing before the Railroad Commission, and that, as a result, the public was not properly represented, and lacked opportunity to present the facts bearing upon the application from its standpoint. There is no statute requiring any other or different notice than such as was given in this case; and, from the general structure of the statutes regulating procedure before the Board of Railroad Commissioners, it is readily to be inferred that the board itself, as a public agency, is charged primarily with protecting the interests of the public. In view of the invalidity of the board's action, however, for the reasons already stated, and of the existence of other facts within equitable cognizance, it may be proper to order an additional hearing now, notwithstanding the sufficiency of the original notice.

In this instance, though it is apparent on the record that its decision upon the merits of the application would involve the determination of some close questions of law as well as of fact, it does not appear that the commission called to its aid the attorney general of the state, who is by statute made the legal adviser of the board. Aside from the representatives of three commercial clubs and an employers' association, there was no one in attendance representing the public as such. The sole representation of the public (with the exceptions heretofore noted) was by the one commissioner who presided at the hearings. The affidavits further show that at the time the original order was made one

commissioner, who had not attended the hearings, yielded his assent without having heard the evidence and without having read it, acting, apparently, on the supposition that the previous action of the Interstate Commerce Commission had made his duty merely perfunctory. This is not the character of consideration required by § 10 of chapter 194, Session Laws of 1919, and neither is the commissioner's supposition warranted either by the terms of the Transportation Act of the Congress of the United States or by anything known to us in connection with the application before the Interstate Commerce Commission for increases upon interstate traffic.

The present Public Utility Act attaches a greater degree of importance to the record made before the Board of Railroad Commissioners than any heretofore existing in this state. By § 43, chapter 192, Sess. Laws 1919, it is provided that the findings of the commission shall be admissible as evidence in proceedings before the commissioners or in any court, and that they shall be conclusive evidence of the facts therein stated as of the date and under the conditions then existing. By § 35 of the same chapter it is provided that upon appeal the lawfulness of the decision of the commissioners shall be inquired into and determined on the record of the commission as certified to by it, and that no new evidence shall be taken on such appeal or introduced by any party. The importance which thus attaches to the record made before the Board of Railroad Commissioners renders it imperative that full opportunity be accorded to all interests affected to make a complete showing before the board.

In North Dakota there is a peculiarity in the intrastate rate situation that perhaps is not present to complicate matters in any other state in the Union. A brief statement of this peculiarity will suffice for present purposes. Chapter 194, Sess. Laws 1919, was enacted for the avowed purpose of classifying freight and fixing maximum rates and charges. This law was enacted during the period of Federal control; and, by reason of such control and the Federal Transportation Act, it is conceded that it did not become applicable as a rate statute prior to September 1, 1920. It was stated on the argument that the rates therein prescribed and the classifications were substantially the same as the prewar rates in effect in our sister state of Minnesota. Also that the same differ materially, both in regard to rates and classifications, from

the schedules previously obtaining, and which were in force in North Dakota as the war rates. Section 10 of this act is the section which specifically authorizes the Board of Railroad Commissioners to permit carriers to charge higher rates than those prescribed in the law, provided they make the requisite showing before the commission.

It is apparent that the action of the commission in the instant case entirely ignores the general scheme of rates provided for in the law, and that it authorizes the increases based upon pre-existing schedules filed. To what extent this action subverts the policy of the statute (chap. 194) we are not prepared upon this record to say. But since, prima facie, the statute has been ignored, and the rates adjusted without reference to it, it has in effect been nullified. We cannot say now to what extent it might have been necessary to depart from the plan of this law in order to give to the carriers the relief which the statute itself contemplates. This can scarcely be determined in the absence of a record from which it will be possible to ascertain the relationship between interstate and intrastate rates, so that discrimination may be avoided. It is quite as serious a matter for an administrative board to contravene a fixed legislative policy with respect to a matter which is purely legislative, as it is for a court to invalidate legislation on constitutional grounds, and when a commission is acting under the broad powers given it to authorize compensatory rates above the maximum provided by statute, it should act upon a record that shows the necessity for such action, and we have no hesitancy in saying that it should, so far as possible, observe the declared legislative policy.

The fact that the new rate statute goes into effect following a period of Federal control, and at the expiration of the period fixed in the Transportation Act within which rates could not be lowered, may give rise to extreme difficulty. But this does not, in our judgment, justify either a court or a commission in assuming that the difficulties are insurmountable. On the contrary, it points to the necessity of a more complete showing before the commission than might otherwise be required.

Against the foregoing considerations the carriers urge that they have, in good faith, attempted to comply with the laws of North Dakota in making their application and substantiating it by the showing required; that they have been deprived for approximately thirty days

of the benefit of increased earnings from intrastate business to which the commission found them entitled; and that they should not suffer further hardship through delay. This court fully appreciates the situation from the standpoint of the carriers, but nevertheless, in view of the fact that approximately only one eleventh of their business in North Dakota is affected by this litigation, and the further fact that the war-rate schedules are not disturbed, we would hardly be justified in permitting the case to be closed before the Railroad Commission until there is the best assurance obtainable that a full record has been made upon which the legality of its final order can ultimately be determined. The short delay now required for this purpose, in our judgment, weighs less in the scale which determines the balance of inconvenience than would a present change in status which might ultimately be followed by new hearings, and in turn possibly by rescission of the earlier action with the attendant impossibility of reparation.

Without further expression concerning the merits of this controversy at present, and with no intention to indicate what action the commission should take when the record is completed before it, the further order of this court is that the Board of Railroad Commissioners be and is hereby required to open Case No. 1592 for further hearing; that the board publish notice of the time and place of hearing in accordance with § 585, Comp. Laws 1913, and mail a copy of such notice to the relator herein; that at such hearing the relator and all other interested parties be permitted to adduce evidence, examine witnesses, and submit depositions; and that all of the respondents herein be and they are hereby directed to co-operate to the end that a full hearing be had and a complete record thereof be made as required by law.

The writ and restraining order previously issued herein will remain in effect pending full compliance with the foregoing order and the final disposition of Case No. 1592 by the Board of Railroad Commissioners.

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

GRACE, J. (concurring specially). Relator having made and filed a motion in this court for modification of the original decision and order, a further hearing, upon elements of the case not considered in the

previous decision and restraining order, was, by this court, permitted and ordered.

The motion was fully argued by all parties, in which a further decision, covering additional points not incorporated in the original decision, has been written. Upon the petition originally presented to this court, it assumed original jurisdiction. It exercised its power under that jurisdiction, to declare the order of the Railroad Commission void, and the rates therein prescribed as excessive and contrary to law, and properly so.

The further decision of this court states: "The fact that the new rate statute (Sess. Laws 1919, chap. 194) goes into effect following a period of Federal control, and at the expiration of the period fixed in the Transportation Act, within which rates could not be lowered, may give rise to extreme difficulty. But this does not, in our judgment, justify either a court or a commission, in assuming that the difficulties are insurmountable. On the contrary, it points to the necessity of a more complete showing before the commission than might otherwise be required."

There are other expressions in the additional decision, expressing the same thought, principle, or conclusion, and with all this, we agree. It is the same principle stated, and the same conclusion arrived at by the writer in his dissenting opinion, in the case of State ex rel. Langer v. Northern P. R. Co. 43 N. D. 556, 172 N. W. 329, wherein it was stated: "At such time, when such transportation systems are returned to their owners, if they be so returned, all state regulations and powers will be again revived, and be of the same force and effect as they were at the time of the taking of Federal control.

"The power of the state at the time of taking of Federal control, to prescribe fares, rates, and charges was not repealed, but merely suspended during Federal control, and, upon the termination of that, will again have the same force and effect as at the time of taking of Federal control."

We there, further, fully discuss this principle, at length. Chapter 194 of the Sessions Laws of 1919 was a law of this state at the time the roads were released from Federal control, and became applicable as a rate statute on the 1st day of September, 1920, after Federal control had wholly ceased, and after it no longer had power to fix or pre-

scribe rates. Though that statute became applicable at the time above stated, it seems to have been ignored and disregarded by the commission, and thus, it disregarded the will of the legislature, as expressed in that law, and in effect nullified it.

We do not think the commission can disregard this law. We think it must be the basis of any action the commission may take, resulting in the issuing of its order fixing or prescribing rates. It is the source of their authority and power, relative to fixing rates. It will be time enough to discuss all the principles involved, and whether or not the commission may, in any degree, depart from that law, and upon what principle they may do so, if at all, when the full record is presented, if it ever is presented, from which it may be determined, upon a full consideration and analysis of interstate and intrastate rates, what, if any, power of action may be exercised or taken, by them, to avoid discrimination.

The further order of this court, requiring the Railroad Commission to open up the case for further hearing, and that the board publish notice of the time and place of hearing, and mail a copy thereof to the relator, and that all interested parties be permitted to adduce evidence, examine witnesses, and that the respondents be directed to cooperate in this regard, and that the restraining order previously issued remain in effect, pending full compliance with this order, and until the final disposition of the case by the Board of Commissioners, is in accord with my view.

A. C. HARRIS, Appellant, v. ED HESSIN, Respondent.

(179 N. W. 698.)

Appeal and error — on reversal of directed verdict for defendant, new trial granted; refusal to dismiss action after remand held not an abuse of discretion.

1. An action is brought to recover for money had and received, and for the purchase price of certain merchandise.

The court directed a verdict in favor of defendant and for dismissal of the action, which, for reasons stated in the opinion, is *held* to be reversible error.

Judgment — pleading of res judicata held without merit.

2. The defendant interposed a plea of *res judicata*. For reasons stated in the opinion, it is *held*, that such plea had no application, and, in this case, was without merit.

Opinion filed October 1, 1920. Rehearing denied October 15, 1920.

Appeal from the County Court of Ward County, *Percy Crewl*, Judge of the County Court of Renville County, North Dakota, sitting for and at the request of Wm. Murray, Judge of the County Court of Ward County, North Dakota.

Reversed and remanded.

Palda & Aaker, for appellant.

The burden of proving facts such as would be a bar or estoppel on the ground of *res judicata* is upon the party alleging same. Hanchey v. Coskrey, 81 Ala. 149, 1 So. 259. See 23 Cyc. 1536, ¶ 4 and cases cited.

Extrinsic evidence may be heard, and the question is to be decided by the aid of such evidence, and not by the inspection of the record alone. Hartman v. Pittsburg Inclined Plane Co. 23 Pa. Super. Ct. 360; Fahey v. Esterley Mach. Co. 3 N. D. 220; Coyle v. Due, 28 N. D. 400; Horton v. Emmerson, 30 N. D. 258.

Campbell & Jongewaard, and *Bradford & Nash*, for respondent.

Parol evidence is not admissible either to create or to annul the estoppel arising from a judgment. 23 Cyc. 1534.

No evidence inconsistent with the record and the judgment can have any effect or be adduced. 23 Cyc. 1541.

The record itself is the sole and conclusive evidence. 23 Cyc. 1542.

GRACE, J. This appeal is from a judgment of the county court of Ward county. The action is one by the plaintiff against defendant, to recover $398 and interest, money had and received by the defendant from the plaintiff.

The complaint is in the ordinary form. The answer is a general denial. An amended answer was served during the trial, which included a general denial and also set forth a plea of *res judicata*. A reply was interposed to the amended answer, which sets forth that the issues involved in the action of Hessin against Harris, previously tried in the

district court of McHenry county, are entirely distinct and different from the issues in the present action. Further reference to this matter will be made later in the opinion.

The issues in this action were tried to a jury, and the court, on the motion of defendant, directed it to return a verdict in his favor, which it did.

The appellant specifies three assignments of error; *viz.*, that the court erred in directing the jury to return a verdict in favor of the defendant and against plaintiff, and for the dismissal of the above-entitled action; (2) that the court erred in ordering judgment to be entered in the above-entitled action, under the direction of dismissal of the same; (3) that the court erred in allowing amendment of defendant's answer during the trial of the action, the same thereby changing the issues of the lawsuit. The third assignment of error, at the time of the oral argument before this court, was abandoned, and no further notice need be taken of it.

The facts are few and simple. The plaintiff claims to recover for money had and received by the defendant from plaintiff, and for merchandise furnished by the plaintiff to the defendant. These were the only matters involved in the case, until, during the trial, the defendant amended his answer so as to set up the plea of *res judicata*.

The former action was brought by Hessin v. Harris on a promissory note, in the sum of $500, bearing interest at 7 per cent per annum from date, and it was tried in McHenry county, in the district court.

The complaint in that action admitted the payment on the note of $50, made November 19, 1907. The note was dated the 15th day of October, 1906. The answer to the complaint in that action was a qualified general denial. It also denied that the plaintiff was the owner and holder of the note. It further alleged that the said note, if any exists, is the obligation of M. Zeer & Company, a copartnership doing business in Pierce county, North Dakota. In that case, the defendant made a motion to amend the foregoing answer, so as to include an allegation that the note had been paid. The amendment was not allowed, and the defendant was not permitted to put in any evidence with reference to payments, if any, made upon the note.

With reference to the amendment the defendant, in his brief, has the following to say:

"The case came on for trial in the district court of McHenry county, before a jury. Mr. L. J. Palda was the attorney for Mr. Harris. The record discloses that, at that late date, the following proceedings were had: We regret that, owing to my own absence and Mr. Nash's trial of this case, that this portion of the record did not go into evidence in this case.

"Mr. Palda: At this time, if the court please, the defendant asks leave to amend the answer in this case, by putting in paragraph 4, alleging that said note has been fully paid.

"Christianson: Objected to.

"Court: Sustained. Motion to amend denied.

"The case proceeded, Judge Palda trying to put in evidence and being ruled out in this regard, by the court."

Assuming that to be the record in the former case, and we think it is, or the defendant would not have quoted it; and assuming further that that record is one of which this court might take judicial notice, and we think it is such a record; and considering further that each counsel on the hearing before this court admitted that the amendment was offered in that case and denied,—we think it fully appears that such amendment was offered and denied.

We think this matter is not really in dispute. From this, it would appear that the defendant in that case was prohibited from there alleging or proving payment. If he might or should have done so, the answer to that is, that he was not permitted *to* do so.

If the amendment had not been offered and denied, and proof offered of payment, and that also denied, then the question might arise whether the defendants should not have offered proof of payment, under the theory that that question should have been litigated in that case. That question was not, however, litigated in that case, and the defendant was prohibited from doing so.

The question of payment not having been presented there, by reason of the defendant being prohibited from doing so, it is difficult to understand how the principle of *res judicata* invoked here has any application, and we are convinced that it has not.

The complaint in the former action alleged a cause of action on a promissory note, for $500, with interest at 7 per cent from October 15,

1906. It also alleged the payment thereon of $50, on November 19, 1907.

That case was tried to a jury, and it returned a verdict in favor of the plaintiff, Hessin, for the sum of $500, with interest thereon at the rate of 7 per cent per annum, from the 15th day of October, 1908, less the sum of $50, with interest from November 19, 1907, at 7 per cent, and judgment was entered accordingly.

In the present case, Mr. Palda gave the following testimony: "In the case of Hessin v. Harris, tried in McHenry county, this was an action on a note. The defense interposed by Mr. Harris's attorney, Mr. Brainard, was as set forth in exhibit 'C,' being the answer to exhibit 'B,' the complaint and summons. In the trial of the action we were called in and looked after that feature, and in the trial the issue raised was whether or not the note was a company note or whether one of individual liability. Mr. Harris states that it was a company note of M. Zeer & Company. There was no claim by a specific payment, by the company of the note, and that was not put in as a defense, and proof of payment could not have been made at that time, because it was not in issue, and could not have been plead.

"The issue in this case (Hessin v. Harris) was merely individual liability, and the question of payment was not involved."

The note, which was involved in the Hessin v. Harris case, is not before us; neither is there a copy of it with the record. We do not know whether the note was signed by M. Zeer & Company, or by Harris, individually, though the plaintiff, in his brief, states the note was an ordinary promissory note, signed by M. Zeer & Company. But, in any event, the principal issue in that case was whether or not Harris was individually liable upon that note, and the further issue joined by the general denial in the answer, which denies the execution and delivery of the note.

It would seem, however, that, if defendant in that case were a member of the firm of M. Zeer & Company, that whether the note were signed by M. Zeer & Company or by the defendant, would be immaterial; for, in either event, the defendant might be liable, and by the evidence in that case, it was found that he was so liable for the payment of that note. The fact that he was a member of the partnership, or of that company, and that he claims the note was that of the company, and

not his individually, would not prevent his pleading payment. If he were liable on the note, either as a member of the company or as an individual, he could have pleaded payment, if payments were made. This, he did not do in his original answer, but asked leave to do so at the time of the trial, which was refused. From what has been said, we conclude the matters at issue in the present action are not *res judicata.*

This case has been before this court before and was sent back for a new trial. Defendant claimed that the case should be dismissed, in that it was not brought on for the new trial within a year. After the expiration of the year, defendant made a motion before the county court, where the action was triable, to dismiss it for that reason. The court denied that motion. At the opening of the trial, the motion was renewed and again denied. Defendant bases his claim of right of dismissal on § 7845, Comp. Laws 1913.

As we read that statute, it is discretionary with the trial court, whether, after the expiration of a year from date of the order granting a new trial, it shall, upon proper application or motion made, dismiss the action or retain it for trial. In this case, the court having denied the motion to dismiss the case, it was properly retained on its calendar for trial.

We think this fully disposes of defendant's contention in this regard, and in view of the fact that the trial court retained the action for trial, and refused to dismiss it, thereby exercising its discretion in that regard, and there appearing to be no abuse of its discretion, it must be held that the trial court committed no error in refusing to dismiss the action.

Defendant contends that the evidence is insufficient to establish plaintiff's cause of action. We think the evidence is sufficient, however, to, in part, establish her cause of action, but is not sufficient to warrant reversing the judgment and ordering judgment in her favor. We think the proper course to pursue is to reverse the judgment and grant a new trial. We think that the exhibit "3," which was properly introduced in evidence, to some extent establishes plaintiff's cause of action. There is no admission nor proof by the defendant that this has ever been credited. It was not indorsed on the note, nor was there any proof that

it has been allowed upon the judgment or in any other manner. It is certain, however, that it has been paid.

There is also some proof as to a certain $25 payment. While the proof is not as clear regarding that payment, as well as the bill of goods, wares, and merchandise received by the defendant, we think, there is no evidence that the plaintiff has received credit for these amounts; and we think there is some evidence, even though not of the highest character, that the defendant received the $25 payment and the merchandise.

While the proof in support of plaintiff's claim is not in such condition that a judgment should be ordered upon it, it is sufficient to warrant granting a new trial. The interest of justice requires it.

Defendant should not be permitted to recover all that plaintiff owed him, and neglect and refuse to give credit for the moneys, merchandise, etc., received from the defendant. Perhaps, also, there is some of plaintiff's evidence which was incompetent under subdivision 2 of § 7871, Comp. Laws 1913. Any evidence which is squarely in conflict with that section, of course, is not admissible.

The plaintiff in this case, however, was in the store a great part of the time, and knew considerable about the business, and could testify, perhaps, largely from her own knowledge concerning some of the matters involved in this litigation; and we think she did to some extent so testify.

We do not think that, as the matter stands now, the appeal should be dismissed, on the ground that plaintiff had failed to bring up the record. We think a new trial should be had for the purpose of determining the real issues in this case. If the plea of *res judicata* had not been set up at the trial, the case would there have been disposed of upon its merits.

As we have seen, the plea of *res judicata* was without merit, and the case should be tried on its merits, with that plea excluded.

The judgment appealed from is reversed, and the case is remanded for a new trial.

Appellant is entitled to her costs and disbursements on appeal.

ROBINSON and BRONSON, JJ., concur.

BIRDZELL, J. I dissent.

CHRISTIANSON, Ch. J., being disqualified, did not participate.

STATE OF NORTH DAKOTA, Respondent, v. FRANK SIBLA, Appellant.

(179 N. W. 656.)

Bastards — proceedings may be commenced in county of defendant's residence.

1. A bastardy proceeding may be commenced in the county of defendant's residence although the complainant resides in another county.

Bastards — instruction as to purpose of statute held prejudicial error.

2. In a bastardy proceeding, where the trial court, in its instructions to the jury, has stated that the purpose of the statute was to determine who was the father of the bastard child, with the object, and as stated in the law, when a person is found by the jury to be the father of a bastard child that judgment be entered requiring him to assist the mother in the care and education of the child until the child is able to do so himself; and where, upon a review of the entire record in connection with newly discovered evidence presented upon the motion for a new trial, it appears that such instruction may have influenced the jury in arriving at its verdict, it is *held* that such instruction is prejudicial error.

Opinion filed October 1, 1920.

Bastardy proceedings in Morton County, *Hanley*, J.

From a judgment and order denying a new trial the defendant has appealed.

Reversed and new trial ordered.

Sullivan & Sullivan, for appellant.

"The sole and only question for the jury to determine is whether or not the defendant is the father." People v. Welch, 143 Ill. App. 191; Mann v. State (Wis.) 112 N. W. 38.

L. H. Connolly, State's Attorney, for respondent.

The purpose of a proceeding in bastardy, such as this, is to compel the father of the illegitimate child to assist in supporting the fruits of his immoral act, and to indemnify the public against the burden of supporting the child. Stahl v. State (Kan.) 74 Pac. 238.

BRONSON, J. *Statement.*—This is an appeal by the defendant from a judgment in a bastardy proceeding, and from the order of the trial court denying a motion for a new trial. The jury found the defendant

to be the father of the bastard child of the complainant. In the record it appears that the complainant is about seventeen or eighteen years old and unmarried. She testifies that on July 21, 1918, the defendant had intercourse with her at the home of the defendant, where he lived with his father and mother; that the defendant was the father of the baby boy born to her on April 16, 1919, at the hospital in Bismarck. That she had no other sexual intercourse with him; that she had previously had sexual intercourse while in Canada, but that she had had no acts of sexual intercourse during the months of June, July, and August, 1918. That prior to June 1, 1918, she was living in Canada; from that time until April 11, 1919, she lived in Morton county; since that time she has resided in Bismarck. A doctor, called as an expert, testified that the period of pregnancy is about 280 days, with a variation period of thirty days either way. That a woman who gave birth to a child on April 16, 1919, may have become pregnant in June, July, or August, 1918. The complainant further testified that on the evening of July 4th, at Glen Ullin, she was not with a boy that evening; that she was with one Thresa Duricheck all that evening. That she was not with any boy that evening excepting when they went to see some children, when one Zeigler was with her and her sister. The defendant in his testimony denied any act of sexual intercourse with the complainant on July 21, 1918, or at any other time. He testified that the complainant was with Nick Zeigler that day. Thresa Duricheck testified that on the evening of July 4th, while she was sitting in a car talking with a man, in front of her house, the complainant came along with another fellow, passed her house, and they walked down towards a mill. She sat there about an hour in the car, but did not see them come back; that it was dark down towards the mill, with no street lights.

In the instructions of the court to the jury the court stated:

"This action is brought under the laws of the state of North Dakota, under what is known as the Bastardy Statute, and that statute was passed for the purpose of cases like this, cases of this kind, to determine who is the father of the bastard child, with the object, and as stated in the law, when a person is found by a jury to be the father of a bastard child, that judgment is entered requiring him to assist the mother in the care and education of the child until the child is able to do so himself. That is the purpose of this proceeding."

Later the defendant made a motion for a new trial based, among other grounds, upon newly discovered evidence. Among the affidavits of such newly discovered evidence, one Zeigler swears that on the 4th of July, 1918, in the evening he went riding in an automobile with complainant, and while out riding had sexual intercourse with her. The defendant specifies many errors in the instructions and rulings of the trial court, and in the action of the trial court in overruling its motion for a new trial upon the ground of newly discovered evidence.

The principal contentions of the defendant are that the action should be dismissed for the reason that the district court of Morton county had no jurisdiction on account of the plaintiff being a resident of Burleigh county; that the trial court prejudicially erred in giving the instructions above stated and in refusing to grant a new trial upon the newly discovered evidence submitted.

Decision.—We are satisfied that the district court of Morton county had jurisdiction. A bastardy proceeding partakes both of a civil and criminal character, and proceedings may be instituted in any county of the state. State v. Long, 19 N. D. 679, 683, 125 N. W. 558. We are further satisfied that the trial court did not err in refusing to grant a new trial upon the grounds of newly discovered evidence, for the reason that the defendant failed to supplement the newly discovered evidence so submitted by a showing of due diligence to discover such testimony before the trial, and of its discovery since the trial.

However, the testimony of the plaintiff, which was all that was offered for the state, is in many respects somewhat discredited by the testimony adduced in behalf of the defendant, and particularly upon the showing made upon a motion for a new trial. In view of the state of this record the instructions so given may possibly have received consideration by the jury in determining the paternity of the child, upon the ground that the measure of the responsibility was a judgment only which required the defendant to assist in the care and education of the child. The statute, § 1049, Comp. Laws 1913, provides that if the defendant is adjudged to be the father the court shall render such judgment as may seem necessary to secure, with the assistance of the mother, the maintenance and education of the child until such time as the child is likely to be able to support itself, and such judgment shall also require the defendant to secure the payment thereof by an under-

taking, and in default thereof the defendant shall be committed to jail until discharged according to law. Upon the whole record, therefore, in this case, and in the interests of arriving at substantial justice by remanding this case for a new trial, this court is of the opinion that such instructions should be considered, for the purposes of this case, prejudicial error. See People ex rel. Weese v. Welsh, 143 Ill. App. 191, 194; Menn v. State, 132 Wis. 61, 112 N. W. 38; 1 Blashfield, Instructions to Juries, § 412. A judgment in bastardy not only serves the purpose of requiring and enforcing through confinement assistance by the father for the support and education of the child, but it also may serve to determine for the state and for the child the paternity of such child. See chap. 70, Laws 1917. A new trial is ordered.

GRACE and BIRDZELL, JJ., concur.

ROBINSON, J. I concur in the result, but hold the instruction was not erroneous.

CHRISTIANSON, Ch. J. While I believe it would have been better if the instruction referred to in ¶ 2 of the syllabus had not been given, it is difficult to understand how honest, intelligent, and reasonable men could have been misled thereby.

Although I am unable to find any specific ruling that can be said to be prejudicial to the defendant, a careful examination of the record rather impresses me with the view that the interests of justice will probably be best subserved by ordering a retrial of the action.

DES LACS WESTERN OIL COMPANY, a Corporation, Appellant, v. NORTHERN TOOL COMPANY, a Foreign Corporation, and Canadian Western Manufacturing & Supply Company, Limited, a Foreign Corporation, and the Great Northern Railway Company, a Foreign Corporation, Respondents.

(179 N. W. 697.)

Sales — ownership and value of property held properly determined as questions of fact.

1. In an action of replevin, where a supply company shipped certain oil

machinery consigned to itself, under bill of lading with sight draft attached for $5,938, and where the plaintiff, refusing to pay the amount thereof, by claim and delivery proceedings seized and took from the possession of a common carrier such machinery, and where the supply company had previously made a contract of sale covering such machinery with a tool company, which in turn had later made a contract for resale of a portion thereof.

It is *held*, upon the record, that the questions of ownership and value of the property were largely questions of fact, and that the trial court did not err in determining that the supply company was the owner of the property, and that the value thereof was the contract price.

Opinion filed October 1, 1920.

Action in claim and delivery in Ward county, *Leighton*, J.

From a judgment in favor of the supply company and from an order denying plaintiff's motion for a new trial or judgment *non obstante*, the plaintiff has appealed.

Affirmed.

Halvor L. Halvorsen and *Greenleaf & Wooledge*, for appellant.

"Where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading—in other words, where there is anything to rebut the effect of the bill—it becomes a question for the jury whether the property has passed." Ogg v. Shuter, L. R. 10 C. P. 159.

"By the act of accepting goods in bailment, the bailee acknowledges a right or title in the bailor." Warder Bushnell & G. Co. v. Rublee, 43 N. W. 569.

Fisk & Murphy, for respondents.

The plaintiff carries the burden of establishing all the material and necessary averments of its complaint. Among these is the allegation of ownership and immediate possession. Halverson v. Anderson, 3 N. D. 540.

The real test whether an action can be maintained turns upon the question whether plaintiff is, at the time of the institution of the suit, entitled to the immediate possession of the property claimed. 23 R. C. L. 866, ¶ 15, cases cited in note 17; 34 Cyc. 1386, 1387, cases cited in notes 52–55.

BRONSON, J. *Statement.*—This is an action brought to recover the possession of certain oil-well machinery. The facts are substantially as follows:

The defendant supply company is a foreign corporation engaged in the hardware and oil machinery business with its principal office at Calgary, Alberta. In March, 1918, this supply company entered into a contract with the defendant Northern Tool Company, a foreign corporation, for the sale of certain well machinery. This contract provided for the sale and delivery of certain oil machinery for a consideration of $40,000; that the vendor should forthwith commence the loading of such goods sold, and continue such loading until all of the same was shipped; that the consideration should be paid by two notes aggregating $13,000, and, as to the balance, by payment of sight drafts with bills of lading attached, covering the goods, properly proportioned on each car shipped. Later, in March, 1918, the plaintiff made a written contract with the defendant Northern Tool Company for the sale and delivery of certain oil machinery for a consideration of $5,920, to be paid by the immediate delivery of $2,000 in Liberty bonds, and, for the balance, by the payment in full of a sight draft attached to the bill of lading, for such goods upon their arrival at destination. The plaintiff delivered to the tool company the Liberty bonds. The Northern Tool Company, in April, 1918, directed the defendant supply company to ship to the plaintiff the oil machinery covered by its sales agreement with the plaintiff, accompanied by a sight draft for $5,000 attached to the bill of lading.

In May, 1918, the defendant supply company shipped the goods involved upon a bill of lading consigned to the order of itself, with a sight draft for $5,938 drawn by such supply company upon the plaintiff. Upon arrival of the goods, the plaintiff refused to pay the amount of such sight draft. The defendant supply company refused to release such sight draft and bill of lading unless payment was made. Thereupon, in May, 1918, this action was instituted and the goods taken from the possession of the railway company upon proceedings in claim and delivery. The defendant Northern Tool Company did not appear and is in default. The defendants, the supply company and the railway company, answered. This action was tried before the court without a jury. In September, 1919, upon findings rendered, judgment

was entered in favor of the defendant supply company, for the return of the property, or, in the event that a return thereof could not be made, for value, with interest and costs amounting to $6,452.05. The plaintiff later made a motion for a new trial or for judgment *non obstante*. From the order denying plaintiff's motion and from the judgment so rendered, the plaintiff has appealed.

Decision.—The principal questions involved concern the ownership and the value of the property. In brief, the appellants contend that the defendant supply company has failed to prove title in the property, that it is estopped to claim title, and that there is no evidence to warrant the alternative judgment for money rendered. Upon this record the question of the ownership of the property, the right to its immediate possession, and the value thereof, were largely questions of fact. The trial court has found adversely to the contentions of the plaintiff. We are not disposed to disturb its findings of the judgment as rendered. It was necessary for the plaintiff to establish ownership, a right to immediate possession. Haverson v. Anderson, 3 N. D. 540, 58 N. W. 340; 34 Cyc. 1386. This ownership at the time of the seizure was principally a question of intent. See notes in 2 L.R.A. (N.S.) 1078, and 10 C. J. 351. This court, upon this record, may not hold as a matter of law that the defendant supply company, under its contract with the defendant Northern Tool Company, intended to part with title and make delivery of the property involved prior to the payment of the sight draft and bill of lading. See § 5536, Comp. Laws 1913; Hart-Parr Co. v. Finley, 31 N. D. 130, L.R.A.1915E, 851, 153 N. W. 137, Ann. Cas. 1917E, 706; note in 39 L.R.A.(N.S.) 309. The contracts involved were subject to a construction upon the record, as contracts to sell, and not as bills of sale. The claims of an estoppel are without merit. Although there is considerable evidence in the record to show that the property was not worth the contract price, nevertheless, the value as found by the court is substantially the stipulated price in the contract of the plaintiff with the Northern Tool Company, upon and through which it claims title. It is substantially the amount stated in the sight draft. The trial court was fully justified in finding as a fact that the value of the property was the contract price.

The judgment and order appealed from is in all things affirmed, with costs to the respondent.

GEORGE KARAS, Respondent, v. WILLIAM G. McADOO, Director General of Railroads, Appellant.

(179 N. W. 710.)

Master and servant — master failing to provide skids for piling ties in lifting which employee was injured held liable.

This is a personal-injury suit in which the plaintiff, an employee of the defendant, recovered a verdict for $1,200. Working under the directions of defendant's foreman, the plaintiff and his coworker were piling up heavy water-soaked railroad ties. While lifting a tie to the height of 5 feet, one end slipped from the hand of the coworker and fell to the ground. The fall jarred the tie from the hands of the plaintiff, and it fell against him and severely bruised his foot. For piling the ties to such a height, defendant should have provided skids on which to slide them up a gradual incline. Obviously there was a safe and easy way of doing the work, and hence defendant should not have ordered or permitted the doing of it in a way that was onerous and dangerous.

Opinion filed October 5, 1920.

Appeal from the District Court of Ward County, Honorable *Frank E. Fisk,* Judge.

Affirmed.

Dudley L. Nash and *Murphy & Toner,* for appellant.

There was no negligence shown on the part of the defendant. The injury was the result of an accident. Manson v. Great Northern R. Co. 31 N. D. 643; Carver v. International & F. N. R. Co. 72 Tex. 308, 17 Am. Neg. Cas. 647; Cooley, Torts, § 543; Boyer v. Eastern R. Co. (Minn.) 12 Am. Neg. Rep. 496; Timm v. Michigan C. R. Co. (Mich.) 57 N. W. 116; Roechke v. M. C. R. Co. 59 N. W. 243; Hanley v. Grand Trunk R. Co. 62 N. H. 274; Hunter v. Company, 85 Fed. 379; Hamilton v. R. Co. 61 N. W. 415; Cameron v. R. Co. 8 N. D. 618.

The plaintiff assumed the risk, and cannot recover. Hanley v. Grand Trunk R. Co. 62 N. H. 274; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492; Cartwright v. R. Co. 228 Fed. 876; Kelly v. R. Co. 9 N. W. 816; Bradshaw v. R. Co. 21 S. W. 346; Carr v. Construction Co. 48 Hun, 266; Kennedy v. R. Co. 17 Atl. 7.

The order of the master is immaterial on the question of the assump-

tion of risk. Bradshaw v. R. Co. 21 S. W. 346; 1 Labatt, Mast. & S. § 438; Curran v. R. Co. 143 Mass. 197; Kean v. Mill Co. 33 N. W. 395; Noth v. Peters, 13 N. W. 219; Linch v. Mfg. Co. 143 Mass. 206; Showalter v. Co. 60 N. W. 257; Burlington v. R. Co. 29 Pac. 175; Cartwright v. R. Co. 228 Fed. 872.

J. E. Burke and *Palda & Aaker,* for respondent.

It is the master's duty to furnish a sufficient force of servants to accomplish, with reasonable degree of safety to the servants employed, the particular work in which they are engaged. Pennsylvania R. Co. v. Hartell, 85 C. C. A. 335; Denver & R. G. R. Co. v. Reiter, 107 Pac. 1100; Coughlan v. Philadelphia, B. & W. R. Co. 67 Atl. 148; Brown v. Rome Mach. & Foundry Co. 62 S. E. 720; Beard v. Georgian Mfg. Co. 70 S. E. 57; N. Chicago Street R. Co. v. Auffman, 112 Am. St. Rep. 207; Fitter v. Iowa Teleph. Co. 121 N. W. 48; Dougherty v. Mpls. Steel & Mach. Co. 110 Minn. 497, 126 S. W. 1; Verlinda v. Stone & W. Engineering Corp. 119 S. W. 719.

ROBINSON, J. This is a personal-injury suit. Defendant appeals from a judgment on a verdict for $1,200. In August, 1918, the plaintiff was in the employ of the Great Northern Railway Company as a laborer. He and others were piling up railroad ties as they were thrown from the cars. The ties were piled in bunches of eight tiers, and the top of each tier was about 6 feet high. The ties were water soaked and weighed about 300 pounds. When putting on the top tier, the plaintiff had to lift his end of the tie 5 feet or more. This was done under the direction of the foreman of the company. While making such a lift the end of the tie slipped from the hands of the coworker of the plaintiff, and, falling to the ground, it jarred from the hands of the plaintiff the end of the tie, and it fell against him, knocked him down, and fell on his leg and foot with such force that it caused him to faint and become unconscious. His foot was badly bruised. The evidence shows that the work was done under the direction of the foreman of defendant, and it was dangerous for one man to life such heavy water-soaked ties to such a height, and that in such lifting it was no uncommon thing for men to get hurt.

Now, if defendant had provided two skids about 12 feet long, then all of the lifting and all of the danger might have been avoided by

placing one end of each skid on the ground and the other end on the pile of ties, and skidding or slipping each tie up the skids. That would have made the work light and easy.

The law of the case has been stated by this court. Lilly v. Elm Point Min. Co. 45 N. D. 464, 178 N. W. 128.

"One who, for a good consideration, promises to serve another, must perform the services, and must use ordinary care and diligence therein." Comp. Laws, § 6112.

"An employee must substantially comply with the directions of his employer concerning the services in which he is employed." Comp. Laws, § 6115.

"An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed." Comp. Laws, § 6109.

"An employer must, in all cases, indemnify his employee for losses caused by the former's want of ordinary care." Comp. Laws § 6108.

"The common carriers by steam railroads are liable in damages for injury to employees resulting, in whole or in part, from the negligence of any officer, agent, or employee of such carrier, or by reason of any defect of insufficiency due to its negligence or defect in its cars, engines, or appliances." Laws 1915, chap. 207.

Here there was a defect in the appliances for piling up the heavy water-soaked ties, and by reason of such defect the injury resulted. As in the case cited, the court said: "The superintendent had no right to order or even permit him [the plaintiff] to do what was dangerous or to work in an unsafe place." So, in this case, the company, by its foreman, had no right to order or permit the plaintiff and his coworker to take the chances of injury by lifting heavy water-soaked ties to the heighth of 5 feet.

After the injury the plaintiff was taken to a hospital of defendant, and there nursed and treated for twenty-three days, and then given $70 on signing a release of damages. But as the release was made within thirty days after the injury, it was voidable. Laws 1917, chap. 179.

It is insisted that the verdict is excessive, but that was a question of fact for the jury, and another jury might well give a greater verdict. When a party has to receive his damages at the end of a lawsuit, the expense is justly a matter of consideration. It is more than

probable that, before any action was commenced or expense incurred, defendant might have made a fair and legal settlement for a sum much less than the verdict. Poor men are not commonly fond of litigation. The record shows no material error. Defendant has had a fair trial. The verdict is well sustained by the evidence.

Affirmed.

CHRISTIANSON, Ch. J., concurs.

BRONSON, J. (specially concurring). I concur in the affirmance of the judgment. The alleged negligence of the defendant is based upon the failure to furnish sufficient assistance to the plaintiff in doing the work assigned to him. Upon the whole record I am of the opinion that the evidence adduced, although not strong, was sufficient to form a question of fact for the jury in this regard. Likewise, plaintiff's contributory negligence and his assumption of the risk were questions of fact for the jury. The instructions of the trial court were fairly given; upon the record the verdict may not be held by this court excessive. Pursuant to chapter 179, Laws 1917, commonly termed the Anti-ambulance Chasing Act, it was not necessary for the plaintiff to deposit in court the moneys received in settlement.

GRACE, J., concurs.

BIRDZELL, J. (concurring specially). This is a close case. The negligence alleged is that of the foreman compelling the plaintiff to work at unloading heavy ties without giving him sufficient assistance. There is evidence that the ties were heavy, main line ties, some of them being made unusually heavy by being water soaked, and that ties of this variety required for their safe handling more than two men to a tie. On the whole record I am not prepared to say that there was not sufficient evidence to form a question of fact for the jury.

CHRISTIANSON, Ch. J. (concurring specially). While the case is a close one, I am not prepared to say as a matter of law that plaintiff's injuries were not, at least partly, attributable to defendant's negligence. Nor do I believe it can be said as a matter of law that plain-

tiff assumed the risk. Of course, the contributory negligence on the part of the plaintiff would not operate as a bar to the action. "It is only when the employee's act is the sole cause—when the employer's act is not part of the causation—that the employer is free from liability" under either the Federal or the State Employer's Liability Acts. See § 8657, U. S. Comp. Stat. chap. 207, Laws 1915; Koofos v. Great Northern R. Co. 41 N. D. 176, 170 N. W. 859. Nor is there any contention made by the appellant in this case that the law is otherwise. And the record shows that the trial court gave proper instructions on the subject of contributory negligence under the Employer's Liability Acts.

JOHN FECHNER, Appellant, v. M. B. FINSETH, Respondent.

(179 N. W. 701.)

Vendor and purchaser — contract construed to be for the sale and purchase of land and not an option.

1. A written contract with reference to the sale and purchase of a certain tract of land described in it, and which is entitled an "Earnest Money Contract of Sale," examined and *held* to be a contract, in fact, for the sale and purchase of the land, and is, in nature and effect, a contract for deed.

Judgment — judgment notwithstanding verdict for plaintiff held reversible error.

2. The action was one to recover damages for breach of contract. Plaintiff had verdict for $125. The setting aside of the verdict of the jury by the court, and granting judgment for costs for the defendant notwithstanding the verdict, and for a dismissal of the action, for reasons stated in the opinion, are *held* to be reversible error.

Evidence — oral evidence as to purchaser's possession under written contract held admissible.

3. The written contract being silent on the question of possession, for the reasons and under the authority cited in the opinion, oral testimony with reference thereto was properly received.

Opinion filed October 12, 1920.

Appeal from a judgment of the District Court of Burleigh County, *W. L. Nuessle*, J.

Judgment reversed and case remanded.

Halpern & Rigler, for appellant.

Where a contract is reduced to writing and the written contract is not complete, parol evidence is admissible to show what part of the contract was omitted. Putnam v. Prouty, 24 N. C. 517; Gilbert Mfg. Co. v. Bryan, 166 N. W. 805.

F. E. McCurdy for respondent.

GRACE, J. The action is one to recover damages for $650, from defendant, for breach of contract for sale of certain real property. The plaintiff and defendant entered into a written contract, which, so far as material to this controversy, reads thus:

"Earnest Money Contract of Sale:

"Driscoll, N. Dak., Sept. 30th, 1919. Received of John Fechner, $100 as earnest money, and in part payment of the following described property, situated in the county of Kidder and state of North Dakota, *viz.* [Here, in the contract, follows a description of the property, by metes and bounds] which I have this day, through authorized agent, sold and agreed to convey to said John Fechner, for the sum of $1,200, on terms as follows, *viz.:* $100 in hand paid as above, and $300 Nov. 1st, 1919, $800 Nov. 1st, 1920, payable on or before the dates as above named, 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. The above premises being garage building and lot of Tuttle Auto Company Garage at Tuttle, and is a sale of the complete garage and equipment as at present, all except the stock of goods now on hand in said building.

"And it is agreed that, if the title to said premises is not good, and cannot be made good within sixty days from the date hereof, this agreement shall be void, and the above $100 refunded. But, if the title to said premises is good, in my name, and said purchaser refused to accept, the same said $100 shall be forfeited to the said M. B. Finseth. But it is agreed and understood by the 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.

"M. B. Finseth.

"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.

"John Fechner."

Plaintiff paid the $100 payment mentioned in the contract. Shortly after making the contract he moved his family from Golden Valley to Tuttle, where he rented a house for them. The defendant refused to give plaintiff possession of the garage and fixtures which he purchased.

Defendant claims that plaintiff, by an agreement not included in the written contract, agreed to purchase certain stock of goods, consisting of automobile accessories which were then in the garage. The plaintiff denies any such agreement, and shows, by his testimony, that he was to have possession of the garage as soon as he moved over to Tuttle.

The distance from Golden Valley to Tuttle is about 150 miles. Plaintiff's testimony shows that he expended, for freight, drayage, and moving from Golden Valley to Tuttle, and removing from Tuttle to Hebron, to which place he moved after his failure to get possession of the garage, the sum of approximately $63.

The plaintiff also made two drives, by automobile, from Golden Valley to Tuttle, and during one of the such drives he took his family with him; in other words, moved them from Golden Valley to Tuttle.

The trial court did not allow him to show the value of the use of his automobile for such trips. The question of whether there was any subsequent agreement as to the time when possession should be given was properly submitted to the jury. It returned a verdict in favor of plaintiff, and assessed his damages at $125. This verdict was set aside upon a motion by the defendant, for judgment notwithstanding the verdict, and a judgment of dismissal of the action was entered in defendant's favor, together with costs, allowed in the sum of $15.

Appellant's assignments of error, in substance, are: That the court erred in ordering judgment for the defendant notwithstanding the verdict, and in rendering and entering such judgment; that it erred in refusing to order judgment entered for the plaintiff upon the jury's verdict, and for plaintiff's costs and disbursements. The errors assigned by appellant should be well taken.

The contract in question is not an option contract; it in no way partakes of the nature of an option contract. "In construing a contract of the parties, intention is to be collected not from detached parts of the instrument, but from the whole of it." 9 Cyc. 579, 39 Cyc. 1175–1232.

The contract is definite and certain as to the parties to it, the consideration, the terms of sale, and the description of the land sold. There is nothing indefinite or uncertain in it, with the exception that no mention is made therein with reference to the time when the plaintiff should have possession. Otherwise the contract is complete, and covers and includes the undisputed agreement of the parties. It is nothing less than a contract for deed, executed by the defendant to the plaintiff, whereby the defendant, upon the consideration mentioned therein and the terms therein set forth, sold to the plaintiff the real property described.

The fact that the title of the contract is "Earnest Money Contract of Sale" does not change the nature of the contract. Nor does the fact that the money was received as earnest money affect the nature of the contract, when the whole thereof is considered. By this contract there was a sale of the land by the defendant to the plaintiff. The plaintiff actually purchased the land and paid part of the purchase price, and it became a definite and binding contract, by both parties, according to its terms.

The payment of the $100 as earnest money is the very best evidence of the final and conclusive assent of both parties to the contract. Earnest money, as such, only demonstrates that a contract has been made. Earnest money is not the payment of a certain sum for an option. It is not for the right or privilege to purchase certain goods or property, within a definite time; it is a partial payment for goods or property actually purchased, and with reference to the sale of purchase of which an actual contract has been entered into between the parties, and to which their assent has been given. In this case, the payment of the $100 was a part payment of the consideration, stipulated and agreed to in the written contract, as the selling price of the property in question.

The conclusion is irresistible, that a binding, legal contract, for the sale of the real property above described, was duly and legally entered

into and executed, by and between the parties, and duly delivered.

The agreement with reference to the time of delivery of possession was not covered by the written contract. There is testimony showing that, at or before the execution and delivery of the contract, there was an agreement that plaintiff should have possession of the premises just as soon as he could move over.

The testimony of the defendant was in conflict with this, his testimony tending to show a different agreement with reference to possession. There was a square conflict in their testimony in this regard, and it was a proper question for the jury to determine which, if any, agreement in regard to possession was made between the parties.

This question was submitted to the jury, under proper instructions by the court, and the jury returned a verdict in plaintiff's favor, thereby necessarily determining that question favorably to him.

The written contract being silent on the matter of possession, and it being shown that some agreement was made with reference to possession, it was proper to receive oral testimony to show what the agreement was. By permitting this, no term of the written instrument was varied, as it did not cover that question.

We think it clear that the oral testimony in this regard was properly received. See Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Gilbert Mfg. Co. v. Bryan, 39 N. D. 13, 166 N. W. 805.

Mention is made in regard to a certain clause in the contract, which, in substance, is that, if the title to the premises is not good, and cannot be made good within sixty days from the date of the contract, the agreement shall be void, and the $100 refunded; but, if the title is good and in the name of the purchaser, and the purchaser refuses to accept the same, the $100 shall be forfeited; and it is claimed, by reason of that clause, no enforceable agreement existed until after the sixty days had expired. That clause must be read with the entire contract. All the clauses must be considered together, to determine whether a valid, subsisting contract was, in fact, entered into.

There is no testimony showing the title was not good, and that it was good is not in any manner disputed. The defendant does not deny that the title is good, and in his name, and does not claim that he could not deliver title. As the record stands, the presumption must prevail that the title was good and in the name of the defendant, and that he could

deliver good title, and this presumption must prevail from the date of the contract and until the contrary appears.

It is manifest that the court erred in directing the verdict for defendant notwithstanding the verdict, and in dismissing the case. There is no merit in any of the reasons and causes set forth by the defendant as a basis for the motion.

The judgment appealed from is reversed, and the case remanded to the district court, with instructions to set aside the judgment in favor of the defendant, and enter judgment in favor of plaintiff, on the verdict of the jury.

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

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

BIRDZELL, J. (concurring specially). I concur in the foregoing opinion, except the discussion with reference to the admissibility of parol evidence on the question of possession. I express no opinion upon this matter, as it would seem that the verdict is correct even though the parol evidence referred to were not admissible, for, by legal implication, the purchaser was entitled to possession. Hence, in any event, the testimony bearing upon this question was not prejudicial to the defendant.

THOMAS HOLDEN, Appellant, v. FRED S. CHAMBERLIN, Respondent.

(179 N. W. 706.)

Bankruptcy — evidence held not to show a new promise after adjudication reviving the debt.

Plaintiff brought an action to recover upon a debt discharged in bankruptcy, on the theory that a new promise of payment, by the debtor, after the ad-

NOTE.—The question of the effect of an expression of hope or expectation as a new promise which will revive a debt after the discharge in bankruptcy has arisen in a very few instances, but in connection with this question it may be stated that in many instances the rules applicable to the tolling of a statute of limitation may be applied, as will be found by an examination of the cases collated in a note in 38 L.R.A.(N.S.) 577, on expression of hope or expectation as a new promise

judication, had revived the same. The case was tried to a jury, and, after the evidence was submitted, the court directed a verdict in favor of the defendant, on the ground that there was no evidence showing a new promise.

It is *held*, for reasons stated in the opinion, that the court, in directing a verdict, was not in error.

Opinion filed October 14, 1920.

Appeal from a judgment of the District Court of Ramsey County, *C. W. Buttz*, J.

Judgment affirmed.

Cuthbert, Smythe, & Wheeler, for appellant.

The court erred in granting defendant's motion for a directed verdict. Torrey v. Krauss, 149 Ala. 200, 43 So. 184, 146 Ala. 548, 40 So. 956; Ekler v. Galbraith, 12 Bush, 71; Bradner v. Stern, 225 Ill. 430, 80 N. E. 307; International Harv. Co. v. Lyman, 90 Minn. 275, 96 N. W. 87; Smith v. Stensfield, 84 Minn. 343.

T. R. Stevens and *Rollo F. Hunt*, for respondent.

A debt discharged is not a debt paid. The moral obligation remains, and is a sufficient consideration for a new promise to pay. Collier, Bankr. 11th ed. p. 499.

In order to constitute a new promise there must be a clear, distinct, and unequivocal recognition and renewal of the debt as a binding obligation, but it is not necessary that the new promise should be in writing, except where this is required by state statute. Bankruptcy in 7 C. J. p. 412.

The promise must be clear, distinct, unequivocal, such as to indicate on the part of the debtor a clear intention to bind himself to the payment of the debt, and it may be a question for the jury whether the words used were efficacious to that extent. 3 R. C. L. § 147.

There is a distinction between reviving a debt barred by the Statute of Limitations and a debt discharged in bankruptcy. Scheper v. Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869; 38 L.R.A.(N.S.) 581; Stern v. Bradner, S. & Co. (Ill.) 80 N. E. 307; Brandenburg, Bankr. 3d ed. 391; Smith v. Stanchfield, 84 Minn. 343, 87 N. W. 917.

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which will toll the Statute of Limitations or revive debt after discharge in bankruptcy.

On the question as to what promise, acknowledgment, or payment takes case out of Statute of Limitations, see note in 6 L. ed. U. S. 481.

It is well settled under the authorities that a mere expression of an expectation of a hope to pay a debt discharged in bankruptcy, or a mere acknowledgment of it, is not sufficient to remove the bar of the discharge of bankruptcy. Coe v. Rosene, 66 Wash. 73, 38 L.R.A. (N.S.) 577, 118 Pac. 881; Torrey v. Krauss, 149 Ala. 200, 43 So. 184; 146 Ala. 548, 40 So. 956; Ekler v. Galbraith, 12 Bush, 71.

GRACE, J. This appeal is one from a judgment entered upon a directed verdict.

The material and controlling facts are as follows:

During the years 1904 to 1913 or 1914, defendant was engaged in general merchandising, at Doyon, Ramsey county, North Dakota. He had been acquainted with the plaintiff for twenty-seven years.

In the month of June, 1913, the defendant applied to the plaintiff for a loan of $1,000. The plaintiff made the loan, and, as evidence thereof, the defendant executed and delivered to the plaintiff his promissory note for $1,000, dated July 3, 1913, due January 1, 1914, with interest before and after maturity, at the rate of 10 per cent per annum.

In April, 1914, the defendant was adjudged a bankrupt in an involuntary bankruptcy proceeding, in and by the district court of the United States for the district of North Dakota. During the course of the trial, the following stipulation was made by the parties: "It is hereby stipulated by and between the parties to this action that, on or about the 3d day of April, 1914, the defendant, F. S. Chamberlin, was adjudged a bankrupt in an involuntary bankruptcy proceeding, in and by the district court of the United States for the district of North Dakota; and that the note sued upon in this case was filed, as a claim against the bankrupt estate of said F. S. Chamberlin, in said bankruptcy proceeding, and was allowed therein; and that such proceedings have been had in said bankruptcy, whereby the defendant, F. S. Chamberlin, has been in said court discharged from all of his debts listed in that proceeding, including the note in court; and that, at this time, the plaintiff relies upon a new promise to pay the defendant, which new promise is denied by the defendant.

It is agreed that, in such bankruptcy proceeding, there was paid to the plaintiff, by the trustees in bankruptcy, as dividends, the sum of

$50.40, on November 2, 1914, and the further sum of $58.56 on June 21, 1915, and that this amount was indorsed upon and allowed on this note, together with other indorsements, amounting to $67.

The plaintiff brought this suit upon the note, the complaint being in the ordinary and usual form in such case. Among other defenses, the defendant alleged that on the 3d day of April, 1914, he was adjudged a bankrupt, and that on the 10th day of April, the note was duly proved and filed as a claim against his estate, in that proceeding; and that he turned over all his assets, both real and personal, to the trustee in bankruptcy; and further alleges the receipt, by the plaintiff, of the dividends above mentioned. He also alleges that any claim of plaintiff, based upon the notes, has been extinguished.

The plaintiff claims that after defendant was adjudicated a bankrupt, he made new promises, orally, to pay the debt. The defendant's contention is that he made no new promise of a definite and certain character.

The new promise, if any, centers around a conversation had between plaintiff and defendant, in defendant's office in Crary, North Dakota, in June, 1916.

The substance of the conversation, as the evidence discloses it, may be summed up in a very few sentences. Chamberlin's testimony shows that he told Holden that when he was *able,* he would pay the debt, or, if he *could* pay the debt, he would do so. He told Holden that he considered it a personal debt, and that, as soon as *could,* he would pay it.

The plaintiff, in the month of July, 1916, had the defendant arrested for obtaining money under false pretenses. At the present trial, the defendant was asked if he did not give certain testimony in the preliminary hearing, which was quoted to him as follows:

"You told Mr. Holden, at that time, that you would pay him whether the bankruptcy paid out or not." Answer: "I surely did, and Mrs. Chamberlin told him, also."

The defendant did not know whether that question was asked him or not; he would not swear that he did not so testify. He said, "I would have to take this evidence." The plaintiff claims this statement, when originally made, was a new promise to pay the debt.

If the defendant ever made the statement included in the question and answer just above set forth, we do not think there is any compe-

tent evidence of it in this record. We do not find that that part of the record, in the criminal case where such evidence was given, is offered as evidence in this case; and, if it were, we do not see how it could be for any other purpose, excepting to affect the credibility of the defendant. That case, too, was between different parties; that is, the state of North Dakota against the defendant Chamberlin. The question and answer above is no evidence of a new promise, and no further attention need be given to plaintiff's contention in this regard, as it is wholly without any merit.

The plaintiff claims that, during the conversation at Crary, the defendant said: "I will pay you. I calculate to pay you, and I will pay it. I could pay you two or three hundred dollars this fall, and that much a year from now, and in three years' time I may clean it all up."

It appears, however, that Mr. Holden, at the time of that conversation, made an offer to the defendant to give him three or five years to pay the balance, if he would give a note, with an indorser.

The plaintiff, in answer to the court, said: "Well, he made this offer, and I made him a proposition to give him three or five years, with an indorser, but that he would not do."

The propositions made by defendant to the plaintiff and by plaintiff to defendant were conditional, and all were unaccepted; those of the plaintiff were latest made. It was shortly after this conversation that plaintiff made out a complaint charging defendant with obtaining money under false pretenses.

The appellant has assigned seven errors, and in addition thereto, the insufficiency of the evidence to sustain the verdict, pointing out what is claimed to be the insufficiency of the evidence.

The first four errors assigned relate to the overruling of plaintiff's objections to certain evidence offered by the defendant; it is held that the court was not in error in overruling the objections.

The fifth and sixth errors assigned relate to evidence which had reference to the swearing out of the warrant by the plaintiff against the defendant, for obtaining money under false pretenses.

The defendant stated the only purpose of introducing such testimony was to show that he and the plaintiff parted without an agreement, at their conversation in Crary, 1916. The court held that, for

that purpose, it would admit the testimony. In this regard, we do not think the court committed any error. If the testimony had been admitted for any other purpose, a different question might arise. But the only real question in this case being whether defendant made a new promise, the swearing out of the warrant shortly after the meeting in 1916, at Crary, and the conversation had there between the parties, was some evidence that there was no new promise to pay the debt.

The court was not in error in directing a verdict for defendant. The evidence clearly shows there was no new promise to revive the debt. The propositions made by each to the other, the plaintiff making the latest, were conditional, and all remained unaccepted and refused.

The jury could not find a new promise was made, unless there was competent evidence to support such finding, and there is no such evidence in this record.

If the evidence had been submitted to the jury, and it had returned a verdict in favor of plaintiff, the court, upon application, or of its own motion, would necessarily have to set such verdict aside, it being entirely unsupported by any competent or substantial evidence. The directed verdict is amply supported by the evidence.

It is true that a debt discharged in bankruptcy is not, in fact, paid. The debtor is relieved from the payment of it, but his moral obligation remains unsatisfied, and is a sufficient consideration to support a promise to revive and pay the debt.

The promise is sufficient, whether it be made orally or in writing, if it be definite, certain, and free from ambiguity; or if the promise or offer of payment by the debtor be conditional, the condition must be pleaded by the creditor, and he must show, by competent evidence, that the condition has been performed.

"Thus, a promise to pay as soon as the bankrupt is able, is a valid one, and not void for uncertainty; but to be available, the promise must be averred in proper form, and satisfactory proof adduced of the defendant's ability to pay,—that is, of the fact that he has sufficient property or means to pay." 3 R. C. L. § 147; International Harvester Co. v. Lyman, 90 Minn. 275, 96 N. W. 87. The plaintiff has wholly failed in this case to comply with these requirements.

To remove the bar of the discharge of the debt in bankruptcy, by a new promise, the evidence to prove it must be clear and convincing,

and must show that it was certain and unambiguous. Mere expressions of an expectation and desire, or a hope to pay a debt discharged in bankruptcy, is not a new promise. 7 C. J. 412.

The writer, speaking for himself, is of the opinion that a debt or obligation discharged in bankruptcy, while not paid, is wholly extinguished, so far as any future legal liability upon it is concerned; that the debt or obligation no longer exist; that there remains only, after such discharge, the moral obligation to pay the debt; that this moral obligation may, and is, a sufficient consideration for a new contract to pay the debt discharged; that in making such new contract, based upon such moral obligation, the minds of the parties must meet upon all the terms in the same manner and to the same effect as upon any other contract; that is, if a debt for a given amount is discharged in bankruptcy, and the debtor makes a definite promise, after the adjudication, to pay the amount of the debt discharged, stating in such promise certain amounts of the debt to be paid at different times, or promising to pay it all at a certain time, that before a new contract is actually made, which is binding upon both parties, such terms contained in the promise must be accepted by the creditor, and this constitutes a new contract for the amount of the debt,—in other words, a new debt,—the moral obligation to pay the debt discharged being a sufficient consideration for the new contract. 7 C. J. 412, 413. And, in addition to this, if there are conditions attached to the offer, they must be pleaded and a compliance with them established by competent proof.

The judgment appealed from is affirmed. Respondent is entitled to his costs and disbursements on appeal.

ROBINSON and BRONSON, JJ., concur.

CHRISTIANSON, Ch. J. (dissenting). The sole question presented for determination in this case is whether the trial court erred in directing a verdict in favor of the defendant. The answer to that question depends upon whether there was any substantial evidence tending to show that the defendant had made a new promise to pay a debt which had been discharged in bankruptcy. Of course if there was any substantial evidence tending to establish such promise, the question wheth-

er such promise was in fact made should have been submitted to the jury.

There is no question but that a new promise to pay a discharged debt must in fact be an actual promise. It is not sufficient that the debtor expresses a hope, desire, or expectation to pay the debt. He must actually promise to pay it. The promise must be distinct and unequivocal, such as to indicate on the part of the debtor an intention to assume an obligation to pay the debt. But it is not necessary that any particular form of words be used. Where the language used is susceptible of different meanings, it may be a question for the jury to determine which is the correct one, and whether the words used did in fact constitute a new promise. Shaw v. Burney, 86 N. C. 331, 41 Am. Rep. 461; Bennett v. Everett, 3 R. I. 152, 67 Am. Dec. 498; Pratt v. Russell, 7 Cush. 462. In Shaw v. Burney, supra, the proof was "that the debtor said: 'The debt is an honest one,—I always intended to pay it;' and that later, when a note was presented to him for execution in settlement of the debt, he refused to sign the note, claiming that a certain recital therein was untrue, but said: 'It is an honest debt and I will pay it certain.'" The superme court of North Carolina held that it was a question for the jury to determine whether, under all the circumstances, the words constituted a new promise.

In Pratt v. Russell, supra, a witness testified that, at plaintiff's request, he called on defendant, with the accounts between plaintiff and defendant, and "told the defendant that the plaintiff wanted him to do something about this note; that she would be glad to have him give her a new note; that she wanted the old note in such shape that she could get it some time or other; that the defendant answered that he was not willing to put the principal and interest into a new note, but said that he had always said, and still said, that she should have her pay." The defendant contended that no express or unequivocal promise to pay the note could be implied from the language of the defendant as testified to by the witness, and requested that the trial court so instruct the jury. The trial court denied defendant's request for such instruction. In submitting the case to the jury the court instructed: That to entitle the plaintiff to recover, he must prove a distinct and unequivocal promise to pay the note by the defendant; that no precise form of words was necessary, but that when words used were relied on as

showing such promise, they must be words capable of meaning or expressing such promise, and must appear to have been used by the party with the intention of making a promise to pay the note; that it was for the jury to say whether the defendant intended, by the words used, to promise to pay the discharged debt. The Massachusetts supreme court held the instructions to be correct. The opinion of the court, which was written by the celebrated Chief Justice Shaw, reads:

"We cannot perceive any objection to the directions given to the jury. Undoubtedly to revive a debt barred by a statute discharge, no express promise is necessary, in contradistinction to a promise implied from an acknowledgment of the existence of the debt. So the judge directed. But the evidence tended to prove two forms of expression used by the defendant, on the same occasion,—one declining to give a written promise, the other amounting to a verbal promise. The words, as he must have used them in the present tense, in answer to a claim of payment to be made by him, 'I have always said, and still say, that she shall have her pay,' are capable of being construed a promise, but might be counteracted by the other expression. It was for the jury to decide upon the credit of the witness, and the accuracy of his recollection, and thus decide what was said."

In the case at bar the defendant Chamberlin testified:

Q. Now Mr. Chamberlin after April, 1914, you have, on repeated occasions, told Mr. Holden that you intended or were going to pay this note?

A. When I could.

Q. Mr. Chamberlin, you say you have since you were adjudicated a bankrupt in 1914 promised Mr. Holden to pay this debt?

A. If I was able to do so.

Q. You have promised to pay this debt, have you not?

A. If I was able to do so; that has always gone in.

Q. Now, Mr. Chamberlin, didn't you tell him at different times after April, 1914, that you intended to pay this debt, and that you had already paid other debts which were provable in bankruptcy and upon which dividends had been paid in bankruptcy?

A. I told Mr. Holden repeatedly that when I was able to pay the debt, or if I could pay it, I would do so. Mr. Holden has been a friend of mine for a number of years. It is too bad he had to lose the

money, I couldn't help it, and in making that promise, if I am able to do so, I intend to carry it out. I don't know what else I can say. I told Mr. Holden I considered it a personal debt, and that as soon as I could I would pay it.

The plaintiff, Holden, testified that after defendant had been adjudged a bankrupt he (plaintiff) had a conversation with defendant at defendant's office in Crary, and that in such conversation, defendant said: *"I will pay you; I calculate to pay you, and I will pay it.* I could pay you two or three hundred dollars this fall, and that much a year from now and in three years' time I may clean it all up." The defendant admitted that upon a certain preliminary examination the following question was propounded to, and the following answer given by, him relating to the conversation referred to by the plaintiff:

"Q. You told Mr. Holden at that time that you would pay him whether the bankruptcy paid out or not?"

"A. I surely did, and Mrs. Chamberlin told him also."

It is true that after this conversation was had and this promise given plaintiff sought to induce defendant to give security for the payment of the debt, *i. e.*, give a note signed by some responsible surety; and that defendant refused to comply with this request. It is not likely that plaintiff would have requested that defendant obtain a surety, unless he was of the belief that defendant had in fact promised to pay the debt. Plaintiff apparently assumed that defendant had promised or agreed to pay the debt and wanted this promise or agreement secured in the manner which he proposed. I do not see how the demand for security affected the promise to pay, if a promise was in fact previously made. It will be noted that in Shaw v. Burney, 86 N. C. 331, 41 Am. Rep. 461, and Pratt v. Russell, 7 Cush. 462, also, certain requests made by the creditor were refused. I do not believe that it can be said as a matter of law that there was no new promise in this case. See Shaw v. Burney and Pratt v. Russell, supra; Bennett v. Everett, 3 R. I. 152, 67 Am. Dec. 498. See also Sundling v. Willey, 19 S. D. 293, 103 N. W. 38, 9 Ann. Cas. 644.

BIRDZELL, J., concurs.

HANSBORO STATE BANK, a Corporation, Respondent, v. IMPERIAL ELEVATOR COMPANY, a Corporation, Appellant.

(179 N. W. 669.)

Chattel mortgages — general creditor without lien not entitled to attack on failure to record mortgage.

1. A defect in the record of a mortgage or a failure to record it cannot be attacked by a mere general creditor who has not some right, or interest in, or lien on, the property itself.

Chattel mortgages — situs of property at time of mortgage is controlling element as to record.

2. Section 6758, Comp. Laws 1913, which makes a mortgage of personal property "void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith for value unless the original or an authenticated copy thereof is filed by depositing the same in the office of the register of deeds of the county where the property mortgaged . . . is at such time situated," makes the situs of the mortgaged property existing at the time of the execution of the mortgage the controlling element.

Trover and conversion — sufficiency of evidence to show conversion.

3. For reasons stated in the opinion it is *held* that there is substantial evidence tending to show that defendant received and converted the grain in controversy.

Opinion filed October 15, 1920.

From a judgment of the District Court of Rolette County, *Buttz,* J., defendant appeals.

Affirmed.

H. A. Libby, for appellant.

Kehoe & Moseley, for respondent.

One who buys personal property is a purchaser, and not a creditor. Volckers v. Stuske, 42 N. Y. Supp. 84; Caplinger v. Vaden, 5 Humph. 629.

The plaintiff, being a mortgagee holding a mortgage on the grain, may, therefore, maintain this action against the defendant, which, on account of its being a trespasser as to the grain, had and has no right to ask that the securities be marshaled. Baron v. San Angelo Nat. Bank (Tex.) 138 S. W. 142; Scaling v. First Nat. Bank (Tex.) 87 S. W. 715; First Nat. Bank v. Sproull (Ala.) 16 S. W. 879; Wylie

v. Ohio River & C. R. Co. (S. C.) 26 S. E. 676; Huellmantel v. Vinton (Mich.) 70 N. W. 412; Godman v. Olson, 38 N. D. 372.

Where one of two innocent persons must suffer a loss, he shall bear it who, by his indiscretions, occasioned it. McMahon v. Sloan (Pa.) 51 Am. Dec. 601; Levi v. Booth (Md.) 42 Am. Rep. 332; Gussner v. Hawks, 13 N. D. 453; Galvin v. Bacon (Me.) 25 Am. Dec. 258; Velzian v. Lewis (Or.) 16 Pac. 641; Acorn Ref. Co. v. Knowlson (Mich.) 154 N. W. 11.

CHRISTIANSON, Ch. J. This is an action in conversion. Plaintiff sues to recover the value of certain wheat and barley grown during the year 1917, on certain lands in Rolette county, covered by a chattel mortgage executed to the plaintiff by one Walter Gran on October 5, 1916. The complaint is in the usual form, and alleges that Gran during the year 1917 "raised, harvested, and threshed a crop of barley and wheat upon said premises, and was the owner of the undivided one half of such crop of barley and wheat;" and that the defendant received 435 bushels of barley and 256 bushels of said wheat, and converted the same to its own use to plaintiff's damage in the sum of $1,020.43. The answer admits the corporate character of the parties to this action, and puts in issue the other allegations of the complaint.

The evidence shows that one Walter Gran in the year 1917 farmed, as a tenant, some land in section 32, township 164, range 68, in Towner county, and in sections 3 and 4, township 163, range 69, and in sections 31 and 33, township 164, range 69, in Rolette county. On October 5, 1916, Gran was residing on the lands located in Towner county. On that day he executed and delivered to the plaintiff bank certain promissory notes and two chattel mortgages. One of the mortgages covered certain personal property, such as horses and farm machinery, and the crops for 1917 on the Towner county lands. The other mortgage covered certain horses and machinery and the 1917 crops on the Rollette county lands. The first mortgage was filed in the office of the register of deeds of Towner county on October 7, 1917, and the second mortgage was filed in the office of the register of deeds of Rolette county on October 7, 1916. The two mortgages secured different notes. It appears that later in the fall of 1916, Gran moved upon the lands located in Rolette county, and took his personal property

with him; but the property was moved back and forth across the county line, as he was required to, and did, go back and forth in carrying on his farming operations in the two counties. Defendant offered to prove that the Towner county mortgage was not refiled, nor an authenticated copy thereof filed, in the office of the register of deeds of Rolette county.

It appears that in the fall of 1917 the plaintiff received from Gran the proceeds of the crops grown on the Towner county lands, and gave him credit therefor on the debts secured by such chattel mortgage. It also appears that on October 12th and 13th, 1917, certain men working for Gran hauled and delivered to the defendant's elevator at Rolla certain wheat and barley, and that the defendant paid Gran therefor. Shortly thereafter Gran absconded. The plaintiff thereupon seized all of the horses, cattle and machinery covered by the Towner county mortgage, and sold all of such property at chattel mortgage foreclosure sale in Towner county, and applied the proceeds of such sale upon the debt secured by such mortgage. Later in April, 1919, the plaintiff made formal demand upon the defendant for the grain in controversy, and, upon such demand being refused, it instituted this action to recover damages for the conversion thereof. The case was tried to a jury, but at the conclusion of the trial, both parties moved for directed verdicts. The court thereupon discharged the jury, and made findings and conclusions in favor of the plaintiff, and defendant has appealed from the judgment.

The various assignments of error are based upon two main propositions:

1. The failure to file an authenticated copy of the Towner county mortgage in Rolette county.

2. Insufficiency of the evidence to identify the wheat.

(1) Under our statute, "a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith for value unless the original or an authenticated copy thereof is filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated." Comp. Laws 1913, § 6758. "The filing of a mortgage of personal property in conformity with the provisions of this article operates as notice thereof to all subsequent purchasers and encumbrancers of so much of said prop-

erty as is at the time mentioned in the preceding section situated in the county or counties wherein such mortgage or an authenticated copy thereof is filed." Comp. Laws 1913, § 6759.

Basing his argument upon these statutory provisions, appellant's counsel contends: (a) That upon Gran selling to it the mortgaged grain defendant immediately became one of Gran's creditor's; (b) that inasmuch as Gran removed the personal property covered by the Towner county mortgage to Rolette county, and an authenticated copy of such mortgage was not filed in Rolette county, such mortgage was void as against the defendant as Gran's creditor; (c) that the plaintiff bank should have foreclosed the Rolette county mortgage, and applied the proceeds of the sale of the horses and farm machinery upon the debt secured by such mortgage, instead of foreclosing the Towner county mortgage, and applying the proceeds of such personal property upon the debt secured by that mortgage; (d) that it was the duty of the plaintiff, under § 6716, Comp. Laws 1913, to resort to and sell under its Rolette county mortgage all the other personal property covered by that mortgage, and apply the proceeds thereof in payment of the debt secured thereby, before attempting to recover from the defendant for conversion of the grain covered by that mortgage.

Assuming, without deciding, that defendant was creditor of Gran, it by no means follows that it is in position to assail the validity of the chattel mortgage under which the horses and machinery were sold, or to invoke the equitable defense which it attempts to invoke in this case.

"It is important that there should be kept in mind a distinction between the right of a general creditor to insist that an unfiled chattel mortgage is void and the ability to enforce this right. While an unfiled chattel mortgage may be void as to a general creditor, he cannot avail himself of the statute until he has armed himself with attachment or execution and levied on the property, or has in some other way secured a lien thereon. Before he has seized the property covered by the chattel mortgage, or secured some lien thereon, he is in no position to raise the question that the mortgage is void as to him." Union Nat. Bank v. Oium, 3 N. D. 193, 200, 44 Am. St. Rep. 533, 54 N. W. 1034.

As has already been noted, the answer (aside from certain admissions) contained merely a denial of the averments of the complaint. The doctrine of marshaling of assets or securities is an equitable one.

And the evidence which defendant sought to introduce as a basis for the application of this doctrine was not in denial of the averments of the complaint, but rather in confession and avoidance thereof. The evidence was not admissible under the general denial, and the trial court properly excluded it. 21 Enc. Pl. & Pr. 1107; 38 Cyc. 2072, note 26; Comp. Laws 1913, § 7448.

We do not find it necessary, however, to base our decision merely on procedural grounds.

It is undisputed that the mortgage under which plaintiff claims in this action was duly filed in Rolette county, and that such mortgage was a valid and subsisting lien upon the grain which Gran raised in 1917 on the Rolette county land. This mortgage secured an indebtedness wholly different from that secured by the Towner county mortgage. It is also undisputed that at the time the mortgages were given the horses, cattle, and machinery covered thereby were all in Towner county. Section 6758, supra, requires a chattel mortgage to be deposited "in the office of the register of deeds of the county where the property mortgage . . . is at such time situated." It is unlawful for a mortgagor to remove from the county the property covered by the mortgage "without the written consent of the then holder of such lien." Comp. Laws 1913, § 10,248. There is no contention that such consent was obtained in this case.

"Where the situs of the mortgaged property is made a controlling element with reference to the place of filing or registration, the situs intended is that existing at the time when the instrument is executed, and not where it may thereafter be removed. In the absence of any specific statutory provisions regarding the removal of mortgaged property, the record of a chattel mortgage in the town or county where it is required to be originally filed for record is held to be constructive notice to all the world, and the mortgage is valid without refiling, even though the property may be removed to another town or county, or even to another state. But by statute it is ordinarily required that if the mortgaged property is removed to another county the mortgage must be refiled or recorded anew in the county to which it is removed, otherwise it is ineffectual as against creditors and innocent purchasers of the property in the latter county. . . . Statutes requiring a refiling after removal apply only to cases where the removal was made

with the consent of the mortgagee. The mortgage need not be refiled where the property was removed without the mortgagee's consent." 11 C. J. pp. 529–531.

(2) There is no question as to the identification of the barley. But defendant says there was no substantial evidence tending to establish that it received the wheat. We are unable to agree with this contention. One Yilkila was sworn as a witness for the plaintiff. He testified that he worked for Gran. On the 12th day of October, 1917, he and four other men hauled and delivered five loads of barley to defendant's elevator at Rolla. On the day following four loads of Durum wheat covered by plaintiff's mortgage were taken from the premises where Gran was living. The witness, Yilkila, accompanied them until they were about 3 miles south of St. John, where he parted from them and went in a different direction, to his home in the Tustle Mountains. At the time he left them they were headed towards Rolla. Rolla was the place to which they ordinarily and naturally would go from the point where he left them. The agent of the defendant testified that on that day he bought from Gran 256 bushels of Durum wheat, and paid him therefor. There was also testimony to the effect that Gran had no other wheat except that covered by plaintiff's mortgage. Defendant's agent stated that he knew by hearsay where Gran lived. St. John, and not Rolla, would be the usual place to market grain for a person living there.

We are of the opinion that there is substantial evidence in support of the trial court's findings that defendant received and converted such wheat.

Judgment affirmed.

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

GRACE, J. I concur in the result.

ROBERT WANBERG, Respondent, v. NATIONAL UNION FIRE INSURANCE COMPANY, a Foreign Insurance Corporation, Appellant.

(179 N. W. 666.)

Insurance — statute making application for hail insurance promptly effective applies where insurer takes additional risks.

1. Section 4902, Comp. Laws 1913, which provides that every insurance company engaged in the business of insuring against loss by hail shall be bound and the insurance take effect from and after twenty-four hours from the day and hour of application, unless it shall notify the applicant by telegram of the rejection of his application, applies to an insurance company taking an application for hail insurance along with additional risks.

Constitutional law — insurance — law requiring hail insurers to act promptly on applications held valid.

2. Section 4902, Comp. Laws 1913, the substance of which is above stated, imposes a duty upon insurance companies doing a hail insurance business of acting promptly upon such applications. It is within the police power of the state, and does not deprive insurance companies of liberty of contract or property without due process of law.

Insurance — statute making hail insurance promptly effective not waived by conflicting provisions in application.

3. Where a statute in substance provides the form of an application for hail insurance with respect to the time when insurance shall be made effective, the benefit of the statute is not waived by an unauthorized, conflicting provision contained in the application.

Opinion filed October 16, 1920.

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

Affirmed.

Barnett & Richardson, for appellant.

"No person shall . . . be deprived of life, liberty, or property without due process of law." N. D. Const. § 13, art. 1.

Corporations are "persons" within the meaning of this paragraph of this amendment. Home Ins. Co. v. New York, 134 U. S. 594, 606; Pembina, etc. Co. v. Pennsylvania, 125 U. S. 181; Mpls. etc. R. v.

NOTE.—For authorities discussing the question of risks covered by hail insurance policy, see notes in 4 A.L.R. 1299, and 7 A.L.R. 373.

Beckwith, 129 U. S. 28; Chicago, R. v. Arkansas, 86 Ark. 412, 111 S. W. 456; Allgeyer & Co. v. Louisiana, 165 U. S. 578, 589.

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property." Heiman v. Ins. Co. 17 Minn. 153, 10 Am. Rep. 154; Lowe v. Ins. Co. 80 Neb. 499, 114 N. W. 586; Ins. Co. v. Rudolph, 45 Tex. 454; More v. Ins. Co. 130 N. Y. 537, 20 N. E. 757; Ins. Co. v. Babcock, 104 Ga. 67, 42 L.R.A. 88.

Wm. G. Owens, for plaintiff.

The regulation provided by § 4902 is a reasonable regulation. Boyer v. State Farmers' Mut. Hail Ins. Co. 86 Kan. 442, 121 Pac. 329, 40 L.R.A.(N.S.) 164 and note; Freund, Pol. Power, 150, 151, 158.

Even in the absence of statute, it has been held that the retention of the premium and the failure to reject within a reasonable time implied an acceptance. Robinson v. United States Benev. Soc. 132 Mich. 695, 162 Am. St. Rep. 436, 94 N. W. 211 (cited in note in 36 L.R.A.(N.S.) 1212).

There can be no waiver of statutory provisions where the waiver, if permitted, would violate public policy. 13 C. J. 423, § 355, and cases cited in note 10, p. 424; Greenhood, Pub. Pol. p. 496.

BIRDZELL, J. This is an action in which the plaintiff seeks to recover insurance covering a hail loss. On July 12, 1917, at 10 o'clock in the morning the plaintiff gave to one Everson, a local agent for the defendant, an application for insurance on his crops in the sum of $1,400, paying a premium therefor of $140. The application, so far as material to this case, reads as follows:

"I, Robert Wanberg of Tioga P. O. County of Williams, State of No. Dak., hereby make application for insurance to take effect from the day this application is received and accepted, as evidenced by the issuance of a policy thereon, at the Waseca, Minnesota, Agency for said Company, and to end on the 15th day of September, 1917, upon growing crops against loss, damage or failure from hail or any other cause except fire, floods, winter kill or failure on my part to properly prepare the ground for seeding and properly seed, care for, harvest, protect, and thresh said crop during the crop season of 1917 to the amount of $1,400. . . ."

On July 13, 1917, Everson mailed the application and the premium remittance to the defendant at Waseca, Minnesota. It was received in the Waseca postoffice on Sunday, July 15th, and delivered Monday, July 16th. On the preceding Saturday, July 14th, shortly after 6 o'clock in the evening, the damage from hail for which recovery is sought occurred. On July 17th the defendant's agent at Waseca mailed the application and premium remittance to Everson, stating that applications for crop insurance would not be accepted at that late date. There is no evidence that the Waseca agency at that time knew that the plaintiff had already incurred loss. When the application and premium were tendered back to the plaintiff, the tender was refused and this action brought. The case was tried to the court without a jury and resulted in a judgment for $1,405.85 and costs. Motion for a judgment *non obstante* or for a new trial was denied, and the defendant appealed from the judgment and order.

The case turns upon § 4902, Comp. Laws 1913. That section reads:

"Every insurance company engaged in the business of insuring against loss by hail in this state shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of said company, and if the company shall decline to write the insurance upon receipt of the application, it shall forthwith notify the applicant and agent who took the application, by telegram, and, in that event, the insurance shall not become effective. Provided, that nothing in this article shall prevent the company from issuing a policy on such application and putting the insurance in force prior to the expiration of said twenty-four hours."

It is first claimed that as this statute imposes a liability outside of that which may be covered by an insurance policy or by a contract, it should be strictly construed, and when strictly construed it will be found to have no application to a proposal for insurance other than for a straight hail insurance policy. Since the application in question covers loss from all causes other than a few excepted ones, it is claimed that the statute does not apply. We are of the opinion that there is no merit in this contention as applied to the facts in this case, for the reason that the application was one for hail insurance as well as other insurance, and the loss was occasioned through hail. To adopt the con-

struction contended for by the appellant would readily lead to defeating the policy of the statute, which could be done by merely linking another insurance risk with hail insurance. The statute is clearly intended to cover all applications for hail insurance, and this is such an application.

It is next argued that the statute violates the provisions of article 1, § 13 of the state Constitution and the 14th Amendment to the Federal Constitution, in that it works a deprivation of liberty of contract and property without due process of law. It is said that the statute operates to transform a mere proposal or offer into a completed contract obligation without affording to one of the parties thereto the option of acceptance or rejection. It is recognized that there is a class of obligations which are implied in law without regard to the assent of the party bound, but it is contended that the obligation imposed here is not properly included within such class. This contention must be examined in the light of the policy evidenced by the statute.

The business of insurance is subject to legislative regulation in the interest of the public. The regulations prescribed by different legislative bodies indicate the broad scope of legislation designed to protect the public. Standard forms of policies are prescribed, investments regulated, deposits required, rates of premiums fixed (German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612); liability established for the amount of the policy regardless of the value of the property at the time of destruction (Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281); defenses such as suicide are cut off though expressly stipulated for in the policy (Whitfield v. Ætna L. Ins. Co. 205 U. S. 489, 51 L. ed. 895, 27 Sup. Ct. Rep. 578). Upon similar principles we are of the opinion that the legislature can recognize other practices in connection with the insurance business which tend to operate prejudicially to the class of patrons and prescribe regulations for their protection. The statute in question recognizes the practical necessity for a prompt decision upon hail insurance applications. It is generally known that the premium covers the risk for the season, and that the practice of writing hail insurance differs somewhat in this respect from other forms of insurance, where either an annual premium or a term rate is collected covering a risk for a definite period. An applicant for hail insurance is prone to rely upon his application being accepted until

notified to the contrary, and he will not ordinarily seek other insurance in the interim. Under the practice which, but for the statute, could not be said to be unreasonable, the applicant for hail insurance would be uncertain as to whether or not his application was accepted, not only during the period of transmission, but during the period required to notify him of the nonacceptance through agents selected by the company. It needs no argument to demonstrate that the employment of the usual means for completing the negotiations looking toward the issuance of a policy of insurance would frequently, in the absence of the statutory regulation, result in the disappointment of the applicant, and would deprive him of the benefit of the insurance at a time when it is most needed, and during which he would have reasonable grounds for believing that his risk was covered. Such would be his assurance, at any rate, that he would ordinarily refrain from applying elsewhere.

In recognition of the necessity for the prompt consummation of the business of hail insurance, the legislature has set a limit of twenty-four hours for the rejection of an application within which time the risk is not insured. In view of the peculiarities attaching to this form of insurance, we cannot say that this period is unreasonable. It would seem that foreign insurance companies, as well as domestic companies, could so arrange their methods of transacting business in the state as to enable them to pass definitely upon the desirability of any given risk within twenty-four hours after the date of the application, notifying the applicant and the agent in case of rejection as required. The statute imposes this duty, and we think it within the province of the legislature to so provide. The measure of liability for a breach of the duty imposed is fixed. It holds the company liable for the insurance applied for. This liability, in our judgment, is sustainable upon the same principle that liability in other directions is sustained for breaches of various duties that may properly be imposed by the legislature. Thus, carriers may be required to fence their rights of way, to keep them clear of combustible material, provide spark arresters for their locomotives, and to install safety devices. Telegraph companies may be required to transmit messages in a certain order of priority and with promptness. See 33 Cyc. 677; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. Insurance companies may be required to make prompt settlement for losses. Fidelity Mut. Life

Asso. v. Metler, 185 U. S. 309, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565. And for the failure to perform the duties imposed, penalties may be provided in the shape of attorneys' fees or added damages, recoverable by the party affected. See cases, supra.

The statute under consideration here is not as rigorous as some that were sustained in the foregoing cases, in that a recovery is more nearly commensurate with the loss attributable to a breach of the duty.

It is contended, however, that the applicant waived the benefit of the statute by signing an application in which it was expressly agreed that the insurance should take effect from the date the application was received and accepted at the Waseca, Minnesota, agency of the company. The general principle that an individual may waive the provisions of a statute intended for his benefit is invoked. We are of the opinion, however, that the principle is not applicable in the instant case. The statute, as we view it, was designed to impose the duty of prompt action upon all companies transacting hail insurance business in this state. To permit an extension of the time for rejection to be effected through language contained in the application would result in relieving the companies of the duty which is specifically enjoined upon them, and thus defeat the policy of the statute. As hereinbefore indicated the statute is a police regulation of hail insurance business prescribed by the competent legislative authority. We should and do hesitate to read into the law implications which would make the effectiveness of such regulation dependent upon private contract. Had it been desired to leave the matter to the contract of the parties, no such statute would have been enacted, or, if enacted, it would doubtless have been qualified by some such expression as the following:

"Unless otherwise provided in the application, every insurance company engaged in the business of insurance against loss by hail in this state shall be bound and the insurance shall take effect from and after twenty-four hours after the day and hour of application," etc.

Section 4902, Comp. Laws 1913, in our opinion, to the extent of its provisions, controls the form of an application for hail insurance, just as other sections control standard policy forms, and any departure from the prescribed forms involving less favorable terms to the applicant or policy holder is an infringement of the statute, and is void.

No other constitutional question is raised.

The judgment and order appealed from are affirmed.

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

ROBINSON, J. (dissenting). This is an appeal from a judgment of $1,500 against defendant on a mere application for hail and other insurance. On July 12, 1917, at Tioga, North Dakota, the plaintiff gave to Gus W. Iverson, a local agent of the defendant, an application for hail and other insurance. It reads, in part:

"I, Robert Wanberg, of Tioga, county of Williams, N. D., hereby make application for insurance to take effect from the day this application is received and accepted, as evidenced by the issuing of a policy thereon at Waseca, Minnesota Agency of the Company."

The application was duly made to defendant at Waseca, Minnesota. Before the application could possibly arrive at Waseca, the crop was destroyed by hail. Without knowledge of the loss, the company promptly rejected and returned the application with a deposit check sent as premium. Do those facts constitute a cause of action? The plaintiff relies on a statute which reads thus: "Every insurance company engaged in the business of insurance against loss by hail in this state shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of the company." The title of the act is "An Act Fixing the Time When Policies of Hail Insurance Shall Take Effect." The title refers to "The Time When Policies of Hail Insurance Shall Take Effect," and not to a time when an application for insurance shall ripen into a policy. Hence, under § 61 of the constitution, the act is void because the title does not express the subject of the act; but aside from this defect in the title, the act should not be so construed so as to deny parties the right to make reasonable contracts or to turn into a contract a mere application for a contract. Here the plaintiff made and sent a written application for insurance "to take effect from the day the application is received and accepted," and not for a policy to become effective within twenty-four hours after the date of the application.

If the statute be so construed as to deny the validity of such a con-

tract, and to impose on defendant a contractual obligation to pay $1,500 when it made no such contract, then the statute does impair the obligation of contracts, and it deprives the defendant of its property without due process of law. It is in no way competent for the lawmakers to say that a mere application for a contract shall itself constitute a contract. But the statute goes still farther; it makes the contract. It declares that within twenty-four hours after an application for insurance is received by a local agent the application shall become a policy of insurance, even though not received by the company. It does not give the company a reasonable time to receive or reject the application, even if it were to have a general office in every city of the state. Surely that is contrary to every principle of law.

WINTHROP B. PHILLIPS, Appellant, v. LIZZIE PHILLIPS, J. J. Coyle, O. B. Herigstad, J. T. Newlove, H. F. Stolz, Optic-Reporter Publishing Company, John Schetler and American Surety Company, Respondents.

(179 N. W. 671.)

Fraudulent conveyances — conveyance through judicial proceedings held made to defraud creditors.

In this case the plaintiff brings suit against his mother and her judgment creditors to quiet his title to certain property in Minot. He appeals from a judgment against him. It appears that by a judicial proceeding the mother, a woman of forty-five years, conveyed all her good productive property to her minor son, who had no means only such as he obtained from the mother or her property and a small salary, barely enough to defray the expense of his living. Manifestly the conveyances were made in trust for the mother, and with intent to hinder, delay, and defraud her judgment creditors. By statute, every transfer of property made and every judicial proceeding taken to hinder, delay, or defraud any creditor, is void against all creditors of the debtor.

Opinion filed October 16, 1920.

Appeal from the District Court, Ward County, Honorable *K. E. Leighton*, Judge.

Modified.

Fisk & Murphy, for appellant.

Fraud cannot be presumed and the burden of proving it is on him who alleges it. Meyers v. Kaiser, 85 Wis. 382, 55 N. W. 688.

The presumption is in favor of good faith, innocence, and honesty. 12 R. C. L. 424; Hart v. Church, 126 Cal. 471. See also note in 34 Am. St. Rep. 402.

Lewis & Bach, J. J. Coyle, C. B. Davis, and *Karl H. Stoudt,* for respondents.

The purchaser of the equity of redemption stands in the shoes of the mortgagor as a successor in interest. Styles v. Dickey, 22 N. D. 513, 134 N. W. 702; Griffith v. Fox, 32 N. D. 660, 156 N. W. 239.

Robinson, J. This case merits little discussion. The judgment was entered in August, 1917, and the appeal was not certified to this court until August 14, 1920. Such a procedure should not be tolerated.

To quiet his claim of title to a valuable lot, the plaintiff commenced this action against his mother and her judgment creditors. Each creditor avers that the lot is the property of the mother, and claims a lien on the same under a specified judgment. The plaintiff appeals from a decree in favor of the judgment creditors. The judgments docketed against Lizzie Phillips, in favor of the defendants, are as follows: $144.10, March 5, 1913; $525.89, January 1, 1914; $137.65, September 10, 1914; $46.65, March 11, 1915.

In 1908, Lizzie Phillips, a widow, the mother of the plaintiff, obtained title to the property (lot 6, block 12, Minot). In 1909 she made to John Schetler, her brother, a trust deed, with rents and profits, to secure $1,625, with interest at 12 per cent from July 20, 1909. On May 6, 1915, John Schetler commenced an action to foreclose his mortgage, and on May 13, 1915, the mother appeared and confessed judgment for $3,000, which was more than $200 in excess of the amount due. On June 26, 1915, after publishing notice of sale, the sheriff struck off and sold the lot to John Schetler for his judgment, with interest and costs. In June, 1916, the sale certificate and all rights under the trust deed were assigned to the plaintiff by his uncle. On June 25, 1916, the time for redemption having expired, the sheriff deeded the lot to the plaintiff, who at once commenced this action.

The transaction was nothing more than a voluntary transfer under

the forms of a friendly court procedure to which the judgment creditors were not parties. The legal effect was precisely the same as if the mother and her brother had made a voluntary transfer to the minor son.

In the same way the mother transferred to her son a model rooming house, the rental of which was over $300 a month. Under a small judgment she permitted or caused the rooming house to be sold on execution, and when a sheriff's deed was issued the title was transferred to her son in consideration of $125. Of course all such transactions are clearly fraudulent. They manifest a purpose to delay, injure, and defraud creditors. As the evidence shows, the plaintiff was only twenty years in June, 1917. He had been married four years, and had supported himself and his wife on a small salary, working only a part of the time, and aside from his earnings he had no property only what he obtained from the mother or the rentals of his property, barely enough to support himself and family. Yet, in June, 1916, when he was only seventeen years old, he redeemed from the trust deed, paying his uncle $1,694 and giving his promissory note for the balance. Then the uncle assigned to him the sale certificate on which he obtained the sheriff's deed. True the plaintiff testifies that he paid the uncle with his own money, but it is in no way credible. His earnings were not more than enough to support himself and his family. He had no means only such as he received from the mother or her property. It is needless to review the oral testimony. The facts speak louder than words, and show beyond question that the only purpose of the transfer was to hinder, delay, and defraud the creditors of the mother, and she had no property only such as was thus conveyed to her son under the guise of a judicial and expensive proceeding. Were it not for the judgments, the transfers to the son could have been made by a direct conveyance at an expense of $1. The mother was in the prime of life. She was only forty-five years old, and, of course, she did not think of making herself a pauper by giving away and virtually donating to her son the beneficial use of all her good property. She continued to occupy and use the property, permitting her minor son to use part of it and to collect the rents, as a mother naturally would regardless of titles.

"Every transfer of property and every judicial proceeding taken with intent to delay or defraud creditors is void against all creditors of the debtor and their successors in interest." Comp. Laws, § 7220.

The majority of the court, however, are of the opinion that the judgment of the lower court must be modified. The judgment of the trial court finds and decrees that the foreclosure of the mortgage given to John Schetler is void, and that the assignment of the sheriff's certificate of mortgage sale to the son, Winthrop Phillips, was in fact a redemption of such mortgage, and canceled and annulled such mortgage, and freed the property from the lien of such mortgage. In its findings, the trial court has determined that the transfer made to the son was for the purpose of cheating and defrauding creditors. In the record it appears that Schetler received a note from the son for $1,850, no part of which has been paid. Whether he took security upon the property for the payment of the balance of the mortgage lien, the record does not disclose.

Schetler is not a party to this action. He is not a party to the fraud alleged, proved, and found, so far as this record is concerned. The judgment rendered herein cannot deprive him of his legal and equitable rights in or liens upon the premises involved without his day in court. Furthermore the rights of the plaintiff as an equitable assignee *pro tanto* of the mortgage, the foreclosure of which has been determined to be void, may still survive as between him and his mother. The statute, § 7220, Comp. Laws 1913, makes the transfer mentioned void against all creditors and other persons named. The effect of the statute is to set aside the fraudulent transfer as to creditors concerned. See 67 L.R.A. 865, 889. The judgment, accordingly, of the trial court, must be modified so as to provide that the liens of the defendants herein are effectual upon the premises concerned, unaffected by the transfer proceedings had with the plaintiff, and subject to any valid encumbrance which may have been on the property involved prior to the Schetler mortgage and further subject to any legal and equitable rights, interests, or liens of John Schetler, his heirs and assigns, as the same may be made to appear in any action instituted for such purposes. It is directed that the trial court enter judgment accordingly.

OTTO LATZKE, Appellant, v. JOHN KRAUSE, Albertina Krause, Herman Krause, and Louis Fligelman, Respondents.

(179 N. W. 657.)

Deeds — finding that deed was not procured by fraud and conspiracy held not erroneous.

In an action to set aside a certain deed on the ground that the execution thereof was procured by fraud and conspiracy, the trial court found that there was neither, and that the deed was valid and effective, and refused to set it aside.

Held, **for reasons stated in the opinion, that the trial court was not in error.**

Opinion filed October 18, 1920.

Appeal from a judgment of the District Court of Richland County, *Frank E. Allen,* J.

Judgment affirmed.

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

W. E. Purcell, W. S. Lauder, for respondents.

GRACE, J. This action is one brought by the plaintiff to set aside a deed executed and delivered by one Hankinson to Herman Krause, conveying the southwest quarter of section 32, Tp. 130 N. of range 49 W., in Richland county, North Dakota.

The further purposes of the action are to recover for the value of the use of said premises, at the rate of $400 per annum, from the year 1902, and the quieting of the title to said premises in the plaintiff, as against all the claims of all the defendants the Krauses.

The facts in the case are many and complicated, and those which are material are as follows:

In January, 1901, one R. H. Hankinson, the owner of the land, sold and agreed to convey the same to John Krause and Albertina Krause, for a consideration of $1,800; he executed and delivered to them a written contract of sale. This contract was never recorded.

Albertina Krause and her husband, John, purchased this land from one Kinney, in October, 1899, upon the crop-payment plan, which provided that all the crops raised upon the land should be applied each year to the purchase price. On the 1st day of January, 1901, the

purchasers had paid the interest to that date, and $30 on the principal. That contract is in evidence, and a memorandum to that effect is indorsed on the contract. About January 1, 1901, a new contract was made between Hankinson and these two defendants, Kinney and Hankinson were doing land business together, and the Hankinson contract was substituted for the Kinney contract. The terms of both were practically the same. The contract from Hankinson to these two defendants was not introduced in evidence.

On August 28, 1901, Otto Latzke recovered judgment, by default, against Albertina Krause and John Krause, for between five and six hundred dollars. On the 4th day of May, 1901, one W. E. Purcell recovered judgment, by default, against the defendants John Krause and Albertina Krause, and also against Otto Latzke, for between three and four hundred dollars.

This plaintiff paid the latter judgment and secured a release thereof. He maintained that it was a lien on the interest of the defendants in the land, superior to the judgment which he had procured against them, and that he paid the same to protect his lien.

On November 26, 1901, execution issued upon the judgment which plaintiff had recovered against Albertina and John Krause; and on the 29th day of November levy was made upon the said land; and on the 13th day of January, 1902, the interest of the defendants in the land was sold at such execution sale, for $290.29, the plaintiff receiving a sheriff's certificate of sale, which was recorded in the office of register of deeds, in Richland county, on the 14th day of January, 1902.

On January 16, 1903, more than a year after the execution sale, no redemption having been made, the sheriff of Richland county delivered his deed of the premises to the plaintiff, purporting to convey all the interest of the defendants in the land to the plaintiff. This deed was recorded on January 16, 1903.

It was on February 4, 1903, after plaintiff had received said sheriff's deed, that he satisfied the Purcell judgment.

The plaintiff further maintains that the following facts are established by the evidence: That, after the 29th day of November, 1901, John, Albertina, and Herman Krause unlawfully agreed and conspired together to devise and carry out a scheme to defraud and cheat him, and that the facts, relative to such fraudulent scheme, are substantially

as follows: That, said defendants should represent to the plaintiff and to Hankinson, that John and Albertina had assigned the contract, for the sale and purchase of said land, to the defendant Herman Krause for a valuable consideration, at a time prior to the attaching of the judgment lien of plaintiff, by levy of execution issued thereon, upon their interest in the land; that Herman Krause owned said land, under said contract, in good faith, free from that lien, under a purchase thereof, in good faith, by him, from defendants, John and Albertina, and under payments made by him to Hankinson, of the balance of the purchase price; that Herman should procure, to be issued to him from Hankinson, a deed conveying the land to him as the owner thereof, in fee simple; that John should become a voluntary bankrupt, and be discharged from his debts, including those owing to the plaintiff; that, upon the issuance of the deed from Hankinson to Herman, he should commence an action against plaintiff, to determine adverse claims to the land, claiming to be the absolute owner thereof; that John should also commence an action against the plaintiff, to determine adverse claims to another tract of land, which he claimed to own and occupy as a homestead, and which of record appeared to be subject to the lien of plaintiff's judgment, and further that the defendants should represent that John Krause and Albertina Krause were insolvent; that all the foregoing was done with the intent to deceive the plaintiff into believing that the defendant Herman Krause was, in truth, the absolute owner of the land, free from all claims of the plaintiff; and that John and Albertina were not the owners of any interest in the land, and had not been at any time after the attachment of the lien of the plaintiff's judgment, by the levy; and all this, with the intent to procure the plaintiff, in reliance upon such representations, to accept, in settlement of his valid and just claims against the defendants, under the judgment, a nominal sum of money to be paid by the defendant, Herman Krause, but for the benefit of John and Albertina, and to procure the plaintiff to release all his claims, both in law and equity, against all the defendants and against the land. The plaintiff further claims as facts, established by the evidence, that pursuant to this fraudulent scheme, defendants represented to Hankinson that John and Albertina had assigned said contract to Herman, for a valuable consideration, at a time prior to the attaching of the lien of plaintiff's judgment, by the

levy, and that Herman owned said land, in good faith, free from said lien, under a purchase in good faith from the defendants John and Albertina, and because of the payments of the purchase price by Herman to Hankinson; and that said defendants, by such representations, induced said Hankinson to believe and act upon the same as true, and to execute, acknowledge, and deliver to the defendant Herman Krause a deed conveying the land to him, which is dated December 5, 1905, and recorded in the office of register of deeds.

It is further claimed by plaintiff that the evidence shows that all of such false representations were made to him, and that the actions to quiet title were commenced by Herman and John, and that the plaintiff relied upon the representations and acts done as aforesaid, and, believing them to be true, and knowing nothing to the contrary, was induced to believe, and did believe, that the assignment of the contract had been made in good faith, for value, prior to the attachment of his lien, by the levy, upon the land; that John and Albertina neither had nor owned any estate or interest in the land or contract, at any time after the levy above mentioned; that the deed from Hankinson to Herman conveyed good and valid title to the land, in fee simple absolute, to Herman, and that Herman was the actual owner thereof, free from any estate or interest therein, on the part of John and Albertina or either of them; that John and Albertina were insolvent and that he could not collect any part of his claim from them, or either of them; that, for these reasons, the plaintiff was induced to compromise all his claims against the defendant, and to release the same, which amounted, at the time of the settlement, to $1,223.15, exclusive of costs incurred in the sale of the land aforesaid under execution, and also to convey the land to Herman Krause, for a total consideration of $100, to be paid by Herman Krause out of money belonging to John and Albertina, or one of them, and that the plaintiff did, induced by the promises, on the 6th day of March, 1906, execute and deliver to Herman Krause a deed of the land running to Herman Krause, as grantee, which is recorded in the office of register of deeds, in book 23 of deeds, at p. 445.

It is further claimed as an established fact, that the assignment of the land contract to Herman was not made before the attachment of the lien of plaintiff's judgment upon the land, by the levy, but many

months thereafter; that the assignment was not for a valuable consideration, or in good faith, but for the express fraudulent purpose of inducing the plaintiff to believe that Herman Krause owned the land, free from all liens or claims of plaintiff, and to cheat and defraud him; that there was a secret agreement and understanding between the defendants, to the effect that John or Albertina, or one of them, should at all times, in spite of the assignment, be and remain the owner of the land and the contract, and be entitled to the full beneficial title, use, and occupation thereof, and that Herman should not, by or through the assignment, or in any manner, obtain an interest in the land or contract; but on the contrary, as soon as the fraudulent scheme should be completed and carried out, and the fraudulent settlement aforesaid made with the plaintiff, and the land conveyed pursuant thereto, Herman should and would convey the land to the defendants John and Albertina, or one of them; that by reason of the secret interest of John and Albertina in the land they were not insolvent; that their interest therein was worth more than the amount of plaintiff's claims, and was not exempt from seizure for sale and execution; that the bankruptcy proceedings, on the part of John Krause, was false and fraudulent, in that he failed to list and schedule any interest in the land as a part of his estate; that Herman Krause, when he commenced the action to determine adverse claims to the land, did not own the same, in fee simple, or at all, but it was owned by the defendants John and Albertina; that John and Albertina have at all times since January 16, 1903, had the possession and use of the land and enjoyed the usufruct therefrom; that the reasonable value of the use of the land is $240 per year; that in the year 1905 the plaintiff removed from Richland county, North Dakota, to the state of Minnesota, and has lived there ever since; that he did not discover the fraud practised upon him by the defendants, as aforesaid, until the month of March, 1915; that he brought this action promptly after the discovery thereof; that the plaintiff has received from the defendant the sum of $100, and is ready, willing, and able to, and offers to, do therewith as equity and good conscience may require, and has offered that sum in court, to abide the order thereof in that regard; that there have been no permanent or valuable improvements made upon the land; that the defendants Krauses have paid the taxes from 1903 to 1917, inclusive;

that, on the 28th day of November, 1905, the defendant Herman Krause mortgaged the premises to Tallak Brokken, to secure the sum of $1,500, which is secured by a mortgage recorded in the office of register of deeds on the 9th day of December, 1905; that the money raised thereby was used by Herman Krause to pay Hankinson for the land and other necessary expenses connected therewith; that on the 23d day of March, 1911, Louis Fligelman purchased the mortgage and the debts secured thereby, and said mortgage was duly assigned to him; that there is due thereon the sum of $1,500; and interest from the 28th day of December, 1910, at the rate of 12 per cent per annum, no part of which has been paid.

It is claimed as an established fact by the defendants John and Albertina, that the assignment of the contract to Herman was made in order that he might bring about a settlement with Latzke, with whom they were not on friendly terms, but with whom he was on friendly terms; that, when Herman took the assignment and procured the deed of the land from Hankinson, by paying him the balance of the purchase price, that he held the land in trust for them; that after Herman acquired the title to the land in trust, he asserted title thereto, or claim and interest or a lien thereon, and also that he mortgaged it to one John R. Jones, for $2,500; that Albertina brought suit against Herman and John R. Jones, and it was finally determined, by this court, that they, or neither of them, had any claim or interest against the land.

Plaintiff's case is based upon an alleged fraudulent agreement and conspiracy between John, Albertina, and Herman, to devise and carry out a scheme to defraud and cheat the plaintiff; that such fraudulent scheme was entered into and consummated by them, resulting in his delivering the deed to the land for the $100, while he was deceived by such fraudulent scheme, and while he was laboring under such deception.

The allegations of fraud and conspiracy against the Krauses are very specific and very extended. The principal charges of fraud, in substance, are above set forth.

While the case appears to be quite complicated, the only real points in the case are, whether the assignment was made after plaintiff ac-

quired his lien under the levy of the execution, but antedated so as to show its execution prior to such lien; and the further point of whether such assignment was dated back, with the intention, and as a part of an agreement and conspiracy entered into by the defendants, for the fraudulent purpose of deceiving the plaintiff, thereby causing him to part with his interest in the land while so deceived.

It is incumbent upon the plaintiff to show by clear and convincing evidence, that the assignment was dated back, so as to antedate the levy under the judgment, for the fraudulent purpose of deceiving the plaintiff; and that plaintiff relied upon all the false and fraudulent representations and was deceived thereby, and, while laboring under such deception, executed the quitclaim deed sought to be set aside, whereby he relinquished his claim and interest, if any he had, in said land.

The assignment of the contract was made in the law office of Gustav Schuler, at Wahpeton. At the time of the assignment of the contract, he was in business with his brother Gene, who was not a lawyer. They officed together and also conducted a loan and real estate business. Gene was also a builder and contractor.

Albertina, John, and Herman Krause and Gustav and Gene Schuler were the only ones present at the time the assignment was executed. Each of them, except Gene, have testified in this case.

It is not practical to analyze the testimony of each witness separately, nor to go into it to any great length. In answer to questions propounded to them, the Krauses, and each of them, earnestly deny any understanding or agreement between themselves, to have the assignment dated back, so as to antedate the levy.

John being called for cross-examination under the statute, in one part of his testimony, admits that the matter of dating the contract back was talked over with Gene. He thought his (John's) wife talked with him. But later in the trial, on redirect examination, he specifically denies any agreement or understanding that the assignment of the Hankinson contract, which he made to Herman, should be dated back, or that he ever entered into any agreement or conspiracy with his wife or Herman to have the contract assigned to Herman and date the assignment back, or that there was any talk of that kind, at any time or place, between his wife, Herman, and himself.

Albertina gives positive testimony, which is to the effect that, at the time of the assignment of the contract, there was nothing said about dating it back; and that she never had any talk, at any time or place, about having the assignment dated back. Herman's testimony is to the same effect.

The Krauses all admit that, at the time the assignment was made, they knew that the plaintiff had a judgment against John; and they also, in effect, testify that the object of the assignment was to get a settlement with the plaintiff, and that Herman being friendly with him, he could get a more favorable settlement than they.

We do not think there is any substantial testimony to show that there was any agreement or conspiracy to defraud plaintiff, by dating the assignment back; nor is there any testimony of the date when they were in Schuler's office; nor to show that the date of the assignment is a date or point of time prior to the actual execution of the assignment.

Gustav Schuler, in whose office the assignment was drawn,—and the testimony shows he was present in the office while the Krauses were there,—says, in answer to the following questions:

Q. You may state whether to your knowledge, at any time, John Krause, Herman Krause, and Albertina Krause, or any of them, came to your office to have an assignment of the contract to a piece of land drawn, from John and Albertina Krause to Herman Krause.

A. I do not remember the circumstance.

Q. You may state whether or not you remember of John or Albertina or Herman, or any of them, ever asking you to draw an assignment of the contract to a piece of land, from John and Albertina Krause to Herman Krause, and to date the assignment back.

A. No, I cannot recall any such circumstances.

Q. If the Krauses, John, Albertina, or Herman should ask you to take the acknowledgment of the assignment and date the assignment back, of the land contract, you would have remembered it, would you not?

A. Why, yes, I believe I would recall it.

Q. It would be an unusual request, would it not?

A. Yes, it would be unusual.

Q. It would be asking you to do something that any lawyer or notary public should not do?

A. So it occurs to me, yes.

Q. And if a request of that kind was made to you, you would remember it, wouldn't you?

A. I think I would.

By Mr. Wolf: "If, under such circumstances as counsel has asked you about, you had been requested to do such a thing, you would have refused to do it?

A. Absolutely.

John, who was a witness in the case of Krause v. Krause, 30 N. D. 64, 151 N. W. 991, being called for cross-examination under the statute in this case, was examined as to certain testimony he gave in that case, relative to the assignment of the contract. He, however, largely failed to remember what he had testified to in that case. His testimony in this regard, in that case, was placed in evidence, by offering that part of the settled statement of that case, relating to the assignment of the contract. We do not think any of that testimony is sufficient to prove the allegations of the complaint in this case, even if such testimony were admissible, and we do not think it was, except for the purpose of affecting the credibility of the witness as an admission against interest, otherwise it was irrelevant and inadmissible. That case was between different parties. This plaintiff was not a party to that suit, nor were any of the defendants, excepting Albertina Krause and Herman.

Albertina Krause was also examined as to her testimony in the former case, and asked if she did not make certain answers to certain questions. The observation we have made in regard to the testimony of John Krause, given in the former case, applies also to Albertina's testimony given in the former case, and about which she was asked in this case.

Some time prior to the trial of this suit, Herman Krause went to the office of Dan R. Jones. There, it became known to Jones, that Herman was going to testify in this case. Jones asked him if he were going to swear the same thing as he swore to before, in the case of Albertina v. Herman and John R. Jones, and that he said that he was going to tell the truth; that Jones then read him what he had said in the former case, about dating back the contract, which was as follows:

Q. Isn't it a fact that the assignment was made afterwards, but was dated back so it would appear that it was made before the Latzke judgment?

A. Yes.

Q. Don't you know the assignment was dated back?

A. I guess so.

Q. Do you know why it was dated back?

A. I guess so.

Q. Mr. Krause, can you tell why that assignment was dated back?

A. Well, it was going to be taken away from them, anyway. Latzke had judgment and he was going—I do not know whether he had sold it or not, but he was going to take it.

Q. He was going to take the land?

A. Yes.

Q. And you wanted it fixed so he could not take the land away?

A. Yes.

Jones was then asked by counsel for the defendants in this case: From what did you read that?

A. I read from the paper book.

Q. In the former case?

A. In the former case.

Jones, continuing, said: "I asked him if he was going to testify to the same thing again, and he said he was, and I says, 'Is that—everything true, Herman?' And he said it was. He volunteered the statement of how the assignment was made. He said they went up to the office of Gustav Schuler, to get Gus to make the assignment, and that they had talked it over with Gus; that Gus said he could not do anything of the sort, and then he said they went to Gene Schuler, and Gene Schuler said, as long as they did not acknowledge the assignment before a notary public, that he could do it and there would be no harm done. Then it was that the assignment was made by Gene Schuler, and dated as they wanted it, before the Latzke judgment. I also read him what John and Albertina had said about this contract, this assignment."

All of that testimony was objected to as hearsay. It is clear that all that Herman said to Jones was a conversation between them, not in

the presence of John or Albertina. It certainly could not be binding upon them; it was purely hearsay, and was inadmissible.

During the cross-examination of Herman Krause, he was asked many questions relating to the testimony which he gave in the former case, relative to the assignment, which questions, in substance, included the testimony given by Herman on the former trial, as read to him by Jones in his office prior to the time of this trial.

It is stipulated that the questions were as asked and answered on the former trial. The former testimony in this regard may be considered admissible, for the purpose of affecting the credibility of the witness Herman, and his evidence in this case in that regard is largely the reverse of what he gave in the former trial.

In the former case, he was an interested party; in this case, he was a witness against his adversary in the former case; that is, for Albertina.

We think his testimony could be disregarded altogether, but as his testimony in this case is corroborated, or is practically the same as that of Albertina and John, with reference to the assignment, it could be considered as corroborated by theirs.

The plaintiff, having been served with the papers in the suit brought against him by Herman to quiet title, went to town of Hankinson and saw Herman. This was in March, 1906, he went out to the farm and had a talk with Herman. He claims that, at that time, Herman told him the assignment was dated ahead of the contract, and that he, Herman, owned the land; that Herman told him that the contract was in the bank, and that John had gone through bankruptcy; that an estimate was made of the amount which John owed the plaintiff, and that Herman then offered to pay him $100, to avoid standing the expense of the suit or trial; that Herman told him that, if he did not accept the $100, John having gone through bankruptcy, that the chances were that he would not get anything.

Plaintiff went into the bank the following day, and claims he examined the contract and assignment, and found the assignment dated ahead of his levy. He then accepted the $100 offered him by Herman, and executed and delivered to Herman a quitclaim deed of the premises.

The testimony of Herman Krause shows, at the time he made the

$1,500 loan on the land, he left the contract with Fligelman, through whom he made the loan from Tallak Brokken; that, when the plaintiff came to see him in March, 1906, he told him that he, Herman, owned the land, and had a deed from Hankinson, and told him that his papers against it were no good; that the plaintiff asked him for a sum of money, about four or five hundred dollars, but that he told him he would not pay any attention to his papers.

Herman denies there was anything said, in that conversation, about the contract or the assignment, and that he, at that time, did not know where the contract was; and that he had never seen it after he turned it over to Fligelman, which was in the fall of 1905, before he made the loan; and that he never, in that conversation, told the plaintiff that the contract was assigned before the levy. He testified that the quitclaim deed was made in the bank by Mr. Kinney, and that the consideration of it was $100, which was there paid.

The trial court made the following finding of fact: "That on the 6th day of March, 1906, one Herman Krause held title to said quarter section of land, subject to the rights of plaintiff, said title, however, being held by the said Herman Krause, in trust, for the defendant Albertina Krause, and not otherwise; in other words, that said Herman Krause held in trust, for the said defendant, Albertina Krause, all the title, interest, and estate, which the said Albertina Krause, defendant, had held or owned in said land; that, on the said 6th day of March, 1906, the plaintiff and said Herman Krause entered into an agreement, by the terms of which the said plaintiff agreed to convey to said Herman Krause his interest in said quarter section of land, on payment to him of the sum of $100; that the said Herman Krause, pursuant to said agreement, on said day, duly paid to said plaintiff the said sum of $100 in money, which plaintiff duly received and accepted, and that in consideration of said payment the said plaintiff, on said day, duly conveyed said quarter section of land to the said Herman Krause, by good and sufficient deed; that, in making and carrying out said agreement with plaintiff, the said defendant, Herman Krause, acted as agent and trustee for the defendant Albertina Krause, and, on the execution of said conveyance from plaintiff to Herman Krause, the said Herman Krause held whatever title to said quarter section of land he acquired by virtue of said deed, as trustee for the

defendant Albertina Krause. The court further finds that in said transaction no fraud or misrepresentation or deceit was practised by either Herman Krause or either of the defendants, John Krause or Albertina Krause. The court finds that the evidence does not establish that the allegation of the complaint that either Herman Krause or defendants John Krause or Albertina Krause, for the purpose of procuring the execution of said deed, falsely represented that the so-called Hankinson contract was assigned to said Herman Krause, before the attachment issued in the case in which plaintiff recovered judgment against the defendants John Krause and Albertina Krause was levied; and the court further finds that, in the transaction in which Herman Krause paid to plaintiff the sum of $100, and the plaintiff conveyed the said quarter section of land to said Herman Krause, the said Herman Krause and the defendants John Krause and Albertina Krause acted in good faith, and in that transaction neither were guilty of any fraud or false representations or deceit.

"The court further finds that the defendant Herman Krause has no interest or estate in, right or title to, or lien or encumbrance upon, said quarter section of land, or any part thereof, except as trustee. The court further finds that the defendant Louis Fligelman, while he did not appear in the action, as a matter of fact, is the owner of a mortgage covering the said quarter section of land, but the exact amount of said mortgage the court does not find further than that said mortgage is a first lien on said quarter section of land."

We think the foregoing findings of fact of the trial court is amply sustained by the evidence, and that the findings of fact, as a whole, are correct. The date on the assignment is prior to the levy of the execution by the plaintiff, and while there is some testimony tending to show that the assignment was made after John was adjudged a bankrupt, which was on the 5th day January, 1902, and some other testimony of like character, we do not think it, or any of the evidence, is sufficient to show that the date of the instrument is not correct, and entirely insufficient to show that the assignment was dated back, in order to antedate the levy of plaintiff, under his execution.

In this case, the plaintiff has charged fraud and conspiracy. The burden is upon him to prove that, by clear and convincing evidence, and in this we think the plaintiff has failed.

As a circumstance in the case, it may also be noticed that plaintiff received his sheriff's deed on January 16, 1903; that there is not any evidence that he ever took any steps to take possession of the land; he permitted the defendants to remain in possession, cropping the same and paying the taxes, and from the time he received the deed, up until the action to quiet title was commenced against him by Herman, he certainly could not claim that he had been deceived by anyone. He must have known that they were raising crops on the land, and making payments to Hankinson on the purchase price of it.

John and Albertina Krause, at that time, had only a contract from Hankinson for the purchase of the land. That contract would, no doubt, have been subject to cancelation, if payments had not been made, and crops had not been raised with which to make the payments, as it was a crop contract. Yet, there is no demand for possession by the plaintiff, nor did he assert any act of ownership over it. He did not pay any taxes during that time, nor did he ever do so. Plaintiff's conduct, in this regard, certainly shows that he did not believe his interest in the land, if any he had, of any great value.

In the case of Krause v. Krause, 30 N. D. 64, 151 N. W. 991, one of the principal issues, as we view it, was whether there was any fraud in the assignment of the contract. This court, in stating the facts in that case, uses the following language: "Defendant, as a second defense, insists that the assignment to Herman was also made in fraud of creditors, and especially the creditor Latzke; among other things, calls attention to the fact that, on January 5, 1902, plaintiff's husband filed a voluntary petition in bankruptcy, was adjudged a bankrupt and discharged as such, December 3, 1903. The judgment of Latzke was scheduled in that proceeding. Defendant claims that the assignment of the Hankinson contract was in March, 1902, but was dated back, so as to appear to have been made before the Latzke judgment. The evidence as to dating back is very unsatisfactory, and was brought out from Herman by direct question of his counsel. The fact is denied, and the evidence will hardly warrant the court in finding that such assignment was dated back."

While that action was not between the same parties as this, and while the principle of *res judicata* could not, for this reason, perhaps, be invoked, even though some of the issues were the same, and especial-

ly was the issue of the antedating of the assignment involved in that case, yet we think we may take notice that the issue of antedating the contract was involved in that case, and that the evidence which tended to show such antedating was even stronger there than here, but, as the excerpt from the decision in that case shows, is not regarded as sufficient to show the fact of antedating the assignment. And so we conclude in this case, the evidence is entirely insufficient to show the antedating of the assignment, or to show fraud in procuring the same.

The testimony in this regard is not at all clear or convincing. We must therefore hold there is no fraud or conspiracy shown as claimed by plaintiff. We think the settlement made with Herman by plaintiff, whereby he received $100 from him, and gave him a quitclaim deed of the land, must be held to be a full and complete settlement for his interest in the land, if any he had, and his quitclaim deed must be held to have been validly and legally executed and delivered, and that it conveyed his interest in the land to Herman.

We think, also, that defendants John and Albertina may be considered the owners of the fee title of the land in question, free from any claims of plaintiff, by reason of having been in possession, under color of title, for a period of ten years, and paying the taxes during all that time.

It is true that for one year of the ten Herman paid the taxes, but we must hold, as the trustee for John and Albertina. At the time he paid the taxes for the year, he had money in his possession belonging to them, or one of them, which was greater in amount than the amount of the taxes for that year.

There is no dispute but that the $1,500 mortgage, above referred to, is a valid and subsisting lien upon the land in question, and it is so held.

We have examined all the errors assigned, and find none that would justify a reversal of the judgment. The judgment appealed from is affirmed. Respondent is entitled to his costs and disbursements on appeal.

STATE OF NORTH DAKOTA EX REL. JOHN M. BAER et al., Petitioners and Relators, v. THOMAS HALL, as Secretary of State, et al., Respondents.

(179 N. W. 712.)

Elections — candidates for individual nominations may object to printing at head of same column of names of others indicating they represent another national party.

Candidates whose names appear upon a general election ballot in a column devoted to "individual nominations" may properly object to the printing at the head of the same column of the names of candidates (also nominated by individual petitions) in such a way as to indicate that the latter represent a national political party with which the plaintiffs do not affiliate.

Opinion filed October 19, 1920.

Original application for writ of injunction.

Writ granted.

Wm. Lemke, Special Attorney General, *Barnett & Richardson, Clair F. Brickner,* and *Chas. L. Crum,* for petitioners and relators.

Wm. Langer, Attorney General, and *E. B. Cox,* Assistant Attorney General, for respondents Secretary of State and County Auditors. No appearance for individual defendants.

PER CURIAM. In the petition herein the plaintiffs allege that they are candidates for certain offices to be voted upon at the approaching general election on November 2, 1920, having been nominated by individual petitions. The respondents are printing concerns holding contracts for printing ballots, the secretary of state, and the county auditors of thirty counties, for which the respondent printing companies are printing election ballots. It is alleged that there are three parties in the state entitled to representation upon the official ballot, and to have the names of their candidates printed in separate columns, to wit, the Republican party, the Democratic party, and the Socialist party; that the candidates of these parties are entitled to have their names printed in a column, separate and distinct from the plaintiffs; that the respondents are engaged in the preparation, printing, and distribution of ballots on which the names of the plaintiffs appear in a

column headed "Individual Nominations," and under the names of candidates for Socialist presidential electors; that the word "Socialist" follows the name of each candidate for Socialist presidential elector, and that the candidates are grouped, and at the right of the group is printed the name "Debs;" that the petitioners are not Socialists, but individual candidates on individual nominations, who have in the past been Republicans, and who "intend to vote the Republican ticket, outside of their individual nominations;" that the printing and distribution of the ballot in the manner complained of will tend to confuse the voters and materially injure the chances of the petitioners in the election. The prayer for relief is for a temporary injunction restraining the action complained of, pending a hearing, and for a permanent injunction.

Upon the filing of the petition and the bond, a temporary restraining order was issued on October 16th, accompanied by an order to show cause, returnable October 18th.

Owing to the close proximity of the election, the attorney general was notified at the time of issuing the restraining order, and, to facilitate the early presentation of the matter, he waived further notice and consented to represent the official respondents. The individual respondents were not formally represented at the hearing on the return day.

The return and answer filed on behalf the official respondents denies that there are three political parties entitled to recognition as such on the official ballot, but contends that there are but two, the Republican and Democratic parties. It alleges that the Socialist party did not participate in the general election of 1918, to the extent of voting for candidates for representative in Congress and state officers. Nor did it participate in the presidential primary held in March, 1920. These facts, with reference to its nonparticipation, are borne out by the abstract of votes on file in the office of the secretary of state.

A separate answer has been filed by the county auditor of Richland county, accompanied by a sample ballot printed in four columns. This ballot is being supplied Richland county. In this ballot the names of the "Socialist" electoral candidates appear in a column separate and apart from the names of the petitioners. As no objection is made to this form of ballot, the petition will be dismissed as to the defendant the county auditor of Richland county.

It developed on the argument that the defendant Glove Gazette Printing Company is supplying ballots to twenty-four counties, and but three of them are being furnished ballots in the form objected to. There is then no objection to the ballots at present being supplied in forty counties.

It appears that the presidential electors who are designated as "Socialists" upon the ballot were nominated by separate, individual petitions, in which the petitioning electors did not purport to act as a party. The only statement in the petition in any way indicating the political principles which it was desired to have represented on the ballot is the request that the name of the candidate "be designated 'Socialist.'" Each of the affidavits filed by the nominees states, however, that he is a candidate of the Socialist party, and each petitions that his name be designated "Socialist" upon the ballot.

Our conclusions upon this matter must, of necessity be briefly expressed, and only such reasons will be assigned as, in our opinion, are essential to demonstrate the correctness of the conclusions. The nomination petitions of the candidates for presidential electors who desire to be designated as "Socialist" on the ballot are individual nominating petitions, and do not purport to represent the action of the party as such taken in any convention of any kind or in any primary election. They are essentially individual nominations, and, as such, they are not entitled to any grouping which would represent concerted party action. Neither is there any warrant for printing after their names upon the official ballot the designation of a person who is commonly known to be the candidate of the Socialist party for President. Nor is there any warrant for the printing of a box beside the name of the person who is regarded as the candidate of the Socialist party for President, in which it purports to be possible for the voter to vote by one cross for as many candidates for presidential elector as there are electors to be elected. Comp. Laws 1913, § 959. In brief, under the form of nominations made, the candidates who have stated that they desire to be designated as Socialists on the ballot are nothing more nor less than individual nominees, and there is no warrant for any sort of grouping upon the ballot or for any type of designation thereon that will tend to connect them with the party known nationally as the Socialist party.

But the correctness of our conclusion in this case does not depend upon the status, with respect to the Socialist party, of the electoral candidates who are designated "Socialist." For if it be assumed that these candidates are entitled to represent the Socialist party, and are to be regarded for all purposes of ballot arrangement as representing that party, it would follow that the petitioners have legitimate grounds for complaint against a ballot that would place the names of candidates affiliated with a distinct party organization in a column set apart for individual nominations, and this is especially true where the party nominations are for offices appearing at the head of the ticket.

We have not before us the electoral candidates who desire to be designated as Socialists. Consequently, we shall not undertake in this proceeding to determine absolutely the position and form in which their names may properly be placed upon the ballot. We are called upon here to determine the status of the Socialist electoral candidates only in so far as their arrangement upon the ballot adversely affects the petitioners. The petitioners have a right to have their names appear in the column of "individual nominations," and they have a further right to have removed from this column all semblance of political party affiliation on the part of other candidates appearing in the same column, except in so far as party affiliation may be inferred from the word or words used to designate the principles for which various nominees having individual nominations stand. Thus, if a three-column ballot is used, it should contain at least one column devoted exclusively to individual nominations, and in that column there may not be placed the names of any candidates not purporting to stand on individual nominations. If the "Socialist" President and Vice-President electors remain in the column, there must be removed therefrom the grouping of their names, the name "Debs" in the center and immediately to the right of the group, and the square or box purporting to facilitate voting for the group as a unit. We are not disposed, upon this petition, to interfere with the administrative matter of ballot arrangement, nor do we consider it a judicial function to determine what form of arrangement may be least calculated to produce confusion. We cannot say that the plaintiffs are prejudiced by having their names appear in the column of individual nominations along with other candidates who have individual nominations, even though

the principles for which the other candidates stand might differ radically from the principles for which the petitioners stand.

A writ will issue restraining the respondents in the respects hereinabove indicated, *viz.:*

The writ will require that in a three-column ballot there be one column devoted exclusively to individual nominations; that if the Socialist President and Vice-President electors remain in the column of individual nominations, there be removed from their names the name "Debs;" also that there be removed the square or box purporting to facilitate the voting for the group as a unit, and in lieu thereof there be placed a square opposite the name of each individual designated "Socialist," and that the respondents be restrained from printing or circulating three-column ballots which do not conform to this decision.

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

GRACE, J. I concur in the result.

STATE OF NORTH DAKOTA EX REL. JOHN F. LUHMAN, Appellant, v. J. L. HUGHES as the County Auditor of Stark County, State of North Dakota, Respondent.

(179 N. W. 717.)

Elections — certificates of primary nomination on a nonpartisan ballot held properly refused by county auditor.

Where, pursuant to chap. 117, Laws 1919, candidates for a county office have been selected upon a nonpartisan ballot at a primary election, § 501, Rev. Codes 1899 (§ 971a, Comp. Laws 1913), has no application, and certificates of nomination of a person as a candidate for such county office, to be voted on at a general election, were properly refused by the county auditor.

Opinion filed October 19, 1920.

Application for a mandamus in District Court, Stark County, *Crawford,* J.

From an order and judgment quashing the petition and dismissing the action, the relator has appealed.

Affirmed.

H. C. Berry, for appellant.

William Langer, Attorney General, and *Albert E. Sheets, Jr.,* Assistant Attorney General, for respondent.

PER CURIAM. This is an appeal from an order and a judgment dismissing and refusing to grant a petition for mandamus. The petition presented to the trial court alleged that the relator duly presented to the county auditor of Stark county certificates of his nomination signed by the requisite number of qualified electors in the county, nominating the relator to the office of sheriff of such county. That the relator requested the county auditor to place his name as candidate for such office on the official printed ballot, to be voted at the general election to be held November 2, 1920. That the county auditor refused so to do. In response to an order to show cause issued upon such petition, the county auditor answered and made his return to the effect that he refused to file such certificates of nomination for the reason that he was governed by chap. 117, Laws 1919; that the relator was not a candidate at the June, 1920, primary election, and no petitions nominating him for such office at such primary election had ever been filed. After a hearing, and upon the petition, and the answer of the defendant together with the records and files in the matter, the trial court made its findings, quashing the petition and dismissing the action, pursuant to which judgment was entered. The relator herein has, accordingly, appealed from such order and judgment. The only question concerned in this appeal is the right to be nominated upon an individual petition for the office of sheriff upon the nonpartisan ballot, where the selection of the nominees for such office has been held pursuant to law at a primary election conducted for such purpose. Upon this record there is no showing nor pretense made that such certificates of nomination were presented for the purpose of filling vacancies in the candidate or candidates for the office of sheriff. It will accordingly be presumed that the two candidates who received the highest number of votes at the primary election for such office of sheriff are the candidates whose names will appear on the ballot for the general election to

be held November 2, 1920. The relator asserts the right to become a candidate for such office under § 501, Rev. Codes 1899 (§ 971A, Comp. Laws 1913), which provides for individual nominations.

Chapter 117, Laws 1919, provides for the nonpartisan election of sheriffs as well as other elective county officers. It provides further that at all primary elections there shall be separate ballots which shall be entitled nonpartisan ballots, and the names of all candidates for any of such offices shall be placed thereon without party designation. It further provides that the candidate or candidates receiving the highest number of votes to the extent of double the number of those to be elected to any office, provided there are that many candidates running, shall be duly nominated thereto. That no partisan nominations shall be made for any of such offices. That at the general election there shall be separate ballots, upon which shall be placed the names of all candidates who have been thus nominated, and which shall be entitled "nonpartisan ballots." Clearly this law now effective provides a method for selecting candidates for the office designated, and electing them upon a nonpartisan ballot and without regard to party nominations or party conventions. The method now provided by this law is one for selecting candidates by individual nominations through a primary election, and not through partisan nominations.

Prior to the enactment of chap. 117, Laws 1919, a candidate for the office in question was nominated and elected as a party candidate or as a nonparty candidate upon individual nominations, pursuant to § 501, Rev. Codes 1899. See State ex rel. Hagendorf v. Blaisdell, 20 N. D. 622, 625, 127 N. W. 720; State ex rel. Burtness v. Hall, 37 N. D. 259, 163 N. W. 1057. Section 501, Rev. Codes 1899, accordingly, has no application where the candidates for the office concerned have been selected pursuant to the provisions of chap. 117, Laws 1919. The act is clear and specific in its terms concerning the selection of such candidates, and repeals all other acts or parts of acts in conflict therewith. The order and judgment are affirmed.

NAPOLEON ROBERGE, Plaintiff, Respondent, v. NAPOLEON Z. ROBERGE et al., Defendants, Esdras Roberge and Anne Roberge Alone, Appellants.

(180 N. W. 15.)

Appeal and error — in trial to court under Newman Act supreme court presumes findings based on proper testimony.

1. In an action under the Newman Act (Comp. Laws 1913, § 7843), prior to the amendment of chap. 8, Laws 1919, the supreme court upon appeal reviews the proper testimony in the record, and it is to be presumed that the findings of the trial court are based upon proper testimony in the record, unless the contrary is made to appear.

Trusts — resulting trust adjudged in favor of husband, who bought and paid for land title to which was taken in his wife's name.

2. In an action to declare a deed a deed in trust and to determine adverse claims, where the trial court has found that the husband, the plaintiff, bought 320 acres of land in 1901 and took the title thereto in the name of his wife, and that such husband farmed, cultivated, and improved the same and alone paid all of the consideration therefor; and where it appears from the proper testimony in the record that such findings are amply sustained, and that the presumption of gift or settlement arising from the relations of the parties (husband and wife) is negatived by affirmative evidence in the record, and that such deed was not so made for any purpose of avoiding claims or demands against the husband, it is *held* that a resulting trust arose in favor of the husband, pursuant to § 5365, Comp. Laws 1913.

Opinion filed October 19, 1920. Rehearing denied November 9, 1920.

Action in District Court, Rolette County, *Buttz*, J., to declare a deed a deed in trust and to determine adverse claims.

From a judgment in favor of the plaintiff, two of the defendants have appealed and demand a trial *de novo*.

Affirmed.

Duncan J. McLennan and *Henry G. Middaugh*, for appellants.

In order to overthrow the presumption in favor of defendant's title in a case such as this, the plaintiff must have more than a preponderance of the evidence. Carter v. Carter, 14 N. D. 66, 103 N. W. 425; Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Riley v. Riley, 9 N. D. 580, 84 N. W. 347; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576.

A trust must result, if at all, when the papers and the title pass. Barnard v. Jewett, 97 Mass. 87; Davis v. Wetherell, 11 Allen, 19, note; Roberts v. Ware, 40 Cal. 634; McClure v. Doak, 6 Baxt. 364; Gee v. Gee, 32 Miss. 190; Forsyth v. Clark, 3 Wend. 637; Page v. Page, 8 N. H. 187; Brown v. Cave, 23 S. C. 251; Hollida v. Schoop, 4 Md. 465, 59 Am. Dec. 88; Lehman v. Lewis, 62 Ala. 129.

Verret & Stormon, for respondent.

Witnesses who are not parties to the suit are not disqualified by statute, and may still testify as to conversations held with the deceased which are otherwise admissible. Truman v. Dakota Trust Co. 29 N. D. 456, 151 N. W. 219.

There was a resulting trust in favor of the plaintiff under the provisions of § 3365, Comp. Laws 1913. Carter v. Carter, 14 N. D. 66; Hickson v. Culbert (S. D.) 102 N. W. 774; Sutton v. Whatstone (S. D.) 112 N. W. 850; Graham v. Selbie (S. D.) 67 N. W. 831; Sing You v. Wong Free Lee (S. D.) 92 N. W. 1073; Doll v. Doll (Neb.) 147 N. W. 471; Doll v. Doll (Neb.) 155 N. W. 226; Re Mahin (Iowa) 143 N. W. 420; Sanford v. Sanford, 31 N. D. 190, 153 N. W. 412; Schmidt v. Scanlan (S. D.) 144 N. D. 128; Currie v. Look, 14 N. D. 482, 106 N. W. 131; Watt v. Morrow (S. D.) 103 N. W. 45; Kernkamp v. Schulz (N. D.) 176 N. W. 108.

BRONSON, J. *Statement.*—This is an action to declare an absolute deed a deed in trust, and to determine adverse claims in 320 acres of land. The substantial facts, so far as the same are deemed necessary to be stated, are as follows: The plaintiff, now about seventy years old, was married to his wife, Virginie, in 1877. She died in December, 1909, leaving as the result of such marriage six children, the defendants herein, only three of whom have contested this action, and only two of whom have appealed from the decision rendered by the trial court. In October, 1901, the land involved was purchased from one Coloton for $1,400, and deeded to the wife, Virginie. This consideration was paid by $200 in money borrowed, and by notes secured by a mortgage deed upon this land, signed by Virginie and her husband, the plaintiff. The notes for $100 each fell due in consecutive years commencing in November, 1902. The plaintiff testified that when they married, his wife had no property, and he, about $200 or

$300. They lived in Massachusetts for about seventeen years and then came to North Dakota. He had another half section of land in his own name. In 1901 he learned that the land involved was for sale; he bought it, borrowed $200 to make the first payment, and thereafter paid the notes of $100 each until they were all paid out of his own moneys; most of these payments were made from moneys received in the operation of a threshing machine. Later, buildings were constructed on this land. There he and his wife lived and there she died. He broke the land, cropped it, received the crop proceeds, paid the taxes, and has occupied it ever since. At the time of the purchase he was advised by John Burke, then an attorney, now United States Treasurer, and also a county commissioner, to put the title in his wife's name. He told his wife. She said she would sign her name, but that the farm would belong to him and not to her. That she would sign her name for trust and for protection and for our old age. (The husband and wife were French and spoke French.) Philias, a brother of the plaintiff, testified that at the time the deed was made the wife said that she did not own the land, that it was in her name, but she never paid a cent for it; that her husband paid for it. That the plaintiff borrowed money from him to pay for this land; that he told him he was going to buy this land and pay for it out of the threshing machine. The witness Wagner testified that he was in the real estate business in 1901 and sold this land to the plaintiff; that he made the deal with the plaintiff; had no dealings with the wife; the plaintiff made the loan from his firm to apply on the purchase price. The daughter Anne testified that the mother picked out the place on the land for building the home; that the mother kept the money for everything that was sold on the place; that it was given to mother and she would keep it for father. That she has seen her brother haul grain and bring the money home and give it to mother to put in a box; that afterwards she would give it to Ovilar to make payments on the land. Estras, a son, testified that his mother had charge of this box; that his father put money in that box and when he would pay anything he took it out of that box. That her father called this land mother's land.

Louis Roberge, a brother, testified that the plaintiff had stated several times that the land belonged to his wife. That in 1905 there were some charges on this land, but that he had paid some of them with

profits earned with his threshing machine. Plaintiff testified concerning the box that it was kept only for small change, and that his wife put change money it it. He further testified that the land is not very good soil, that the southeast quarter is worth about $3,000, with the buildings on it, and the other quarter about $2,500 to $2,800.

This action was started by the plaintiff in 1915 to have the deed declared a trust and to quiet title in the land. Three of the children, Napoleon, Estras, and Anne, answered, claiming each an undivided one-ninth interest therein. In 1916 the trial was had. Finally, in January, 1920, findings were made by the trial court that the plaintiff purchased, farmed, cultivated, and improved this land and paid the consideration agreed therefor; that a trust resulted in favor of the plaintiff in such land, and that the plaintiff is the owner in fee thereof. Pursuant to such findings judgment was entered, from which two of the children, Estras and Anne, have appealed and demand a trial *de novo* in this court.

Contentions.—The appellants contend that the testimony of Ovilar, Philias, and the daughter, Virginie, concerning the transactions had with the deceased mother, was incompetent under the provisions of the statute (Comp. Laws 1913, § 7871); that the record fails to show proof so clear, specific, and satisfactory as to establish a resulting trust; that the purchase price of the land, in fact, was paid out of the profits from the land itself; that in truth the consideration was paid or contributed by the wife as well as the husband, so that the principle concerning resulting trusts cannot apply; that the record discloses rather a trust for both of the parties for their old age, and an intent to place the title where the land would be clear from the debts of the plaintiff. The respondent further contends that the record clearly supports the findings of the trial court of the existence of a resulting trust free from any showing whatever, of any intent to make a gift or advancement of the land to the wife, or to protect the plaintiff from any claims or demands against him.

Decision.—This action was tried before the court under the so-termed Newman Act (Comp. Laws 1913, § 7846) prior to the amendment of chap. 8, Laws 1919. Under the act all of the evidence offered shall be received. The record accordingly is before this court with both the proper and improper testimony included. This appeal is

here, therefore, for review upon the proper testimony in such record, with the usual weight and influence accorded to the findings of the trial court that obtain in such cases. It will be presumed that such findings are based upon proper testimony in the record unless it appears to this court upon the review of the record that the contrary is the case. See Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Christianson v. Farmers' Warehouse Asso. 5 N. D. 438, 444, 32 L.R.A. 730, 67 N. W. 300; Carter v. Carter, 14 N. D. 66, 103 N. W. 425.

Upon the oral argument the respondent practically conceded that the testimony of the sons Ovilar and Philias, and the daughter Virginie, concerning transactions had with their deceased mother, as herein involved, were incompetent under the statute (Comp. Laws 1913, § 7871), but contended that the evidence otherwise is amply sufficient to sustain the findings of the trial court. In view of the conclusion to which this court has arrived upon the record, it is deemed unnecessary to pass upon or discuss the competency of such testimony under the statute. The court is satisfied that the findings of the trial court are amply sustained without any consideration of such testimony or the alleged hearsay testimony to which the appellants have also objected.

The principal contention of the appellants is that the proper evidence in the record does not disclose by that clear, specific and satisfactory proof required in such cases, a resulting trust under the statute.

Section 5365, Comp. Laws 1913, provides: "When a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

In establishing such trusts this court has heretofore held that the evidence must be clear, convincing, and satisfactory, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt. Carter v. Carter, supra; Sanford v. Sanford, 31 N. D. 190, 198, 153 N. W. 412; Kernkamp v. Schulz, 44 N. D. 20, 176 N. W. 111.

We are satisfied that, within this rule as stated by this court, the proper testimony in this record amply shows that the entire consideration for the purchase of this land was paid by the plaintiff, the hus-

band, and by him alone. By its findings, the trial court has so found, and it is to be presumed that it followed the rule above stated. The record further fully discloses that the husband not only paid the consideration, but he bought, improved, farmed, and in every way treated the land as his own ever since the date of the deed therefor. The evidence, slight as it is, to the effect that the moneys earned from this land assisted in the payment of this consideration. That the wife, as such, aided and helped in so paying such purchase price. That the land was called her land does not discredit the major thought evident throughout this transaction, that the husband was considered and treated as the owner, in fact, from beginning to the end. There is no showing at all that the husband did not treat this land the same as the other land owned by him in his own name. The earnings from this land, as far as this record shows, were considered as his earnings just the same as earnings from his other lands, no matter whether the same were, as they necessarily would be, aided and assisted by the co-operative efforts of his wife and children.

The presumption stated in the statute therefore obtained; provided the presumption of gift or settlement arising from the relation of the parties (husband and wife) is overcome by the evidence in the record. See Currie v. Look, 14 N. D. 482, 484, 106 N. W. 131, note in 127 Am. St. Rep. 252. The evidence, however, clearly negatives any such presumption of gift or settlement. It affirmatively negatives any intent of a gift or settlemnet. The record further does not warrant the claim that the deed was made for the purpose of avoiding claims and demands existing or that might exist against the husband. The language and acts of the parties must be considered in connection with their status in life. They talked French; they were not well versed in English. The inducing cause for so placing the title in the wife was probably the advice of two well-known and well-versed people within their acquaintance, upon whom they placed reliance in such matters. Rather sad is the commentary that this property, comprising with the husband's other property, "the community" in fact, of the husband's and wife's efforts of life, should now, near "the end of his journey," be sought, by anticipation, through descent.

The judgment is affirmed, with costs.

ROBINSON and GRACE, JJ., concur.

BIRDZELL, J. (dissenting). The plaintiff in this case does not rely upon an express trust, for no valid express trust was created. Comp. Laws 1913, § 5364. This section is a misprint. See § 4821, Rev. Codes 1905, for the correct provision. He relies upon a trust which the law implies from the circumstance of the payment of the consideration. Comp. Laws 1913, § 5365. This is a resulting trust implied in law. In such cases the rule is established that the plaintiff's evidence must amount to more than a mere preponderance, for he is seeking to overcome the apparent legal effect of his own act in directing or permitting the title to be vested in another. Carter v. Carter, 14 N. D. 66, 103 N. W. 425. In that case it was stated in the syllabus:

"The proof must be clear, specific, satisfactory, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt."

A majority of the members of this court has expressed the opinion that this burden of proof has been sustained by the plaintiff, and has stated the substance of the testimony which is regarded as amounting to the necessary proof. In this the majority members agree with the trial court. A reading of the evidence, however, leaves in my mind a grave doubt as to the correctness of this conclusion. This doubt arises from the facts established by the record with regard to the payment of the consideration, as well as from the testimony of the plaintiff himself with regard to the nature of the transaction when the land was conveyed to his wife.

The consideration was not paid at the time the property was purchased, but was paid later, largely from the earnings of the farming operations upon the land in question. The grantee in the deed was shown to have been an important factor in the operation of the farm. So it was really paid out of the joint earnings of the husband and his wife.

Where a husband causes property to be transferred to his wife or to be taken in his wife's name, a presumption of gift or settlement arises which must be overcome before a court is justified in directing a reconveyance. See Pom. Eq. Jur. § 1039; Perry, Trusts, §§ 143, 147. It does not seem to me that this presumption is overcome in this case.

The testimony of the plaintiff himself goes a long way toward disproving the existence of a resulting trust for his benefit. He testified:

"Well, says I, if I can get the $200 I believe I will try it, and Mr. Wagner commences to make the deed out in my name, and that farm I was going to buy they were mortgaged up lots of times and I didn't want to do any business without getting anybody to look the thing up for me, so I went down to get John Burke. Mr. Burke came to Mr. Wagner's office and he looked things over, and Mr. Wagner asked me if I have any bond. That is all I could remember now. I told him I could get some. Mr. Burke says, 'Mr. Roberge, *why don't you put that in your wife's name,' and Mr. Godfrey says that too.*"

"Q. Both men?"

"A. Both men. He says if there is any bond to be paid you pay that yourself. Then for the reason it will get *it in trust for you in your old age, you and your wife, and I told* Mr. Burke and Mr. Godfrey that *I didn't see no difference between my name and my wife's name.* Mr. Burke told me, he says *if you want to keep it in trust for your old age that is the way you have got to do it.* So they made them papers and I went down home with them papers and I told my wife, 'Here is the property, *for our old age,'* and she says, 'I don't want to have those in my name.' She says, 'I am not supposed to know anything about farming or anything of that kind.' Says I, 'I was advised by the two wisest men in the county to do that *for our protection for our old age.'* My wife replied, she says, 'In this case I sign my own name,' but, she says, 'the farm will belong to you, and not to me.' She says, *'I will sign my name for trust and for protection for our old age.'* She says, first, 'If I die—I don't know whether it will be next year or ten years or twenty years or fifty years. . . . And you don't have no trouble with nobody and I suppose if you die yourself *it will be something for me; it is a trust, those papers for our old age.' So she signed them, and I sent them to Mr. Burke.*"

From this testimony it would seem to be clear that if the plaintiff had died before his wife, the grantee in the deed, the heirs could not have established a trust, for the legal title and the complete beneficial interest would have merged in her. In fact, she had a beneficial interest from the beginning, and the most the plaintiff ever had after the original conveyance, according to the legal effect of the transaction as

disclosed by his own testimony, was a charge upon the estate for his own support in old age. See Perry, Trusts, § 152; Pom. Eq. Jur. § 1033. In the light of the plaintiff's own testimony, he surely could not have secured a reconveyance during the life of the grantee, and, as I view the case, he is in no better position to do so after her death.

Viewing the case in this light, I am unable to concur in the majority opinion.

CHRISTIANSON, Ch. J., I concur in the foregoing opinion of Mr. Justice BIRDZELL.

JOHN E. LEIDGEN, an Infant, by Harry L. Birdsall, His Guardian ad Litem, Respondent, v. JOHN R. JONES, Appellant.

(179 N. W. 714.)

Master and servant — contributory negligence and assumption of risk defenses not available to employer unlawfully employing minor.

1. Where a minor aged thirteen years seven months is employed to assist in operating a circular saw in violation of the provisions of § 1412, Comp. Laws 1913, the defenses of contributory negligence and assumption of risk are not available to the employer.

Master and servant — instructions on liability to minor injured in unlawful employment held proper; evidence as to unlawful employment of minor held admissible.

2. In an action for personal injuries, where a boy, aged thirteen years, seven months, was employed by the defendant, as found by the jury, to assist in the operation of a circular saw used for sawing wood in a woodyard, it is *held:*

NOTE.—There seems to be considerable conflict of opinion on the question of contributory negligence or assumption of risk by minor employed in violation of statute, but the view is apparently growing that neither contributory negligence nor assumption of risk can be relied upon by the master as a defense to an action for personal injuries to a child who is employed under statutory age, as will be found by an examination of the authorities collated in notes in 12 L.R.A.(N.S.) 461; 20 L.R.A.(N.S.) 876; and 48 L.R.A.(N.S.) 667, on right of one employing child under statutory age to rely on contributory negligence or assumption of risk, to defeat liability for personal injuries sustained by latter.

Upon the general question of assumption of risk by minor servants, see note in 1 L.R.A.(N.S.) 279.

(a) That no prejudicial error was committed by the trial court in not instructing and in refusing to instruct the jury upon methods of guarding the saw, the questions of the ordinary care exercised by the defendant, and the contributory negligence and assumption of risk on the part of the boy.

(b) That the instructions fairly submitted to the jury the nonliability of the defendant, if the jury found that the boy was not so employed by the defendant.

(c) That it was not error to admit evidence that the plaintiff and other boys, just prior to the accident, assisted in the operation of the saw.

(d) That it was not error to charge the jury that the defendant was presumed to know the statute prohibiting the employment of minors in the operation of circular saws.

Appeal — party equally in fault cannot predicate error on improper comments and arguments of adverse party.

3. In the trial of an action for personal injuries, where the counsel for both the plaintiff and the defendant are equally at fault, in comments during the trial and in arguments to the jury concerning the private and family affairs of the respective parties, improper *per se*, extraneous to the issue, and in part outside of the evidence, it is *held* upon the record that the defendant is not in a position to predicate prejudicial error upon the conduct of plaintiff's counsel in that regard.

Opinion filed October 20, 1920. Rehearing denied November 9, 1920.

Action for personal injuries in District Court, Richland County, *Graham*, J.

From a judgment for the plaintiff and from an order denying a new trial, the defendant has appealed.

Affirmed.

Forbes & Lounsbury, for appellant.

The test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods or machinery in general use in the business. Titus v. Railroad Co. 136 Pa. 618, 20 Atl. 517; Kehler v. Schwenk, 144 Pa. 348, 22 Atl. 910; Reese v. Hershey, 20 Atl. 907; Wolf v. Des Moines Elevator Co. (Iowa) 102 N. W. 517.

There is no proof in the case that it was customary to put guards upon machinery of this character. Walter v. Wolerine Portland Cement Co. (Mich.) 112 N. W. 113; Yazdewski v. Barker (Wis.) 111 N. W. 689; Delaware River Iron Shipbuilding & Engine Works v. Nuttall (Pa.) 13 Atl. 65.

J. A. Dwyer and *W. S. Lauder*, for respondent.

The defendant was bound at his peril to know that plaintiff was past sixteen years of age when he sent him or permitted him to assist in operating the wood saw. Dusha v. Virginia etc. Co. (Minn.) 176 N. W. 483; Beauchamp v. Sturgis etc. Co. 250 Ill. 303, 231 U. S. 320; Braasch v. Michigan Stove Co. 153 Mich. 652, 118 N. W. 366. See also note to same case in 20 L.R.A.(N.S.) 500.

The protection of children under sixteen years of age is an inherent power of sovereignty, and the liberty and property of the citizens are subject to this power. Inland Steel Co. v. Medinak, 172 Ind. 423, 139 Am. St. Rep. 386–397; Barbier v. Conolly, 113 U. S. 27; Mugler v. Kansas, 123 U. S. 436; Re Kemmler, 136 U. S. 436; Freund, Pol. Powers, § 259; Bryant v. Skillman Co. 76 N. J. L. 45; State v. Shorey, 48 Or. 396.

BRONSON, J. *Statement.*—This is an action for personal injuries. The defendant has appealed from a judgment in favor of the plaintiff, and from an order denying a new trial. The facts, necessary to be stated, are as follows:

On August 27, 1918, the plaintiff, then aged thirteen years, seven months, suffered injury to three fingers on his right hand, while assisting in the operation of a circular saw in the woodyard of the defendant, at Hankinson, North Dakota. He appears by his guardian *ad litem*. The defendant was engaged in the fuel business, and maintained a woodyard. He had in his employ then about twenty men. In this yard he used a circular saw, operated by a gasolene engine, for the purpose of sawing wood. This saw and engine were supported on a frame some 14 to 16 feet long, and were mounted on trucks so as to be moved from one place to another. The saw was situated on one end and the engine on the other. The wood was sawed by operating a sliding table upon which the wood was placed. The saw was exposed, with no covering or guard. The defendant testified that he was not in personal superintendence of this saw; that one Gronke was the man in charge of the woodyard, and, when he was there, the person in charge of this saw. He further testified that on August 27, 1918, he had employed the boy to pull weeds in this woodyard; that he had employed this boy before but he had quit. That he had no knowledge that the boy, on the day he was hurt, was at the saw; that he had a crew to run

this saw consisting of one Gronke, one Scheller, one Eberhard, and one Radloff. Radloff testified that he was fourteen years old; Eberhard testified that he was thirteen years old. The plaintiff boy testified that he worked for the defendant commencing on August 12, 1918; that he did several different jobs; worked in building and loading a hay rack, unloaded lumber, cordwood, and hauled sawdust from the ice house. That he worked until August 17th. He worked again for the defendant on August 22d, 23d, 24th, 26th, and the 27th. He testified that, on the morning of August 27th, he saw the defendant in the office, because on Monday night he told him that he thought he should haul grain on Tuesday. On this morning of the 27th, he was directed by the defendant to go down and pull weeds in his woodyard. That he went down with the Radloff boy and pulled weeds for about two hours and finished the job. That then he and Radloff walked towards the office, but before they got there the defendant told them to go down and help saw wood with Gronke, Scheller, and Eberhard, who were in a wagon which was then going past towards the yard. That they accordingly went along to saw wood. Further, that, at the yard, Gronke started the engine, and a load of wood was sawed. Scheller got his load and took it away. Gronke then said that one of the boys should go up and take the wood away. Two of the boys were busy getting wood, so he (the plaintiff) went and started taking wood away from the saw. At the time there were four operating that saw. Gronke was feeding the wood into the saw; Radloff and Eberhard were carrying up the wood; the plaintiff was taking away the wood from the saw. He happened to be the one to take away wood, because he had just put a piece on the table to be sawed and the other boys were busy getting wood, and, as Gronke kept on sawing, he had to go up and take it away. Concerning the injuries sustained, he testified that about 11 the engine stopped; a big piece of wood stopped it, and Gronke went around to start it again. As it started he came around, and as he went around "I was turning, and my hand got caught in the saw, and it was sawed." He further testified that he had previously worked on this saw between the 12th and 17th of August. It further appeared from his testimony that he was living with his mother and stepfather. The defendant elicited testimony from him, over objection, that his father had been a bartender and had been in the penitentiary. The defendant further, upon examination of the

mother and the stepfather, brought out, over objection, the fact that prior to their marriage they had held themselves out as husband and wife and hired out as such to a farmer in the vicinity. Scheller, a witness for the defendant, testified that on the morning of the accident he went over to the woodyard and started the saw; that Eberhard and Radloff came along and they started the saw; that Gronke came; then Gronke pushed the table, he threw away, and the two boys, Eberhard and Radloff, handed up the wood. That then he saw this plaintiff boy up there at the saw; that the engine stopped and Gronke went to fix it; that he drove the team to another part of the yard; that he did not see the boy get hurt; that Jones told him that morning to go and saw wood; that these two boys, Radloff and Eberhard, were the only ones then there, and he knew they were working for Jones; that Gronke was there in charge. That this saw had been there some six years. He explains that when Gronke came he wanted to, "throw away" the wood, "them three kids they handed the wood down."

Radloff, a boy aged fourteen years, a witness for the defendant, testified that he worked for the defendant on August 27th; he sawed with Scheller; he first saw plaintiff around the saw on the day of the accident; that when plaintiff came he (plaintiff) started to carry wood, helping him and Eberhard; the wood was handed to Gronke. After the engine started to slow up, they started piling wood alongside of the saw so as to have it handy to put it on the saw. The plaintiff helped a little while, then he stopped and started talking about a Saxon car; when he got hurt he was standing alongside of the table of the saw; the saw was running when he got hurt, but they were not sawing wood. He had previously helped to run this saw many times. Gronke, a witness for the defendant, testified that on the morning of the accident he went to the woodyard; Scheller and the two boys, Eberhard and Radloff, were there sawing wood; he then took Scheller's place, pushing the saw. The engine started to buck; it did not stop but went slow; he stopped sawing wood and went in to fix the engine. About ten minutes or something before the saw began to stop or buck, the plaintiff was there. He first saw him putting wood on the table; the three boys there were helping; they piled up wood close to the saw; he did not see the plaintiff get hurt. He further testified that when he got the engine fixed he expected those three boys to help him; that he expected to saw wood

with Scheller and those three boys (meaning Radloff, Eberhard, and the plaintiff). He cannot remember whether the plaintiff helped him saw wood before or not.

Eberhard, aged thirteen years, a witness for the defendant, testified that he worked for the defendant and helped to saw wood; that on the day of the accident the plaintiff was there handing wood to Gronke. The three boys were taking wood away from the pile and passing it over to the man who was sawing.

During the course of the arguments to the jury the counsel for the defendant made personal attacks upon the private life and relations of the boy's mother, and, in response, the counsel for the plaintiff likewise personally attacked the home and family relations of the defendant. The jury returned a verdict in favor of the plaintiff for $5,000.

Contentions.—The defendant has made some twenty-one assignments of error. These are based upon more than seventy specifications of error. These assignments and specifications will be briefly summarized as follows: That the trial court erred in refusing to admit evidence concerning, and to give instructions upon, methods of guarding the circular saw; in admitting evidence that other boys under sixteen years of age assisted in the operation of this saw; and in refusing to admit evidence that the defendant did not know of the statute concerning the employment of minors under sixteen years of age. That the plaintiff's attorney was guilty of prejudicial misconduct in his address to the jury, by referring to the private and family affairs of the defendant without any justification in the record therefor. That the trial court erred in its instruction to the effect that the directions given by one Gronke were the same as if given by himself. That, likewise, it was error to instruct that the plaintiff boy was not precluded from recovering damages because he had contributed to the injury. That it was prejudicial error to instruct that the defendant was presumed to know the statute concerning minors. That it was error not to instruct the jury, if the boy were employed only for pulling weeds, upon the nonliability of the defendant, the measure of ordinary care imposed upon the defendant and the boy, and the duty of the defendant with reference to latest improvements upon circular saws. That the court likewise erred in refusing to submit the defendant's requested instructions upon the measure of plaintiff's recovery; and finally that the evidence in connection with

such errors is insufficient to support the verdict. Upon the oral argument, the counsel for the defendant grouped the assignments, and strenuously contended that it appears from a consideration of them, as a whole, that the defendant was not accorded a fair trial. That the plaintiff, in the presentation of his case, and the court, in its instructions to the jury, did not submit the case upon the theory of the statutory liability of the defendant.

Decision.—The statutes of this state prescribe that it is both unlawful and criminal to employ a child under the age of sixteen years in operating or assisting in operating circular saws. Comp. Laws 1913, §§ 1412, 1413. The evidence in the record is ample to justify the finding of the jury that the defendant did employ the plaintiff, a boy then aged thirteen years, seven months to assist in the operation of a circular saw. This violation of the statute (so found) established negligence akin to gross negligence. It rendered him liable in a civil action for the injury resulting without regard to the questions of the boy's contributory negligence or assumption of risk. Dusha v. Virginia & R. L. Co. 145 Minn. 171, 176 N. W. 482; Statz v. F. Mayer Boot & Shoe Co. 163 Wis. 151, 156 N. W. 871, Ann. Cas. 1918B, 675; Pinoza v. Northern Chair Co. 152 Wis. 473, 140 N. W. 84. The legal duty imposed upon the defendant through this statute is express and definite. The legislative intent is clear and not to be misunderstood. This duty is not abrogated nor absolved by the contributory negligence or the assumption of the risk by a boy of tender years, whom the statute, in the exercise of a police power, has aimed to, and does, protect.

The evidence and the contentions of the defendant have been set forth rather fully to show the application of such contentions to the record evidence and the law. The complaint alleges that the defendant unlawfully, and with gross negligence, ordered, directed, instructed, and commanded the plaintiff, as an employee, to work around and assist in the operation of this circular saw. It alleged many other things concerning the negligence of the defendant that were unnecessary in an action for the violation of the statute. It, however, alleged a cause of action for the violation of the statute. See Krutlies v. Bulls Head Coal Co. 249 Pa. 162, L.R.A.1915F, 1082, 94 Atl. 459. The defendant sought during the course of the trial, to adduce evidence concerning

the care of the defendant, and the contributory negligence and assumption of risk on the part of the plaintiff. He likewise sought, in the requested and refused instructions, to have the court charge the jury upon these matters. The issue, presented upon the pleadings and the evidence, was squarely the question whether the defendant did employ the plaintiff to assist in the operation of this circular saw. This issue, the trial court fairly submitted to the jury upon instructions reciting the statute, and requiring the jury to find by a preponderance of the proof that the defendant did so employ the plaintiff. It is apparent that the parties, at least the defendant, during the course of the trial, was not fully aware of this statute and the nature of the defendant's liability thereunder. It is true that the trial court, perhaps, through the lack of presentation by the parties of the nature of the statutory liability, charged the jury upon doctrines of contributory negligence and assumption of the risk on the part of the boy. Such instructions, instead of being prejudicial, were too favorable for the defendant. By reason thereof, the defendant was not entitled to have submitted correlative instructions by way of antithesis.

The court might have submitted only, and properly, the charge that if they found by a preponderance of the proof that the plaintiff was employed by the defendant to assist in the operation of this saw, the plaintiff was entitled to recover. See Beauchamp v. Sturges B. Mfg. Co. 250 Ill. 303, 95 N. E. 204, 231 U. S. 320, 58 L. ed. 245, L.R.A. 1915A, 1196, 34 Sup. Ct. Rep. 60. It clearly appears that prejudicial error does not exist in the record upon these matters.

It was not error to admit evidence that this plaintiff and other boys under sixteen years of age, just prior to this accident, had assisted in the operation of this saw. It was corroborative evidence of knowledge by the defendant and his man in charge of the saw that the boys were working thereupon contrary to the statute (which they were presumed in law to know). See Rober v. Northern P. R. Co. 25 N. D. 394, 410, 426, 142 N. W. 22. It was likewise not error, in view of the record, to charge the jury that the defendant was presumed to know the statute involved, and was bound by the directions given by his man, Gronke, who was in charge of this woodyard and the saw.

Upon this record prejudicial error may not be predicated upon the

remarks made by the plaintiff's counsel in his address to the jury. Evidence was adduced, and many remarks were made by both counsel in this case, which, considered by themselves, might well be termed prejudicially erroneous. However, without, in any manner commending such conduct, it is held that both parties are equally culpable, and the defendant is not in a position to complain. It is fair to assume that the jury, if influenced at all, were influenced one way as much as the other. The trial court of its own motion might properly have restrained such remarks. The court fairly instructed the jury upon the measure of plaintiff's recovery. The record, pursuant to the finding of the jury, discloses clearly a liability for violation of the statute. The judgment and order is affirmed, with costs.

CHARLIE CHRISTENSON, Respondent, v. MRS. MARGRIET GRANDY, Formerly Mrs. Margriet Myrdal, Ragnhildur Myrdal, Johann Vilhjalmur Myrdal, Einar Myrdal, et al., Appellants.

(180 N. W. 18.)

Guardian and ward — guardianship held to terminate within Statute of Limitations when minor attains majority — Statute of Limitations held to apply to suit to recover land conveyed by guardian.

Section 8923, Comp. Laws 1913, which provides: "No action for the recovery of any estate sold by a guardian can be maintained by the ward or any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise at the time when the cause of action accrues within three years next after the removal thereof,"—construed, and *held:*

(1) That, within the purview of said statutes, the guardianship is terminated when the minor attains his majority.

(2) That in the instant case, wherein it appears that a guardian was duly appointed; that such guardian presented a petition setting forth certain alleged reasons why certain land belonging to the minor wards should be sold; that the county court made a decree upon such petition, awarding the land to the guardian to enable her to make conveyance to the purchaser, and required the guardian to furnish an additional bond in an amount exceeding the appraised value of the land; and that such guardian thereafter sold and conveyed the land to a purchaser, who paid the purchase price and commenced to exercise

full and complete control over the premises as owner,—the limitation prescribed in such statute is applicable.

Opinion filed October 20, 1920. Rehearing denied November 9, 1920.

From a judgment of the District Court of Cavalier County, *Kneeshaw,* J., defendants Ragnhildur Myrdal and Johann Vilhjalmur Myrdal appeal.

Affirmed.

E. E. Fletcher and *McIntyre & Burtness,* for appellants.

The heirs of the entryman do not take by descent, but by purchase, and with the same force and effect as though their names were written in the patent. Hutchinson v. Caldwell, 153 U. S. 65, 38 L. ed. 356; Witenbrock v. Wheadon (Cal.) 60 Pac. 664.

Each one of the parties would receive an undivided one-fourth interest in the land under the patent. Ibid.

Under the ten-year statute that tacking of possession is not permissible. Streeter v. Frederickson, 11 N. D. 300; Wright v. Jones, 23 N. D. 191.

"Occasional cutting and removal of hay from unoccupied lands under a permit from one claiming title adverse to the plaintiff's grantor is not sufficient to constitute adverse possession so as to avoid plaintiff's deed." Page v. Smith, 33 N. D. 369; Johnson Land Co. v. Mitchell, 29 N. D. 528; State Finance Co. v. Beck, 15 N. D. 374.

The statute does not begin to run until the guardianship has been legally ended, which requires an order of the court having judisdiction of the guardianship, discharging the guardian. Gronna v. Goldammer, 26 N. D. 121; United States F. G. Co. v. Bank, 36 N. D. 16.

G. Grimson (*Bangs, Hamilton, & Bangs,* of counsel), for respondents.

"The guardianship terminates in all events at the arrival of the ward at majority, except for purposes of a final accounting and settlement with the ward." 21 Cyc. 50. See cases cited. Re Algier, 3 Pac. 849; Ganahl v. Sohr, 8 Pac. 650. Comp. Laws 1913, § 8880; being Comp. Laws 1887, § 6038.

Christianson, Ch. J. This is an action to determine adverse claims to a quarter section of land in Cavalier county. The trial court ren-

dered judgment in favor of the plaintiff, and the defendants Ragnhildur Myrdal, Johann Vilhjalmur Myrdal, and Einer Myrdal have appealed and demanded a trial *de novo* in this court.

The complaint is in the usual form, and sets forth that the plaintiff has an estate in fee simple in the premises in controversy and is in possession thereof; and that the defendants claim certain estates or interests in or liens or encumbrances on said property adverse to plaintiff. The prayer for judgment is: That the defendants be required to set forth their claims and that such claims be adjudged null and void; that title be quieted in the plaintiff as to all claims of the defendants; and that the defendants be forever debarred and enjoined from asserting the same. Ragnhildur Myrdal, Johann Vilhjalmur Myrdal, and Einer Myrdal, in their answer, aver that they are the owners of a three-fourths fee simple estate in the land by reason of (their) being the heirs of one Einar E. Myrdal; and by virtue of the patent for said premises issued by the United States government to "the heirs of Einar E. Myrdal, deceased," on December 21, 1891. To this answer plaintiff interposed a reply, wherein he averred that, in proceedings had in the county court of Cavalier county, the said defendant Margriet Myrdal was on August 26, 1891, duly appointed guardian of the said above-named three appellants; and that subsequently it was ordered by the county court of Cavalier county in said proceeding that the land in controversy be awarded to the said Margriet Myrdal, with privilege to sell the same at public or private sale; that said final decree so adjudging was entered on March 7, 1892; that the said Margriet Myrdal did on March 30, 1892, in pursuance of said order, convey said premises to one Frank W. Wilder by warranty deed, which was duly recorded in the office of the register of deeds of Cavalier county, North Dakota, on April 12, 1892; that said Wilder paid to the said Margriet Myrdal the sum of $710 for her share and for the shares of said three appellants in and to said land; that the said land was subsequently sold and conveyed to various parties by instruments of conveyances duly recorded; that the plaintiff purchased the same on December 11, 1914, from the then record owner thereof; that since the purchase by said Wilder on March 30, 1892, said Wilder, and those holding under him or them, have been in possession of said premises and have paid all taxes assessed against the premises. The said reply further averred,

among other things, that the said defendants are barred by various statutes of limitation, including § 8923, Comp. Laws 1913, from maintaining an action for the recovery of said land; and that appellants have been guilty of laches in asserting their alleged rights to said land, and hence are estopped from now asserting such rights.

The material facts are undisputed, and may be summarized as follows: In May, 1890, one Einar E. Myrdal and his wife and children moved on the premises in controversy. Myrdal had entered such premises under the United States pre-emption laws. On April 12, 1891, Einar E. Myrdal died, leaving surviving him as his heirs at law his widow, Margriet (now Margriet Grandy), and his three children, the appellants in this case. Shortly after the death of her husband, Mrs. Myrdal and the children moved to the vicinity of Gardar in Pembina county, some 12 or 15 miles distant from the land in controversy, at which latter place her deceased husband owned a 40-acre tract of land. Judging from her testimony she had little or no faith in the land in controversy. It seems that she had virtually made up her mind to abandon it, and it is very doubtful if she ever would have made final proof thereon if it had not been for Bjorn Bjornson, who apparently had some claim against the deceased, Einar E. Myrdal; and, through his solicitation and assistance, Mrs. Myrdal was induced to make final proof thereon. Bjornson took the matter up with one Blichfelt, who at that time was engaged in the real estate business at Langdon, and induced him (Blichfelt) to advance the necessary moneys to pay the government the purchase price and the costs and expenses incident to the final proof. It also appears that these parties, after the final proof had been made, induced Mrs. Myrdal to make application to the county court to be appointed guardian of the three minor children. She was so appointed guardian by order of the county court on August 21, 1891. On December 21, 1891, patent was issued by the United States government, conveying the land to the "heirs of Einar E. Myrdal, deceased." The petition for the appointment of a guardian was entitled, "In the Matter of the Estate of Einar E. Myrdal, Deceased." The petition, among other things, averred that said minors were residents of Cavalier county, and "that they have no father living, or other legal guardian residing in the state of North Dakota; that said minors have real estate to the value of about $500" situated in the county of Cavalier. The

order for appointment of guardian was entitled, "In the Matter of Appointing a Guardian for Ragnhildur, Johann, Wilhelm, and Einar Myrdal, Minors." The order required Margriet Myrdal to give a bond in the sum of $1,000. After such bond had been given and approved by the county court, letters of guardianship (entitled as the order) were issued to said Margriet Myrdal. Thereafter an order was made appointing appraisers. Such order was entitled, "In the Matter of the Appraisement of the Estate of Ragnhildur, Johann, Wilhelm, and Einar Mrydal, Minors," The order recited that it is made "on the application of the guardian of the said minor children of Einar E. Myrdal, deceased," and ordered that three named persons be appointed "to estimate and appraise all the estate of the decedent, except such as is by law exempt from appraisement." Warrant to appraisers was issued accordingly. The inventory returned and filed by the appraisers recites that it is "a true and correct inventory of all the real estate and all the goods, chattels, rights, and estate of Einar E. Myrdal, deceased, which have come to the possession or to the knowledge of the undersigned guardian and the appraisers of said estate." (The only property mentioned in the inventory is the real estate in controversy, which is appraised at $500. It is stated that there is no money, or personal property.) The inventory is verified by Margriet Myrdal. The verification attached thereto recites: "Margriet Myrdal, by appointment of said county court, guardian of the estate of said Einar E. Myrdal, deceased, being duly sworn, etc." Thereafter Margriet Myrdal filed a petition in the county court, wherein she averred, among other things:

"That your petitioner has been duly appointed guardian of the minor children and estate of the late Einar E. Myrdal, and that letters of guardianship have been issued by this honorable Court to your petitioner on the 27th day of August, 1891, as will appear, reference being had to the record in this cause; . . .

"That said deceased left nothing but one real property valued at about five hundred dollars ($500) which is now in the possession of your petitioner;

"That your petitioner and Ragnhildur, Johann, Wilhelm, and Einar Myrdal, minors, of whom the petitioner is guardian, are the only heirs entitled to the estate of said deceased;

"That the property so left by said deceased consists of the following

described land, to wit: The southeast quarter (S.E.¼) of section thirty-two (Sec. 32) in township one hundred and fifty-nine (159) and range fifty-eight (58);

"That your petitioner has no experience whatever as to farming, and that the land above mentioned can be of no benefit and profit to the heirs, said petitioner being unable to work it herself or to see to its proper management, so as to be of some benefit to the heirs;

"That your petitioner verily believes that the most proper and useful course to follow would be that a final decree be issued giving the above-mentioned property to your petitioner, with privilege to sell the same at public or private sale, or by said petitioner giving a good and proper bond as security in case of sale of said property, for the shares of the above-named minor children.

"Wherefore, your petitioner prays:

"That your petitioner and the minors above mentioned be declared the sole and only heirs of the estate and of said Einar E. Myrdal, deceased;

"That for the greatest advantage and benefit of said heirs the land above mentioned be sold either at private or public sale or by said guardian giving good security for the shares of her wards in the said property;

"That for the purpose of enabling said petitioner to give a clear title to the buyer of said property, the final decree to be issued by this court be issued to Margriet Myrdal in her own name."

The county court made the following indorsement on the petition: "The above petition is hereby granted, and a final decree as prayed for is ordered to be issued to Margriet Myrdal, the above-named petitioner, according to the tenor of said petition," Margriet Myrdal executed an additional guardian's bond in the sum of $700. The bond was signed by two sureties, and approved by the county court. On the same day, to wit, March 7, 1892, a final decree was entered, whereby it was "ordered, adjudged, and decreed . . . that all and singular the above-described real property be and the same is hereby assigned to and vested in the said Margriet Myrdal, forever, in the following proportions, to wit: The whole of said property, to wit, the S.E.¼ section 32, township 159, range 58, in the county of Cavalier, state of North Dakota." Thereafter, on March 30, 1892, Margriet Myrdal conveyed

the premises to said Frank W. Wilder, by warranty deed. Such deed was duly recorded in the office of the register of deeds of said Cavalier county on April 12, 1892. Wilder and his successors have exercised full control over the premises since that time, and no claim has been asserted thereto by any of the defendants until they interposed their answers in this action. The youngest of the Myrdal children became twenty-one years old on April 9, 1912. This action was commenced June 27, 1916.

The only question which we find is necessary to consider is whether the action is barred by § 8923, Comp. Laws 1913, which reads: "No action for the recovery of any estate sold by a guardian can be maintained by the ward of any person claiming under him, unless it is commenced within three years next after the termination of the guardianship or when a legal disability to sue exists by reason of minority or otherwise at the time when the cause of action accrues within three years next after the removal thereof."

Appellants contend that they are not barred by § 8923, Comp. Laws 1913, for the following reasons:

(1) That the guardianship of the appellants has not been terminated.

(2) That the statute does not apply because the jurisdictional requirements relating to sales by a guardian were not complied with, and that hence the sale to Wilder was void.

We will consider these contentions in the order stated.

(1) Appellants contend that the guardianship is not terminated, within the meaning of § 8923, supra, until an order is made discharging the guardian. In the support of this contention they cite Gronna v. Goldammer, 26 N. D. 122, 143 N. W. 394, Ann. Cas. 1916A, 165, and United States Fidelity & G. Co. v. Citizens' State Bank, 36 N. D. 16, L.R.A.1918E, 326, 161 N. W. 562. The cases cited were not actions to recover property sold by a guardian. They were actions upon a guardian's bond, and involved the construction of a different statute from that before us. The Statute of Limitations involved and sought to be invoked in those cases was § 8922, Comp. Laws 1913, which reads: "No action can be maintained against sureties, or any bond given by a guardian, unless commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under legal disability

to sue, the action may be commenced at any time within three years after such disability is removed."

While these sections follow each other, and both relate to the limitation of actions, it will be noted that they are couched in quite different language, and relate to wholly different matters. Section 8922 relates to actions on a guardian's bond. That section makes the *"discharge or removal"* of the guardian the event which puts the Statute of Limitations embodied in that section into operation. Section 8923 relates to actions to set aside sales made, and recover property sold, by a guardian. That section designates *"the termination of the guardianship"* as the point of time at which the Statute of Limitations embodied in that section commences to run.

If the legislature intended to say the same thing in each of these statutes, why did it use such widely different language to say it? The reasoning, and in fact the very language, employed by this court in Gronna v. Goldammer, supra, distinguishes that decision and the decision in United States Fidelity & G. Co. v. Citizen's State Bank, from the case at bar, and shows the marked distinction between the two statutes. In the Goldammer decision this court said: "The primary meaning of the word 'discharge' certainly embraces the affirmative action of someone. The statute does not say, 'From the expiration or lapse of the guardianship,' but uses the words, 'from the discharge or removal of the guardian.' It would certainly seem that affirmative action on the part of the court was anticipated. Another reason for holding to this conclusion is that under the authorities, and probably under §§ 8167 and 8271, Rev. Codes 1905 (Comp. Laws 1913, §§ 8805, 8909), no action can be maintained against the sureties prior to an adjudication by the probate court finding a liability."

Our statutes expressly recognize that a guardianship may be terminated otherwise than by the discharge of the guardian. Thus, § 8920, Comp. Laws 1913, provides: "The marriage of a minor ward *terminates* the guardianship." See also Comp. Laws 1913, § 4470. And § 4471, Comp. Laws 1913, provides that if the appointment was made solely because of the ward's minority, the power of a guardian appointed by a court is superseded by the ward's attaining his majority.

While, of course, the guardian may, even after the ward attains majority, still have in his possession property belonging to the ward,

and be under obligation to deliver the same, as well as to account for funds and property received during the course of his administration, there can be no question but that the control of the guardian ceases when the ward arrives at majority. When the ward reaches majority he stands, so far as his legal rights and obligations are concerned, the same as any other person of similar age. He may make contracts, sue and be sued. He is no longer under guardianship. That is terminated. See 21 Cyc. 50; 12 R. C. L. p. 1117; Brown v. Pinkerton, 95 Minn. 153, 111 Am. St. Rep. 448, 103 N. W. 898, 900; Re Allgier, 65 Cal. 228, 3 Pac. 849.

(2) But the appellants say that § 8923, supra, is not applicable, for the reason that in this case there was in fact no sale made by the guardian as such; that the deed given to Wilder was a general warranty deed executed by Margriet Myrdal individually, and not in her representative capacity; that the proceedings which preceded the sale to Wilder were not in conformity with the statutes relative to the sales by guardian; and that such proceedings and sale were wholly void for want of jurisdiction.

It is difficult to lay down precise rules upon the subject of jurisdiction, by which every case can be clearly and certainly determined.

Chief Justice Shaw said: "To have jurisdiction is to have power to inquire into the facts and apply the law." Hopkins v. Com. 3 Met. 460. Chief Justice Green of New Jersey defined jurisdiction as simply judicial power,—"any power possessed by the tribunal, either affirmative or negative." Perrine v. Farr, 22 N. J. L. 356. See also Van Fleet, Collateral Attack, § 58.

Ruling Case Law (7 R. C. L. p. 1029) says: "The word 'jurisdiction' (jus dicere) is a term of large and comprehensive import, and embraces every kind of judicial action, and hence every movement by a court is necessarily the exercise of jurisdiction. In the sense, however, in which the term ordinarily is used, jurisdiction may be concisely stated to be the right to adjudicate concerning the subject-matter in a given case."

The most approved definition of the term "jurisdiction" is that it is "the power to hear and determine." 4 Words and Phrases p. 3877. However stated, the term implies the power of the court to exercise some judgment, and make some determination.

A court has *jurisdiction of the cause* when the laws of the sovereignty in which the tribunal exists grants it power over the subject-matter and to adjudge concerning the general question involved. Bouvier's Law Dict.; Hunt v. Hunt, 72 N. Y. 217, 38 Am. Rep. 129. Jurisdiction of the person is obtained by the personal service of process on him within the territorial jurisdiction of the court, or by his voluntary appearance. Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. When a court has jurisdiction of a cause and of the parties, it does not lose jurisdiction because it makes a mistake in determining either the facts or the law or both. Jurisdiction does not depend upon the correctness of the decision made. People ex rel. Raymond v. Talmadge, 194 Ill. 67, 61 N. E. 1050; Sherer v. Superior Ct. 96 Cal. 653, 31 Pac. 565. The United States Supreme Court has said that the jurisdiction of the court can never depend upon its decision upon the merits of the case brought before it, but upon its right to hear and decide it at all (Ex parte Watkins, 7 Pet. 568, 572, 8 L. ed. 786, 788); that "jurisdiction is authority to decide the case either way." The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 25, 57 L. ed. 716, 717, 33 Sup. Ct. Rep. 410. Other courts have said: "Jurisdiction is the power to hear and determine a cause, and carries with it the power to decide a cause within the jurisdiction of the court incorrectly as well as correctly, and it does not relate to the rights of the parties, but to the power of the court." Dahlgren v. Superior Ct. 8 Cal. App. 622, 97 Pac. 681. "The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry; not whether its conclusion in the course of it was right or wrong." Lake County v. Platt, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567. "Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the abstract question. Nor is this jurisdiction limited to making the correct decisions. It empowers the court to determine every issue within the scope of its authority, according to its own view of the law and the evidence, whether its decision is right or wrong." Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 316.

In Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851, the plaintiff brought an action to quiet title to a tract of land which had been sold by an administrator. She contended that the probate court had no jurisdiction to appoint the administrator, and that it had no jurisdiction to order a sale of the land. The latter contention was based upon the proposition that the debts, for the payment of which the land was ordered sold, were contracted prior to the issuing of patent, and hence the land could not become liable for the satisfaction thereof, under § 2296, U. S. Rev. Stat. Comp. Stat. § 4551, 8 Fed. Stat. Anno. 2d ed. p. 575. The Minnesota court overruled both contentions. The holding of the court is summarized in ¶¶ 1 and 2 of the syllabus, which read:

"1. The issuance of letters of administration by the probate court of the county where a deceased person resided in his lifetime is conclusive in a collateral action of the regularity of the proceedings resulting in their issuance, unless want of jurisdiction appears affirmatively on the face of the record.

"2. The probate court has jurisdiction over such land. It may rightfully order it sold to pay certain demands. A sale of such land cannot be attacked in a collateral action to quiet title, and on the ground that the probate court improperly ordered it sold. . . ."

In the opinion in the case the court said: "Whether there were facts to warrant a sale in any given case was question which the probate court was obliged to determine, and which that court, and no other, had jurisdiction to determine." The case was brought before the United States Supreme Court by writ of error. In affirming the decision of the court below the Federal Supreme Court quoted with approval the above quoted language from the Minnesota decision, and held that "the jurisdiction of a state probate court to order the land patented to a deceased homestead entryman who had made final proof before his death, to be sold for the payment of his debts, cannot be attacked collaterally because of the provision of U. S. Rev. Stat. § 2296, that no land acquired under the homestead laws shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent." Syllabus, ¶ 3, Doran v. Kennedy, 59 L. ed. p. 996.

Under our Constitution the county court is vested with "exclusive original jurisdiction in probate and testamentary matter, the appointment of administrators and guardians, the settlement of the accounts

of executors, administrators, and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law." N. D. Const. § 111. Hence, it is manifest that the county court had jurisdiction to appoint a guardian for the minor children of Einar E. Myrdal, and to order a sale of the land belonging to them. In fact, it was the only court vested by the Constitution with original jurisdiction of those matters. There is no question but that the county court did in fact appoint a guardian, and that such guardian presented to the county court a petition wherein she asserted that for certain reasons the land of the minors ought to be sold. The petition also suggested that the best way to make the sale would be to set the property over to the guardian so as to enable her to make sale and convey it in her own name to the purchaser. While the procedure thus proposed (and later followed) was irregular and improper, the petition nevertheless asked the county court to act in a matter wherein it had unquestioned jurisdiction, *viz.*, the sale of the property in a guardianship proceeding pending in that court. The fact that the county court erred in its determination did not oust it of jurisdiction either over the subject-matter or over the persons of the parties. The decree which it made still remained one made in a proceeding which it had jurisdiction to hear and determine. The petition filed asked the court to exercise its jurisdiction, and determine whether the facts averred entitled the petitioner to make a sale of the property of her wards. The court said that it did, and directed the sale to be made; in a manner, it is true, which was not warranted by the law. In so doing the court erred in the exercise of its judicial power. It made a mistake of law.

But it cannot be said as a matter of fact that the court did not act. Nor do we believe the actions of the court and of the guardian were such that it can be said as a matter of law that they have not acted, *i. e.*, that their actions were wholly null and void, and that hence the case stands as though they had not acted at all. A guardian had been appointed. The wards had property. The existence of such property was called to the attention of the county court. The guardian asked the court permission to dispose of that property. The court in effect said to the guardian, I set the property over to you so as to enable you to convey it when you find a purchaser. I also require that you furnish a bond to insure that the wards will receive their shares of the purchase

price. The guardian furnished the bond. She made the sale. The purchaser and his successors have been in possession and exercised dominion ever since.

Many of the states have statutes somewhat similar to § 8923, supra. There are many adjudicated cases wherein such statutes have been construed. No good purpose would be accomplished by discussing the statutes of other states, or the decisions construing them. Many of the decisions are collated in a note in 8 L.R.A.(N.S.) pages 354 et seq. We are concerned alone with our own statute, which says that "no action for the recovery of any property sold by a guardian can be maintained . . . unless it is commenced within three years next after the termination of the guardianship." The operation of the statute manifestly is not limited to valid sales. Such sales do not need the protection of such a statute. The statute was intended to apply in certain cases where sales had been made, and where, on account of irregularities, the sale would be subject to attack unless the bar of the statute was interposed. Upon the actual facts of the case before us, we are of the opinion that the bar of this statute is effectual. The guardian of the appellants unquestionably sold their property. She sold it in the manner the county court had said she might sell it. It is the avowed purpose of the appellants to recover such property in this action. For reasons stated above we believe that their cause of action is barred by the statute. The judgment appealed from must therefore be affirmed. It is so ordered.

WILLIAM LANGER, Respondent, v. THE COURIER-NEWS, a Corporation, William Lemke, George F. McPherson, and Herbert A. Gaston, Appellants.

(179 N. W. 909.)

Libel and slander — libelous publications defined under statute.

1. Under Comp. Laws 1913, § 4352, "any publication, by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation," is libelous.

Libel and slander — effect of general demurrer as admission in libel action stated.

2. A general demurrer to a complaint in an action for libel admits allegations of falsity and publication and malice, and the correctness of the innuendo as averred in the complaint, unless the innuendo attributes a meaning to the words which is not justified by the words themselves or by the extrinsic facts with which they are connected.

Libel and slander — when publications libelous as matter of law stated.

3. Where a complaint in an action for libel charges that the defendants maliciously published of and concerning the plaintiff a certain false and defamatory statement; that such statement was intended by the defendants to convey to the readers thereof such defamatory meaning, and was so understood by the readers,—the court cannot say that the statement was not libelous, unless it can say as a matter of law that the publication of the article of and concerning the plaintiff did not expose him "to hatred, contempt, ridicule, or obloquy," or "cause him to be shunned or avoided," or have "a tendency to injure him in his occupation."

Libel and slander — criticism of attorney general not privileged; complaint held to state cause of action in libel.

4. For reasons stated in the opinion it is *held* that the complaint in this case states a cause of action for libel.

Opinion filed October 21, 1920.

Appeal from the District Court of Cass County, *Cole*, J.

Defendants appeal from an order overruling a demurrer to the complaint.

Affirmed.

Harry Lashkowitz and *Vince A. Day*, for appellants.

"A newspaper has the right to fairly and honestly comment on matters of public interest, such as the official conduct of any public officer." Cook v. Pulitzer, 241 Mo. 326, 145 S. W. 481; N. D. Comp. Laws 1913, § 9556; Robertson v. Edelstein (Wis.) 80 N. W. 724; Gundram v. Daily News (Iowa) 156 N. W. 840; Herringer v. Ingberg (Minn.) 97 N. W. 460.

It is for the court to say as a matter of law whether the words are libelous or not libelous. Wood v. Star Publishing Co. 90 Wash. 85, 155 Pac. 400. Shaw, J., in Carter v. Andrews, 16 Pick. 1.

Courts cannot be ignorant in court of what they themselves and all others know out of court. Walsh v. Pulitzer, 250 Mo. 142, 157 S. W.

985; McCue v. Equity Co-op. Pub. Co. 39 N. D. 190, 167 N. W. 225; Newell, Slander & Libel, 2d ed. p. 291, § 5; Black v. State Co. 93 S. C. 467, 77 S. E. 51, Ann. Cas. 1914C, 989.

W. S. Lauder and *A. G. Divet,* for respondent.

Even though written or printed matter does not charge crime, and would not, legally speaking, constitute slander if the language used were merely spoken, it is libelous if tending to expose a person to public hatred, contempt, ridicule, aversion, disgrace, or tends to bring a person into obloquy, or reflects upon his character, or lowers him in general public estimation. Townsend, 76, 77 and notes; Newell, 32–35 and notes; St. James Military Academy v. Gazier, 28 L.R.A. 667; Century Dig. 1854, § 1, and numerous cases there cited; Weston v. Grand Rapids Pub. Co. 87 N. W. 258; Bradley v. Gramer, 59 Wis. 309; Whitney v. Janesville Gazette, 5 Bliss. 330, Fed. Cas. No. 17,590; Carey v. Allen, 39 Wis. 481; Montgomery v. Knox, 23 Fla. 595; Bergman v. Jones, 94 N. Y. 51; Hillhouse v. Dunning, 6 Conn. 391; Shattuck v. McArthur, 25 Fed. 133; Huse v. Inter Ocean Pub. Co. 12 Ill. App. 627.

By demurring, defendants admit the allegations of the complaint. 31 Cyc. 333; 6 Enc. Pl. & Pr. 334; 6 Standard Enc. Proc. 943; Englund v. Townley (N. D.) 174 N. W. 755; Martinson v. Freeberg (N. D.) 175 N. W. 618.

The publication of rumors or hearsay or reports is libelous. Waters v. Jones, 29 Am. Dec. 261; Giddens v. Merk, 4 Ga. 364; Nye v. Otis, 8 Mass. 132; Simmons v. Holster, 13 Minn. 249; Bee Pub. Co. v. Shields, 94 N. W. 1029.

It is immaterial what the writer or publisher of the libel meant. It is no defense in a libel case that the defendant did not mean to libel plaintiff. Taylor v. Bearst (Cal.) 40 Pac. 132; McAllister v. Press Co. (Mich.) 43 N. W. 431.

CHRISTIANSON, Ch. J. This is an action for libel. The defendants interposed a demurrer to the complaint on the ground that it did not state a cause of action. The demurrer was overruled, and the defendants have appealed to this court.

The complaint, the sufficiency of which is the sole question here, is as follows:

Comes now the above-named plaintiff, and for his amended complaint herein alleges and shows to the court:

I. That the defendant The Courier-News is a corporation duly created, organized, and existing under the laws of the state of North Dakota, and was such corporation during all the times hereinafter mentioned; that the defendant William Lemke is, and during all the times hereinafter mentioned was, the duly elected, qualified, and acting president of said corporation; that the defendant George F. McPherson is, and during all the times hereinafter mentioned was, the duly elected, qualified, and acting secretary of said corporation; that the defendant Herbert E. Gaston is, and during all the times hereinafter mentioned was, the duly elected, qualified, and acting treasurer and general manager of said corporation.

II. That during the times hereinafter mentioned the defendant The Courier-News was the owner, publisher, and distributor of a certain daily newspaper known, named, and designated as "The Courier-News;" that during the times hereinafter mentioned the said newspaper had a wide circulation among the people in all parts of the state of North Dakota and also among the people residing in the northwestern part of the state of Minnesota and elsewhere; that plaintiff is informed and verily believes, and upon such information and belief alleges, the fact to be that during said times the daily circulation of said newspaper exceeded 10,000 copies; that said newspaper was read daily by many thousands of people residing throughout the state of North Dakota and also by many people residing within the northwestern part of the state of Minnesota and elsewhere; that the defendants Lemke, McPherson, and Gaston, as officers of said corporation and otherwise, were, and each of them was, during the times hereinafter mentioned, actively engaged in the publication of said newspaper, and in composing and securing the publication of the various articles and matters appearing daily in said newspaper; that during said times the said defendants Lemke, McPherson, and Gaston had and exercised general authority and supervision over the publication and circulation of said newspaper, and determined, controlled, and directed its general policy with respect to politic and other issues, and also determined, directed, and controlled its attitude toward particular individuals, and especially toward the

public officers of the state of North Dakota; and they, and each of them, had knowledge of, and approved of the publication of, the articles hereinafter set forth, and ratified the publication thereof.

III. That during the times hereinafter mentioned the plaintiff was and still is an attorney and counselor at law, duly admitted and licensed to practice as such in all the courts of the state of North Dakota, and was at all said times the duly elected, qualified, and acting attorney general of the state of North Dakota; that plaintiff was elected attorney general of said state at the general election held in the month of November, 1916, and duly qualified and assumed the duties of said office in the month of January, 1917, and ever since said date last aforesaid has been in the active performance of the duties of said office; that prior to the qualification of plaintiff as attorney general, as aforesaid, he was, and for a number of years prior thereto had been, in the active practice of the legal profession, and enjoyed a large and lucrative practice as a lawyer, and was well known in the state of North Dakota as a lawyer, and had a good standing among the people of the state of North Dakota and elsewhere as a practicing lawyer, and was by the people of North Dakota generally held in high esteem as a lawyer, and was generally considered by the people of said state as a lawyer of ability and integrity, which good standing, reputation, and esteem continued undiminished until the time of the publication of the article hereinafter set forth; that since the plaintiff qualified as attorney general and entered upon the duties of said office he has not engaged in the general practice of law, and has not practiced the legal profession at all except in the discharge of his duties at attorney general, as aforesaid; that plaintiff has no other profession or calling except that of attorney and counselor at law, and that on the completion of his service as attorney general as aforesaid plaintiff expects to and will again engage in the general practice of law in the state of North Dakota; that during all said times plaintiff was a man of good character, and was highly esteemed by his fellow citizens generally, and was never guilty of any acts of fraud, corruption, or misconduct, and was never charged or suspected of being guilty of any such acts prior to the publication of the article aforesaid, and that until the publication of the said article the plaintiff was highly esteemed by the people of North Dakota as attorney general of said state, and was generally regarded in his said office as an official of ability and integrity.

IV. That on the 24th day of July, 1919, the defendants wishing, intending, and contriving to injure the plaintiff in his good name and fame among the people of the state of North Dakota and elsewhere, and wishing, intending, and contriving to injure plaintiff in his character and capacity as an attorney and counselor at law and also as attorney general of the state of North Dakota, intentionally, wilfully, maliciously, and unlawfully printed and published, and caused to be printed and published, in said newspaper in all the copies of said issue of said date, of and concerning plaintiff as an indivdual and in his business and profession as a lawyer and in his official character and office as attorney general, a certain false, malicious, defamatory, and libelous article, which said article was and is in the words and figures and of the tenor following, to wit:

"I. V. A. Plan to Initiate 2 New Laws for State

"Farmers' Foes Plan Another Attack on Printing and Administration Acts, It Is Reported.

"If some of the leaders of the Independent Voters' Association have their way, initiative petitions will be circulated for two new laws designated to take the places of the newspaper and administration acts passed by the last legislature and indorsed by the people at the referendum election last month. I. V. A. officers and members have been in session in Fargo for the past three days, discussing the decisive defeat administered to them by the farmers of the state in the referendum campaign, and considered what course the organization is to pursue from now on.

"Only members of the inner circle were admitted to the sessions, and but a few of those present were willing to discuss what took place. It was said, however, that it appeared to be the sentiment of a majority of those who took part in the deliberations that such petitions should be circulated.

"Dissatisfied with Campaign.

"It also leaked out that the sentiment was far from unanimous when it came to approving the manner in which the late campaign was conducted. It became apparent early in the sessions that some of the I. V. A. backers, who had taken the matter of defeating the farmers seriously, and not as a convenient camouflage for maintaining a graft

institution, were in favor of abiding by the decisions of the great majority of the voters and not keep up the fight any longer.

"'I don't believe in the League program, but it appears that an overwhelming majority of the people of North Dakota do,' said one of those who attended the sessions last evening. 'Since the people have unmistakably, on several occasions, shown that they want this program tried, why, I think it should be tried. This is a land of majority rule, and I think it is time for the people of the state to quit fighting and pull together for the common good.

"Looks Like Graft to Him.

"'I did all I could to back the I. V. A., and I believe I was right in so doing under the circumstances. But this plan to initiate two new laws to take the place of those so strongly indorsed by the people seems to me to smack too much of a grafting scheme. The last campaign cost a lot of money. Where it came from and where it went does not seem so very clear to anyone connected with it, at least none has volunteered the information to my knowledge. Coupled with the fact that certain men, connected with the organization display such eagerness to keep up the fight this has aroused my suspicion.'

"Among those present at the gathering were President Iverson of the I. V. A., who resides at Walum, and 'Free-love-Bill' Harris. Some concern was expressed over the absence of Attorney General Langer, according to reports. The organization of the New Economy League at Bismarck some time ago was also the subject of speculation, it seems. It was freely admitted that the encouragement of the new organization would result in a serious split in the ranks of Nonpartisan League opposition.

"Langer Wants Control.

"It became clear early in the referendum campaign that two factions were seeking control of the I. V. A. One was headed by Attorney General Langer and the other by President Iverson. Langer visited heads of Minneapolis and St. Paul corporations that are financing the I. V. A. early this year, and demanded that he be made custodian of the slush funds that were expected in North Dakota. His record was against him, and those gentlemen turned him down, though politely. Because of

this Langer is sore, it was said yesterday, and is attempting to build up a machine of his own.

"Because of the open deflection in the I. V. A. ranks it was decided to hold up final decision on the initiative movement until it had been ascertained if the Economy League will join in. This matter is to be taken up at a future meeting."

V. That at the times hereinafter mentioned there existed within the state of North Dakota an association of persons organized for political purposes, and known as the "Independent Voters Association," which association was well known among the people of the state of North Dakota; that said association was generally referred to and designated as the "I. V. A.;" that the letters I. V. A. contained in said article referred to, and the persons who received and read said newspaper, understood said letters to refer to and to mean the said Independent Voters' Association. That during all of said times there existed in the state of North Dakota an association organized for political purposes, and known and designated as "The Nonpartisan League," that said Nonpartisan League was at all said times well known in the state of North Dakota and to the people generally in the state of North Dakota, and was generally known as a political association or organization, and was, and for more than two years prior to the publication of said article had been, actively engaged among the people of the state of North Dakota in political work.

That during all the times herein mentioned there was active rivalry between the said Independent Voters' Association and the said Nonpartisan League for the favor and support of the people and voters of the state of North Dakota, each of said societies at all times actively seeking the suffrage of the voters of said state in support of their respective political principles, ideas, and policies and actively engaged in opposition to the political principles, ideas, and policies of the other association.

VI. That among the people of the state of North Dakota generally, and among the people who subscribed for and read the said newspaper, the term "slush funds" means, and was among said people generally understood to mean, funds of money collected by wrongful and unlawful means, and used and to be used to bribe voters, and to wrongfully and unlawfully purchase the influence of newspapers and other pub-

lications, and, generally speaking, to debauch the voters of the state and corrupt elections held in the state, and that in publishing said article the defendants used said term "slush fund" in the sense aforesaid, and intended it to be so understood by those who might read said article; that the persons who read said article understood the said term "slush funds" to mean as above set forth, and in reading said article gave said term such meaning, and believed from reading such article that plaintiff was engaged in collecting a fund of money to be used by him for the purpose above set forth. And in that behalf plaintiff further alleges that in publishing the said article the defendants charged, and intended to charge, that plaintiff visited the heads of corporations in the cities of St. Paul and Minneapolis, in the state of Minnesota, and demanded of them that they, and the corporations which they represented, should contribute to "slush funds," and that said slush funds should be turned over to the plaintiff, to be expended by him in bribing voters in the state of North Dakota at elections to be thereafter held, and to wrongfully purchase the influence of newspapers and other publications in molding public opinion concerning issues pending before the people of the state of North Dakota, and to be used by the plaintiff wrongfully, unlawfully, and corruptly in influencing and directing public opinion, and in debauching the voters of the state, and in corrupting elections to be held in the state, and that said funds should be so used by plaintiff to promote the interests of corporations having their offices in the cities of Minneapolis and St. Paul, and that plaintiff should use said slush funds wrongfully, unlawfully, and corruptly, and against the best interests of the people of the state of North Dakota; that the persons taking and reading said newspaper and reading said article understood said article to charge plaintiff with the doing of the things, and the commission of the acts, and for the purposes and with the intentions hereinbefore set forth.

VII. Plaintiff further alleges that it is not true that he was head of a faction that sought to control the said Independent Voters' Association, and plaintiff further alleges that the statement that "Langer visited heads of Minneapolis and St. Paul corporations that are financing the I. V. A., early this year, and demanded that he be made custodian of the slush funds that were expected in North Dakota," is wholly and absolutely false, and in that behalf plaintiff further alleges

that he never visited with or called upon the heads of or officers of any corporation or other business concern in St. Paul or Minneapolis or elsewhere with reference to the subject of collecting moneys or funds for political purposes, or to be used in connection with any activities of the said Independent Voters' Association or any other organization, and he was never engaged in the attempt or effort, directly or indirectly, to collect or have collected any slush funds or funds of any kind or character, directly or indirectly connected with any political activities or any other purposes whatsoever, and in that behalf he further alleges that he never called upon or visited in the city of St. Paul or Minneapolis any person known to him to be connected with any corporation, except as follows, to wit: He once called upon and visited with G. A. Thiel, secretary of the Equity Co-operative Exchange in St. Paul; he once called upon and visited with R. C. Lilly, president of the Merchants National Bank of St. Paul, Minnesota; and he once called upon and visited J. O. Sylvester, an officer of the Sylvester Land Company, in St. Paul, Minnesota; that none of said visits were in anywise connected with the subject of raising or collecting money for political purposes or at all, but were all connected with and related solely to purely personal matters and matters pertaining to his official position as attorney general, and affecting and concerning the interests of the state of North Dakota, and plaintiff never solicited said parties or any of them to contribute money to any purpose, political or otherwise, or to pay or deliver money to him or to anyone else for any purpose, and the subject-matter of slush funds or the collection of money for any political purpose was never referred to, directly or indirectly, between plaintiff and any of said persons; and plaintiff further alleges that the said article, and the whole thereof, in anywise applying to the plaintiff was and is absolutely false, and that when said article was published as aforesaid neither of said defendants had any reason to believe the statements therein contained referring to plaintiff were true or contained any particle of truth; that said article was published as aforesaid by defendants, and said charges were made against said plaintiff by the said defendants and each of them, wilfully and maliciously, and with the deliberate purpose and intention of injuring plaintiff as a man, as a lawyer, and as a public officer.

VIII. That on the 2d day of September, 1919, the plaintiff, in writ-

ing, demanded of the defendant The Courier-News that it retract the statements and charges contained in said article and referring to plaintiff, and that it publish such retraction but the said defendant, The Courier-News, has refused and still refuses and neglects to retract the said statements and charges, or to publish any real retraction of said statements and charges. And in that behalf plaintiff alleges that, instead of retracting the said charges against plaintiff contained in said article and publish such retraction, the defendants in all the copies of said newspaper of date September 4, 1919, and in aggravation of the charges made against plaintiff in the article hereinbefore referred to, on the editorial page of said newspaper printed and published an article in the words and figures and of the tenor following, to wit:

"Wherein We Retract Again.

"Now it's Attorney General Langer who is demanding a retraction. Between County Auditor Tucker and Attorney General Langer we are apparently going to be kept so busy writing retractions that we shall have time for nothing else. But we are nothing if not obliging, and so, if the attorney general wants a retraction, here goes:

"It seems the more or less Honorable Attorney General is peeved because of a story that appeared in our columns not long since concerning the internal dissentions of the I. V. A. In that story appeared these sentences:

" 'Langer visited heads of Minneapolis and St. Paul corporations that are financing the I. V. A., early this year, and demanded that he be made custodian of the slush funds that were expected in North Dakota. His record was against him, and these gentlemen turned him down, though politely. Because of this Langer is sore, it was said yesterday, and is attempting to build up a machine of his own.'

"The Honorable Attorney General did not specify what in these sentences he considered libelous. It was probably not the alleged fact of his meeting with certain Twin City corporation heads. That meeting, we believe, was commented upon at the time by the Twin Cities' big business press, and inasmuch as we have no knowledge that Mr. Langer has begun suit against them he doubtless concedes the fact of the meeting.

"We take it, then, that what we are asked to retract is the charge

that he asked to be made custodian of the slush funds. Or is it that he was refused? Either way, we'll have to retract. That statement was merely an assumption on our part. The reporter who wrote those sentences was not sufficiently acquainted with Mr. Langer's impeccable character. He was proceeding on the assumption that Mr. Langer is actuated by the same motives as other politicians, which, of course, isn't true.

"If the average politician, after being elected, pledged to support a certain program, and then, having turned traitor to that program, had met with the financial props of the opposition, it would have followed, as night and day, that he had been seeking support, financial or otherwise, for the furthering of his own ambitions.

"But, of course, in Mr. Langer's case, it is all different. He is a traitor to his pledges, it is true, but he is actuated by no base or mercenary motives. He is simply engaged in saving his beloved state from 'red socialism.' His visit to the Twin Cities' financiers, coinciding as it did with his betrayal of the cause of the farmers who elected him, was purely a coincidence. He went to the Twin Cities merely to talk of the weather. And under no circumstances, of course, would he accept office, or any assistance towards office, from those big business interests. He is utterly unselfish, entirely unmercenary, actuated, we cannot too often repeat, only by the very highest degree of high motives.

"We want to do full justice to Mr. Langer's irreproachable character. We want no blot to dim his fair name. We regret exceedingly that any charge against him, of mercenary motives or personal ambition, ever entered our columns. He should stand forth, a traitor, in the good old French phrase, *sans peur et sans reproche*. He betrayed the farmers who elected him, not for any selfish advantage, but for their own good. We are only too happy to make this abject retraction, and to clear from all obloquy a name that will stand forth in all future history of North Dakota so unapproached as that of William Langer."

That both of said articles were printed, published, and circulated of and concerned plaintiff by the said defendants wilfully, unlawfully, and maliciously, and with the intention and for the purpose of injuring plaintiff in his good name and fame as a man, a lawyer, and a public official.

That the article first hereinbefore referred to and set forth, so far as

the same referred to or applied to plaintiff, was and is false and defamatory, that by means thereof the plaintiff was greatly injured in his standing and reputation among the people of the state of North Dakota and elsewhere, and his good name and credit as a man, a lawyer, and public official was greatly damaged and injured, and that by reason of all the premises plaintiff has been damaged in the sum of fifty thousand ($50,000) dollars, no part of which has been paid.

Wherefore, plaintiff prays judgment against the defendants for the sum of fifty thousand ($50,000) dollars, and legal interest thereon from the 24th day of July, 1919, together with his costs and disbursements of this action.

A demurrer admits allegations of falsity, publication, and malice, and the correctness of the innuendo as averred in the complaint, unless the innuendo attributes a meaning to the words which is not justified by the words themselves or by the extrinsic facts with which they are connected. McCue v. Equity Co-op. Pub. Co. 39 N. D. 190, 167 N. W. 228; Meyerle v. Pioneer Pub. Co. 45 N. D. 568, 178 N. W. 792; 25 Cyc. 468; 17 R. C. L. 398.

"Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Comp. Laws 1913, § 4352.

"A privileged communication is one made:

"(1) In the proper discharge of an official duty.

"(2) In any legislative or judicial proceeding, or in any other proceeding authorized by law.

"(3) In a communication without malice to person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.

"(4) By a fair and true report without malice of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof.

"In the cases provided for in the subdivisions 3 and 4 of this section,

malice is not inferred from the communication or publication." Comp. Laws 1913, § 4354.

If the language contained in the publication fairly imputes to the plaintiff such acts of conduct as would naturally result in exposing the plaintiff to hatred, contempt, ridicule, or obloquy, or cause him to be shunned or avoided, or had a tendency to injure him in his occupation, it would be libelous *per se.* Lauder v. Jones, 13 N. D. 525, 541, 101 N. W. 907; Meyerle v. Pioneer Pub. Co. supra.

In this case, the plaintiff has not merely averred that a certain statement, alleged to be false and defamatory, has been published of and concerning him; he has gone further, and by specific averments set out the surrounding circumstances; that the language published referred to plaintiff, and was intended to and did, convey to the readers thereof a certain defamatory meaning, and that by reason thereof plaintiff sustained certain special damages.

"This being so, the complaint is not demurrable unless the court can say as a matter of law that the publication of the newspaper article in question of and concerning plaintiff did not expose him "to hatred, contempt, ridicule, or obloquy," and could not have caused him "to be shunned or avoided," or had "a tendency to injure him in his occupation." Comp. Laws, § 4352. If reasonable men, in the exercise of their judgment and reason, might differ as to whether the publication of the article had such effect, then it is for the jury to determine what the fact is. 25 Cyc. 542; 13 Enc. Pl. & Pr. 106; Newell, Slander & Libel, pp. 281, 290, 291. "If there is any doubt as to the meaning of a publication claimed to be libelous, so that extrinsic evidence is needed to determine its character as to its being actionable, it is a question for the jury, under proper instructions from the court, to find its true character and significance." Newell, Slander & Libel, 2d ed. p. 290, § 3. And where the words of an alleged libelous publication "are reasonably susceptible of two constructions, the one innocent and other libelous, then it is a question for the jury which construction is the proper one." In such a case if the defendant demurs to the declaration his demurrer will be overruled. Or, in other words, the rule may be stated thus: It is for the court to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to determine whether such meaning is truly ascribed. Newell, Slander &

Libel, 2d ed. p. 291, § 5. See also Black v. State Co. 93 S. C. 467, 77 S. E. 51, Ann. Cas. 1914C, 989; McCue v. Equity Co-op. Pub. Co. supra.

The first article charged that the plaintiff "visited heads of Minneapolis and St. Paul corporations that are financing the I. V. A., early this year, and demanded that he be made custodian of the slush funds that were expected in North Dakota." It further charges: "His record was against him, and these gentlemen turned him down, though politely." The language quoted assumes that certain "slush funds" were expected in North Dakota, and charges that the plaintiff "demanded that he be made custodian of the slush fund;" but that his record was such that the contributors to the slush funds refused to comply with his demands.

The second article admits that the *charge* contained in the first article, that the plaintiff demanded that he be made custodian of slush funds, and that such request was refused, was "merely an assumption" on the part of the reporter who wrote the article. The remainder of the article speaks for itself. It seems to be in effect an ironical reaffirmation of the charge made in the first article.

"It is well settled that a publication imputing roguery, rascality, or general depravity, which carries with it a charge of moral turpitude and degradation of character, the natural tendency of which is to hold the party up to hatred, contempt, or ridicule, and to expose him to the reprobation of virtuous and honorable persons, is libelous. 25 Cyc. 260; 17 R. C. L. pp. 290, 291. McCue v. Co-op. Pub. Co. supra. A libelous charge may be made indirectly as well as directly. 17 R. C. L. p. 314; 18 Am. & Eng. Enc. Law, p. 977.

In Cooper v. Greeley, 1 Denio, 347, the plaintiff had announced through the press that he intended to sue the publishers of the New York Tribune for libel. In commenting on this announcement, Mr. Greeley, in the columns of his paper, said:

"There is one comfort to sustain us in this terrible dispensation. Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it in New York, for we are known here, nor in Otsego county; *for he is known there.*"

Cooper brought action, alleging that this statement was libelous, and by innuendo, averred the meaning of the last clause to be that the plain-

tiff Cooper, in consequence of being known in the county of Otsego, was in bad repute there, and would not, for that reason, like to bring a suit for libel in that county. Defendant's counsel (W. H. Seward) contended that the charge was not libelous. In his argument he said: "The words set forth do not constitute a libel. The charge that the plaintiff did not, for any cause, like to bring action for libel to trial in Otsego county is not defamatory or libelous. It only reiterates and applies to the plaintiff the truism that 'a prophet has no honor in his own country.' The point of the article is the inference that the plaintiff would prefer a trial where the prejudice and rivalries which assail every man at home should not reach him." The court, however, overruled this contention, and held that the publication amounted to a charge that the plaintiff was in bad repute in the county referred to, and for that reason would not like to bring the issue to trial in that county, and that as so understood the publication exposed the plaintiff to contempt and ridicule, and, hence, was libelous.

It is suggested by appellants' counsel that the publications were privileged. Its privileged character certainly does not appear from anything said in the complaint. Clearly the publications do not fall within privileged communications as defined by our statute. See § 4354, supra. The statement does not purport to be a comment upon, or criticism of, any official act of the plaintiff. The second statement admits that the first charge was made without any actual basis therefor. The fact that a person is a public officer does not render privileged the wanton publication of false defamatory statements regarding him. Putnam v. Browne, 155 N. W. 910.

It must be borne in mind that we are only ruling on a demurrer, and hence must assume that all issuable, relevant, and material facts well pleaded in the complaint, are true.

Testing the complaint by the rules heretofore set forth, we are of the opinion that it states a cause of action for libel as defined by § 4352, Comp. Laws 1913.

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

BIRDZELL and BRONSON, JJ., concur.

ROBINSON, J. This is a political libel suit, and it is no exception to

the rule that every suit is both a public and a private nuisance. Such was the Barnes-Roosevelt Case and the Ford Case. Such suits do often cost the parties several thousand and the public several thousand, and result in a verdict for six cents, or nothing. And if the libel is scandalous or injurious, the suit adds tenfold to the scandal and the injury. In several such libel suits this court has, by a majority vote, overruled a demurrer to the complaint, and still, on reflection, the parties have known better than to bring the suits to trial. Witness the McCue Case, 39 N. D. 190, 167 N. W. 226. In that case, as in this, the complaint is verified. It avers that the plaintiff has been damaged $50,000, a sum exceeding his earnings for ten years. Of course the averment is clearly false, and yet it is in keeping with the character of the suit.

In this and similar cases the formulated opinion of the court and of each judge is booked and published at an expense to the public. Hence we cannot be too careful to refrain from quoting irrelevant matter. In the brief of counsel for plaintiff the libel, and all there is of it, is quoted thus:

"Langer Wants Control.

"It became clear early in the referendum campaign that two factions were seeking control of the I. V. A. One was headed by Attorney General Langer and the other by President Iverson. Langer visited heads of Minneapolis and St. Paul corporations that are financing the I. V. A., early this year, and demanded that he be made custodian of the slush funds that were expected in North Dakota. His record was against him and these gentlemen turned him down, though politely. Because of this Langer is sore, it was said yesterday, and is attempting to build up a machine of his own."

On this, the comment of the distinguished counsel from Wahpeton is as follows:

"Beyond all question a man who would do what Mr. Langer is charged in this article with having done *is* a 'damned rascal.' A man who is so utterly devoid of all sense of decency and honor and principle who, while occupying the high office of attorney general of the state, would go to St. Paul and Minneapolis and there demand that money gathered together to be used for corrupt political purposes be turned over to him that he might use it for the purposes for which it was collected is certainly a rascal of the lowest type; and, no doubt, unless in

the meantime he reform, he will eventually be damned,—at least in the estimation of decent people."

In the McCue Case the court held it was not actionable to charge that McCue had boasted of raising a slush fund to help defeat certain candidates for the supreme court. To avoid the effect of that decision the complaint avers that in this case the words "slush fund" were used and understood in a peculiar sense. But the court will take official notice of the words and the sense in which they are used and understood by the people of the state. The words are in everyday use and are common political slang. The court knows, and every person knows, that the words have not a literal meaning, and that money is never used as slush. Indeed, the term "slush fund" is merely a slang term for campaign fund.

Then, on its face, the alleged libel clearly shows that every reader must understand the same as if this were given as an addenda at the foot of the libel, *viz.:*

"Of course the editor was not present when Mr. Langer conversed with the corporation magnates; no reporter was present. Our version of the conversation is only our best guess or conjecture. We do not claim to be clairvoyants or mind readers."

Now it is well known that in state political referendum and nominating campaigns Mr. Langer put himself to the front and became the most prominent person in the politics of the state. He was a candidate for governor and came near to securing the nomination. He had a perfect *right* to go to the Twin Cities and to ask the corporate magnates for a campaign fund, and still there is not a word of evidence that he did it, because the editor was not present, the reporter was not present, and the article shows on its face that what is said of Mr. Langer concerning the "slush fund" is merely a guess or conjecture. The court will take notice of the fact that in the recent political contest Mr. Langer became the leader of several parties that were opposed to the Nonpartisans and its leaders. In 1916 and in 1918, with the strenuous support of the League and these defendants, Mr. Langer was elected to the office of attorney general, and for about three years he worked with the League managers, and enjoyed their trust and confidence and received large appropriations. He was laden with money and honors; in the administration of the state affairs he stood next to the governor. Then,

for some reason, he broke with the League and became the leader of the opposition. He spent several months—a great part of his time—going over the state making speeches and denouncing the League managers and the defendants. Of course the abuse and denunciation became mutual and reciprocal; it became much the same as when two boys go onto the street and commence a contest of slinging mud at each other, and the one who gets the worst of it commences to cry and runs home to mama. There is nothing in the alleged libel which tends to expose Mr. Langer to hatred, contempt, or ridicule, nothing which caused him to be shunned, or which lost him a vote in the race for governor. The libel in question did not injure him to the amount of one cent. If anything, it was a benefit to him, because it advertised him, and, like most politicians, he is fond of seeing his name in print and on the headlines of the newspapers.

It is true that in libel suits decisions can readily be cited on any side of any case. It is true that judges are still disposed to follow a line of decisions which were given when conditions were very different. Time was when newspapers were few, and when political abuse or mudslinging was not a daily occurrence, when an editorial in a newspaper was considered as true as Holy Writ; but of late newspapers have become about as numerous as trees in the forest. Daily papers of eight pages are issued and filled with advertisements, telegrams, political notes, and political abuse. It is so common that few people are so foolish as to give any credence to anything in the line of political abuse. And in this case the libelous article shows on its face that it was merely given as the guess or conjecture of the editor. It did no injury to Mr. Langer; it did not call him a rascal of any type, or impute to him the unpardonable sin or any danger of being damned. In the light of plain common sense, common usage, and common knowledge the complaint does not state a cause of action.

GRACE, J. (dissenting). The complaint states no cause of action for libel. It is clear, and it will be conceded that, by no stretch of imagination, can the articles published be held a libel of the plaintiff, either in his official, professional, or individual capacity; and that the article, or articles, standing alone, are not libelous, and will not support a cause of action.

We think every member of the court would agree to what has been said if it were not for the alleged innuendoes pleaded. We are of the opinion that the alleged innuendoes in explanation of the language used in the articles do not result in stating a cause of action.

"But an innuendo must not introduce new matter or enlarge the natural meaning of words. It must not put upon them a construction which they will not bear. It cannot alter or extend the sense of the defamatory words, or make that certain which is, in fact, uncertain." Newell, Slander & Libel, 3d ed. 755. See cases cited in note 40. "The office of the innuendo is to aver the meaning of the language published. Therefore, if the meaning of the language is plain, no innuendo is needed. The use of it can never change the import of the words, nor add to or enlarge their sense."

Chief Justice Shaw states the law as follows: "The law proceeds on the hypothesis that what is the ordinary meaning and nature and intrinsic force of language is a question of law. When, therefore, words are set forth as having been spoken by the defendant of the plaintiff, the first question is whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo undertaking to state the same in other words is useless and superfluous; if they do not, such an innuendo cannot aid it. It therefore often happens that where innuendoes are added, which do alter and vary and even inflame and exaggerate the sense of the words much beyond their natural force and meaning, yet such innuendoes are held not to vitiate the declaration.

"The reason of which I take to be this: The words themselves imputing an infamous offense, the innuendo may be rejected as surplusage; and as the plaintiff is not allowed to go into evidence *aliunde,* to show that the words were, in fact, used in the sense imputed by the innuendo, they can have no influence whatever. But, if the words do not impute such infamous crime, by their natural sense and meaning, then, as a general rule, the plaintiff is not entitled to recover, and, as he cannot enlarge that meaning by an innuendo, so as to let in proof of extraneous facts, his action must fail." Newell Slander & Libel, p. 756.

The decision of the majority, as I view it, is a long step in the direction of the destruction of a free press. If such mild expressions as used in the articles complained of may be made the basis of libel suits, when

clearly such articles are not libelous, soon it will be that every editor, publisher, or owner of a newspaper will be deterred from the mildest criticism of any person, public officer, or candidate for public office, for fear of endless litigation which may be brought against him, and enormous expense which is thereby likely to be heaped upon him.

B. F. FELTON, Respondent, v. HERMAN NURNBERG, Appellant.

(179 N. W. 720.)

Pleading — terms of written agreement annexed control allegations on demurrer; averments inconsistent with writing disregarded.

1. Where a written agreement is incorporated as a part of a complaint, its terms control and determine the sufficiency of the complaint as against a demurrer in every particular, where the contract terms do not sustain the allegations of the complaint as to its contents, and where the averments are contradictory of, or inconsistent with it, they will be disregarded.

Brokers — complaint in action for commission for making loan held not to show full performance of broker or of loan company.

2. In an action on a contract to recover commissions due for making a loan, where the complaint alleges due performance of the conditions precedent on the part of the plaintiff to be performed, and, further, specifically alleges specific acts of performance by the plaintiff, and where, under the terms of a written agreement incorporated in the complaint, conditions precedent are required of the plaintiff, and also of a specific loan company mentioned therein, and where, further, the facts as alleged fall short of showing due performance, it is *held* that the general allegations of due performance do not aid in supplying the necessary allegations to show full performance on the part of this designated company, or of the plaintiff.

Opinion filed October 23, 1920.

In District Court, Stutsman County, *Cole*, J., to recover commissions due for making a loan. From an order overruling a demurrer to the complaint the defendant has appealed.

Reversed.

John A. Jorgenson, for appellant.

Where one agrees with another to pay a sum of money or to do a

thing, and no time is mentioned for the performance of such agreement, the law presumes that the money shall be paid, or the thing done within a reasonable time. Brown v. Brown, 103 Ind. 23, 2 N. E. 233; Urquhart v. Belloni, 57 Or. 314, 111 Pac. 692; Liliengren Furniture & Lumber Co. v. Mead (Minn.) 44 N. W. 306. Citing Stone v. Harmon, 31 Minn. 512, and Driver v. Ford, 90 Ill. 595.

Parol evidence is not admissible to show that it was intended that payment of a mortgage should be made only out of a certain fund. Carlton v. Vineland Wine Co. 33 N. J. Eq. 466; Sangston v. Gordon, 22 Gratt. 755; Neale v. Albertson, 39 N. J. Eq. 382.

John W. Carr, for respondent.

The term "cash" as used in this agreement means money in hand at the time as opposed to credit. 11 C. J. 20; Palliser v. United States, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034.

Oral evidence is admissible where the contract is silent, unless the oral evidence contradicts or is inconsistent with the terms of the written contract. DePue v. McIntosh (S. D.) 127 N. W. 533; Putnam v. Prouty (N. D.) 140 N. W. 93; Erickson v. Wiper, 33 N. D. 193.

BRONSON, J. This is an action on a contract to recover commissions due for negotiating a loan. The defendant has appealed from an order overruling a demurrer to the amended complaint. The contract incorporated in the complaint, and upon which the action is based, reads as follows:

"This agreement is made for the purpose of procuring for Herman Nurnberg a loan upon his section 9, township 140, range 64.

"It is hereby mutually agreed between B. F. Felton, party of the first part, and Herman Nurnberg, party of the second part, that the said party of the first part is to procure if possible, for the party of the second, a loan for the sum of $12,800 on the above-described land for a period of five years, with interest at 6 per cent per annum payable annually. And if the party of the first part is successful in obtaining the above loan, the party of the second part agrees to pay the party of the first part the sum of $640 cash for his services in procuring said loan.

"Said second party is to execute application this day, and first party is to forward it to this company, and if acceptable and loan made by

the said company, then this amount to be due the said party of the first part from the party of the second part. If not acceptable, then and in that event the said party of the second part is in no wise indebted to the said party of the first part. Unless a smaller sum is accepted by the said party of the second part, in that event the said party of the second part is to pay the party of the first part, one half per cent per annum during the life of the loan in cash.

The loan company described in the application is to accept or reject application within ten days from this date; and in case they accept of this application, it is hereby mutually agreed between the parties hereto, that the said loan is to be made as soon as clear title is furnished by the second party hereto, and if it is not made within the time specified, this agreement is to be null and void."

In connection with this contract, the complaint further in substance alleges an oral agreement to pay a cash commission of $640 to be deducted from the loan, at the time the plaintiff furnished the money with which to make the same. Further that plaintiff obtained a loan for $12,800 at 6 per cent for five years payable annually, and requested the defendant to complete the loan by executing and delivering the necessary notes and mortgages; that the defendant declined to make such notes and mortgages and refused to carry out the written contract; that, notwithstanding that plaintiff had caused the moneys to complete such loan to be deposited in a bank on delivery upon compliance by the defendant with his part of the contract, the defendant refused to perform any part thereof.

The complaint further alleges that the plaintiff has complied with all of the provisions and conditions of the contract on his part to be performed, and that the defendant has wholly failed to perform, and that there is due the plaintiff $640.

Does the complaint state a cause of action? The complaint seeks to recover the consideration specified in the contract upon allegations of full performance of the provisions and conditions thereof on the part of the plaintiff to be performed. The terms of the written agreement control and determine the sufficiency of the complaint as against the demurrer made in every particular, where the contract terms do not sustain the allegations as to its contents, and where the averments are

contradictory of, or inconsistent with it, they will be disregarded. Johnson v. Kindred State Bank, 12 N. D. 336, 340, 96 N. W. 588.

The terms and conditions of the contract imposed upon the parties were, respectively, as follows:

Upon the defendant:

1. To execute an application for a loan in *this* company.

2. To furnish a clear title to the property involved.

3. To pay a commission of $640 in cash, if the application was acceptable and the loan made by *this* company.

4. To pay ½ of 1 per cent per annum, during the life of the loan, in cash, as commission, if a smaller loan was accepted.

Upon the plaintiff:

1. To forward the application of the defendant to *this* company.

2. To procure, if possible, a loan, as stated, from *this* company.

Upon the part of *this* company:

1. To accept a loan on this property, pursuant to the application within ten days.

2. To make a loan thereon as soon as clear title to such property is furnished.

The complaint does not allege that the plaintiff forwarded the application of the defendant to *this* company; it does not allege that *this* company accepted a loan on this property or agreed to make a loan thereof. The complaint does not allege the name of *this* company, although it is clear from the contract that a loan was to be made in a certain specific company whose name at least does not appear from the face of the contract or the pleadings in this record. The complaint furthermore does not allege that the plaintiff procured a loan from *this* company pursuant to the contract for the defendant.

It is true that the complaint has alleged generally compliance on the part of the plaintiff with the provisions and conditions of the contract on his part to be performed. This is in accord with the statutory provision providing for a general allegation of due performance of conditions precedent in a contract. Comp. Laws 1913, § 7461. See Sifton v. Sifton, 5 N. D. 187, 190, 65 N. W. 670.

The plaintiff, however, has further specifically pleaded that he obtained for the defendant *a* loan for $12,800, and requested the defendant to complete said loan by executing and delivering the necessary

notes and mortgages; that the plaintiff caused to be deposited with the bank the moneys to complete said loan. The general allegations, therefore, of due performance, do not aid in supplying the necessary allegations to show full performance on the part of *this* company and of the plaintiff, where the plaintiff has attempted to allege what he has actually done and where such facts so alleged fall short of showing due performance. 13 C. J. 728; Pease Oil Co. v. Monroe County Oil Co. 78 Misc. 285, 138 N. Y. Supp. 185. The allegations in the complaint, that the plaintiff procured a loan for the amount of the contract, and caused a deposit to be made for the amount thereof, is far from being a compliance with the terms of the contract providing for a loan with *this* company. See Henry v. Sacramento, 116 Cal. 628, 48 Pac. 728; 13 C. J. 728. The complaint is further defective not only in not showing the name of *this* company, but also in failing to definitely allege concerning the application which by the terms of the contract may have qualified or supplemented the written contract.

The defendant in his brief has urged principally that the demurrer should be sustained for the reason that the contract by its terms provides for the payment of a commission only if the application is acceptable and the loan made. This argument is based upon the theory that no commission became due under the contract until the loan was actually made, in fact. We are of the opinion that this question cannot be determined as a question of law upon this record for the reason that the agreement itself contemplates the execution of an application and the acceptance of such application, before a loan should be made by *this* company. This would involve a construction of the application in construction with the agreement and the action of the company thereupon before a legal interpretation could be given to the words "loan made." It might possibly appear from the whole of such instrument and the action had that the intention of the parties concerning the use of such words would be a question of fact for the jury. See 13 C. J. 788; 9 C. J. 632, note 11. The trial court erred in overruling the demurrer. Its order is reversed.

ROBINSON and GRACE, JJ., concur.

BIRDZELL, J. I dissent.

CHRISTIANSON, Ch. J. (dissenting). I dissent. The legislature has said: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties." Comp. Laws 1913, § 7458. It is the duty of the courts to recognize and give effect to this rule.

The written agreement involved in this case recites that the defendant, Nurnberg, is the owner of a section of land upon which he desires to make a loan. And that it is "mutually agreed between B. F. Felton, party of the first part, and Herman Nurnberg, party of the second part, that the said party of the first part is to procure, if possible, for the party of the second part a loan for the sum of $12,800 on the above-described land for a period of five years, with interest at 6 per cent per annum payable annually. And if the party of the first part is successful in obtaining the above loan, the party of the second part agrees to pay the party of the first part the sum of $640 cash for his services in procuring said loan." The complaint in this case unquestionably alleges that plaintiff fully complied with this portion of the contract.

But the majority opinion holds that the above-quoted portion of the contract is limited by the subsequent portions which requires Nurnberg to execute a loan application, and provides that Felton shall forward such application to the loan company. And that inasmuch as the complaint does not specifically aver that the loan application was executed by Nurnberg, and forwarded to and accepted by the loan company, and the loan made by it, the complaint fails to state a cause of action. The provision that Nurnberg should execute a loan application was clearly for the benefit of Felton. It is a matter of common knowledge that such applications contain certain questions, and require the applicant to make certain answers or representations relating to the character of the land, the amount and value of improvements thereon, and matters of that kind. Obviously the defendant cannot complain if the plaintiff procured the loan without such application. That would merely give the defendant a more favorable deal than he was entitled to. The primary object concerning which the parties contracted was the procurement by the defendant of a certain loan, at certain terms, upon certain land. The remainder were matters of detail relating to the principal object of the contract. The complaint in this

case shows that the plaintiff on his part performed what he had agreed to perform; that he obtained the loan which he was employed to obtain.

In my opinion the trial court was correct in holding that the complaint stated a cause of action. The order appealed from should be affirmed.

BIRDZELL, J., concurs.

FRED C. HIEB, as Administrator of the Estate of John Hoff, Deceased, Respondent, v. JACOB HOFF, Appellant.

(179 N. W. 696.)

Executors and administrators — evidence held sufficient to sustain verdict for plaintiff.

In an action brought by an administrator to recover money loaned by the decedent to the defendant, the evidence is examined and *held* sufficient to support the verdict for the plaintiff.

Opinion filed October 23, 1920.

Appeal from District Court, Bottineau County, *W. J. Kneeshaw,* J. Affirmed.

J. J. Weeks, for appellant.

W. H. Adams, for respondent.

BIRDZELL, J. This is an action brought by the plaintiff as administrator of the estate of John Hoff, deceased, to recover of the defendant the sum of $1,955.20, which it is claimed was loaned to the defendant by John Hoff on or about October 2, 1918. The defendant denies that the money was loaned to him. The facts disclosed by the record are as follows:

On August 12, 1918, John Hoff and his father, Jacob Hoff, the defendant, had a transaction with one August Pranke, whereby August Pranke agreed to purchase certain personal property of John Hoff amounting to $2,600, and certain real property the record title of which was in Marie Hoff, mother of John Hoff, and wife of Jacob Hoff,

amounting to $6,400. The parties went into the State Bank of Omemee, and, after discussing their deal, called upon the cashier of the bank, N. F. Maakestad, to draw up a bill of sale of the personal property and a contract for deed covering the land. The contract for deed was signed by Marie Hoff, John Hoff, and August Pranke. The former instrument recited the payment of $2,600, but it was left in escrow with the cashier of the bank. The latter instrument called for the payment of $100 at the time of delivery of the contract, $2,300 on October 1, 1918, and the balance by instalments of $1,000 each, due November 1, 1919, and annually thereafter. The payment of $100 was made at the time the contract was entered into. On October 2, 1918, Pranke, John Hoff, and Jacob Hoff again went to the State Bank of Omemee, where Pranke paid $5,144.35, which John Hoff, the son, directed to be credited as follows: $644.35 to his own checking account and $4,500 to the credit of Jacob Hoff, the defendant. John Hoff died November 28, 1918.

The plaintiff and respondent contend that the $4,500 credited to the defendant included the larger portion of the $2,600 which was paid for the personal property covered by the bill of sale from John Hoff to August Pranke, and that John Hoff directed it to be credited to his father in pursuance of an understanding or agreement that he would loan it to him to enable him to partially clear up a mortgage on some land. The jury rendered a verdict for the plaintiff for $2,181.30, upon which judgment was entered.

The only question for consideration on this appeal is whether or not there is sufficient evidence to support the verdict. We are of the opinion that the verdict is amply supported. A witness by the name of Zarnetski testified that he had taken some part in the negotiations leading up to the deal that was consummated in August, 1918, acting for Pranke, and that he was present in the bank when the papers were executed. He is one of the witnesses to the contract for deed. He testified that during a conversation at that time between Jacob Hoff and John Hoff, Jacob Hoff indicated a desire to borrow some money to apply on a mortgage, stating that he did not have the money and would have to borrow it; whereupon John said that he would get money on the payment for the land and the property included in the Pranke deal, and that he would let his father have the use of that. Upon cross-ex-

amination he was asked whether or not he understood John to say that he would loan his father not only the money that came from the personal property, but also the money that came from his father's land or his mother's land. In response he stated that John had told him that the land actually belonged to him, but that it was in his mother's name yet. (No claim is made in this suit, however, for any money paid on acount of the land.) Pranke testified that the payment made October 2d included full payment for the personal property purchased ($2,600), and that the balance was to apply on the land.

Maakestad testified that John Hoff directed him to credit the money to the respective accounts of himself and his father in the amounts hereinabove indicated, saying at the time that the $4,500 was the father's money. According to Maakestad's recollection, John's direction was as follows: "You put $4,500 in pa's name, that belongs to pa; put that in his name. The balance put to my credit on checking account."

There is some further testimony offered in the nature of an admission. The plaintiff administrator and his sister, the widow of John Hoff, in December, 1918, approximately a month after the death of John Hoff, called upon the defendant and asked him if he knew what became of the money that John got for the personal property, and that after some hesitation he said he did not know anything about it; that he did not have anything to do with that. Mrs. John Hoff also testified to this conversation, and it is not disputed by the defendant. The bill of sale and contract for deed are in evidence, and are in accord with the testimony regarding the consideration.

In the state of the evidence as disclosed above, it clearly appears that of the payment of $5,144.35 at least $2,600 belonged to John Hoff as payment for the personal property; that of that payment he received only $644.35, which was placed to his checking account in the bank; that there had been a conversation between John Hoff and the defendant less than two months before, in which it was agreed that John would loan the defendant some money out of this transaction to apply on a mortgage; and that the defendant, though present at the time the money was paid and credited at the bank, including the $2,600 owing to John, part of which was credited to his account, professed to have no knowledge as to what had become of John's part of the money thus

paid. We are of the opinion that upon the whole record there is ample, substantial testimony to support the verdict of the jury. The judgment is affirmed.

E. S. PRICKETT, Respondent, v. OTTO PETERSON, Sheriff of Divide County, North Dakota, Appellant.

(179 N. W. 718.)

Fraudulent conveyances — good faith, purchase for value, and change of possession of automobile held for jury.

1. In an action for a conversion of an automobile seized by a sheriff upon a warrant of attachment, where the plaintiff claims to have previously purchased the same from the judgment debtor, it is *held* that the questions of whether such purchase was made in good faith and for value, and whether there was an actual change of possession and delivery of such automobile, were, upon the evidence, questions of fact for the jury.

Fraudulent conveyances — evidence sustaining verdict for plaintiff in conversion of automobile.

2. The jury, by its verdict, awarded plaintiff damages in the sum of $350. *Held*, that the verdict is supported by the evidence.

Opinion filed October 23, 1920.

Appeal from District Court of Divide County, Honorable *Frank E. Fisk*, Judge.

Judgment affirmed.

Brace & Stuart and *John E. Greene*, for appellant.

"Where circumstances under which a transfer of property by a debtor is made are suspicious, the failure of the parties to testify or to produce available, explanatory, and rebutting evidence is a badge of fraud." 20 Cyc. 450.

Moody O. Eide and *Greenlead & Wooledge*, for respondent.

The question of the delivery and possession of the automobile was a question of fact for the jury. Rosenbaum Bros. & Co. v. Hayes, 5. N. D. 476.

GRACE, J. This action is one in conversion brought by the plaintiff against defendant, to recover the value of a certain Overland 79 model B. touring car, alleged to be of the value of $500. The answer denies plaintiff's ownership of the car, or the conversion thereof by the defendant, and the value thereof.

As a further defense, defendant claims that he seized the automobile upon a warrant of attachment, in an action where one E. M. Truax is plaintiff and Charles Alton defendant; and that the property was taken by him as the property of Charles Alton, under the belief that the same belonged to the said Alton; and that he still holds it in that way, subject to the order of the court.

The plaintiff claims, and offered evidence to prove, that sometime prior to the attachment he purchased the automobile from Alton, for whom he was working in the operation of a coal mine, for the sum of $200, $96 of which he claimed to have been paid in cash, and the balance by giving Alton credit for indebtedness from Alton to plaintiff, amounting to $104.

It further appears that, on about the 2d day of June, 1919, the plaintiff had filed a claim of lien against the mine property for $309.90, for his work as a miner therein from February 1st to the 29th day of May, 1919, and which he claimed was owing by the owner or owners of the mine to him.

There is some substantial evidence showing the delivery of the car by Alton to plaintiff, some two weeks after the time of the purchase. After the service of the writ of attachment on plaintiff, and after defendant had taken possession of the car thereunder, the plaintiff served notice upon him of a third party claim. The defendant was furnished an indemnity bond by the plaintiff, in the case of Truax v. Alton, and thereupon refused to deliver the car to plaintiff.

There is evidence that Alton was quite deeply indebted to various creditors at about the time of the sale by him, of the automobile to plaintiff. The evidence shows that plaintiff got a receipt from Alton for the $96 cash paid, but the same was lost. There was no bill of sale of the car from Alton to plaintiff.

At the time of the sale plaintiff was in the employ of Alton. At the time of the sale, the car was not in working order, and was being repaired, and was not turned over to plaintiff for about two weeks there-

after. At the time defendant took possession of the automobile, plaintiff asserted his right thereto.

There is evidence showing that after the car was repaired Alton brought it over and delivered it to the plaintiff at his place. Alton testified that he sold the plaintiff the car about April 25th, and that it was worth from $350 to $400; and that the sheriff took it away from plaintiff about two weeks after he had delivered it to him.

The case was tried to the court and a jury. The jury returned a verdict in plaintiff's favor for the sum of $350. Upon this verdict judgment was entered in plaintiff's favor. The only error assigned is the insufficiency of the evidence to sustain the verdict and judgment.

The question now is not whether the verdict or judgment is sustained by a preponderance of the evidence, but whether there is any substantial evidence in the record to support them. We think, upon examination of the evidence, that it is sufficiently substantial to show a sale of the car to plaintiff, in good faith and for a valuable consideration, at a time prior to the levy of the attachment. This, we think, is shown by the testimony of Alton, Hickman, and the plaintiff.

We are of the opinion, further, that the evidence shows that in making the sale there was no violation of § 7221, Comp. Laws 1913. We think the evidence was sufficient, so that the jury could infer there were two debts owing to plaintiff,—one, an individual debt from Alton to him, and the other, the company debt from the operators of the coal mine,—and that the individual debt, together with the $96 in cash, was the consideration for the sale.

The evidence is not very definite as to the company debt. However, the lien statement, together with slight testimony relative to that indebtedness, was some evidence of that indebtedness.

Alton, the operator of the coal mine, as well as the plaintiff in this case, were witnesses, and defendant had full opportunity, on cross-examination, to ascertain from them any further details in regard to the company debt, if he desired to do so.

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

STATE OF NORTH DAKOTA ON THE RELATION OF O. E. LOFTHUS, as State Bank Examiner, The Scandinavian American Bank of Fargo, a Corporation, and H. J. Hagen, N. G. Eggen, Lars Christianson, H. L. Bolley, Spurgeon Odell, Emil J. Headland, and J. P. Holmes, Directors and Stockholders of the Scandinavian American Bank of Fargo, and P. R. Sherman, Cashier and Stockholder, Relators, v. WILLIAM LANGER, Attorney General, and as an Individual, and as a Member of the State Banking Board, and Thomas Hall, Secretary of State, and as a Member of the State Banking Board, and as an Individual, and Albert E. Sheets, Jr., as Assistant Attorney General, and as an Individual, and the State Banking Board and P. E. Halldorson, as Pretending Receiver of Said Bank, and as an Individual, Defendants and Respondents.

(177 N. W. 408.)

Courts — supreme court may frame its original process as the exigencies require.

1. In the exercise of its original jurisdiction, the supreme court may frame its process as the exigencies require.

Attorney general — on original application to prohibit wrongful acts of attorney general, supreme court may act independently of his consent.

2. Where an original application is made which seeks to restrain and prohibit the further continuance of alleged wrongful acts by the attorney general, the supreme court may exercise its original jurisdiction independent of any application to or the consent of such attorney general.

Prohibition — in matter involving state bank examiner, state guaranty funds, and powers of state banks the supreme court may exercise its original jurisdiction.

3. Where the state examiner and a bank chartered by the state make an original application which seeks to restrain and prohibit the attorney general and members of the state banking board, and parties acting under their orders, from exercising unlawful powers and usurping the powers and duties of the state examiner in attempting to declare a state bank insolvent, and to conduct

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NOTE.—On the question as to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry, see notes in 20 L.R.A.(N.S.) 351, and 44 L.R.A.(N.S.) 395.

On effect of certification of postdated check, see note in L.R.A.1917F, 1099.

a receivership thereover, and where it appears from the record that the prerogatives of such examiner, the state guaranty funds, and public depositors, are directly involved, and that the rights of such bank, as well as a large number of other banks, concerning their rights to do business, are concerned, and that there exists a wide-spread and unprecedented public interest and concern with regard to the solvency of such banks, and the operation of the banking laws of this state in regard thereto, it is *held* that such circumstances give rise to the exercise of the original jurisdiction of this court pursuant to its constitutional powers.

Prohibition — the supreme court may place in charge of a state bank the state officer ordinarily charged with that duty.

4. Upon such application, where it is deemed necessary in order to preserve the rights of the parties, to safeguard the public interests, and to prevent the issue presented in the application from becoming moot by a continuance of the alleged wrongful act, the supreme court may issue its temporary restraining order, and place in charge of the institution affected the state officer ordinarily charged with the duty in such cases.

Statutes — latest of two conflicting statutes must prevail.

5. It is a well-settled rule of law, where two legislative acts are repugnant to, or in conflict with each other, that the latest expression of the legislative will must control, even though it contains no repealing clause.

Banks and banking — state examiner may take charge of bank release possession to its officers without a receiver.

6. Pursuant to chapter 53, Laws 1915, the state examiner is granted the specific power, with the approval of the state banking board, to appoint a receiver for a banking corporation; no receiver shall be appointed for such reasonable time as he may require for an examination of a bank. Before the appointment of a receiver, he may take charge of a bank, and thereafter release the possession of such bank to its officers, without the appointment of a receiver.

Banks and banking — state banking board cannot appoint a receiver for a bank without knowledge or consent of state bank examiner.

7. Since the enactment of chapter 53, Laws 1915, the state banking board does not possess the power of appointing a receiver for a bank, independent of the initiative action or without the knowledge or consent of the state examiner.

Banks and banking — state banking board, without action by state bank examiner, could not place temporary receiver in charge.

8. Where the state banking board, during the absence of the state examiner from the state, and without his initiative action, knowledge, or consent, or that of the acting state examiner, determined a bank to be insolvent, and caused the bank to be closed, and placed its temporary receiver in charge thereof, it is *held* that such action is illegal and beyond their powers.

Banks and banking — state banking board without action by state bank examiner may not close bank and place receiver in charge.

9. Where the state banking board, and the attorney general acting pursuant to its orders, during the absence of the state examiner from the state, and without his initiative action, knowledge, or consent, or that of the acting state examiner, caused an examination of the Scandinavian American Bank at Fargo to be made, and immediately, upon the reception of the report of its examiners, declared such bank to be insolvent, caused the bank to be closed, and its temporary receiver to be placed in charge thereof, arbitrarily and without any warning or opportunity given to the bank officials or stockholders to comply with its demands or findings, and without notifying or consulting the state examiner or the acting state examiner, it is *held* that such action was unwarranted, and neither within the spirit nor letter of the legal powers conferred upon such board.

Banks and banking — determination by banking board as to value of collateral held arbitrary and without foundation.

10. Where examiners, in their report upon which the banking board determined the bank to be insolvent, list as excessive and inadequately secured loans, a number of loans aggregating $743,000 secured largely by farmers' notes and farmers' postdated checks, in the proportion of about two to one, and where such examiners have, by arbitrary action and without specification, concluded that such farmers' notes are not worth over 50 per cent of their total amounts, and that the postdated checks are not collateral at all and of no substantial value, it is *held* that such determination is wholly arbitrary and without foundation in fact.

Banks and banking — "postdated checks" may be used as collateral.

11. Postdated checks are negotiable instruments similar to bills of exchange payable at a future date, and may be used as collateral paper the same as any other negotiable instruments.

Banks and banking — state banking board's finding of a bank's insolvency held unjustified and unreasonable.

12. Where the state banking board has based its findings of insolvency upon the report and conclusions of its examiners, to the effect that certain loans in such bank are excessive and inadequately secured; that certain debts listed amounting to $46,000 are worthless; that the bank has failed to maintain its legal reserve in strict accordance with the law, and has over $169,000 of past-due paper; and where, in the record, it is shown that no opportunity was granted or order made permitting such bank to comply by reduction of such excessive loans, although it had the ability so to do, and that in fact such excessive so-termed loans were in fact adequately secured; and that, further, the banking board or the state examiner had not theretofore required the banks of the state to maintain their legal reserves as strictly required (by keeping on hand all moneys deposited by other banks with it), and had given

the bank no instructions or order so to do within a specified time; and, further, that since the state examiner took charge there was paid into such bank over $35,000 on such bad debts and a large amount upon the paper of such bank,—it is *held* that the finding of insolvency is not justified and was unreasonably so determined.

Opinion filed October 24, 1920.

Original application to prohibit and restrain the respondents from usurping the powers and duties of the state examiner, and from wrongfully continuing its appointee as receiver of the Scandinavian American Bank of Fargo.

Writ granted directing the state examiner to continue in charge of said bank, with full power to release possession of such bank to its officers when he deems fit, and restraining the respondents from further continuance of their wrongful acts.

Judgment for costs and disbursements ordered in favor of the relators and against the respondents.

Wm. Langer, Attorney General, *Albert E. Sheets,* Assistant Attorney General (*S. L. Nuchols* and *W. S. Lauder,* of counsel), for respondents.

Lemke, Paddock, & Day, for relators.

BRONSON, J. *Proceedings.*—This is an original application to prohibit and restrain the respondents from interfering with the duties of the state examiner, and from continuing their alleged wrongful acts in determining the Scandinavian American Bank of Fargo to be insolvent, and in appointing thereover, a receiver.

On October 2, 1919, this court issued its preliminary order, temporarily restraining the respondents and placing in charge of such bank the state examiner upon petition, which alleges, among other things, that the respondents are usurping the powers and duties of the state examiner; that arbitrarily, illegally, and wrongfully they had occasioned advance information to be given that such bank was to be closed and had caused a run to be made on such bank; that illegally and wrongfully, without the consent of the state examiner, they caused such bank to be closed and a temporary receiver to be appointed; that such respondents are attempting arbitrarily to invalidate large amounts of col-

lateral of such bank, are failing to make due collections thereof, and are about to sell great quantities thereof; that their arbitrary and illegal action, unless restrained, will financially wreck such institution; that public moneys are on deposit in such bank and the state bank guaranty fund are involved, as well as the powers and duties of the state examiner. Such petition seeks to invoke the exercise of the original jurisdiction of this court.

On the return day, October 15, 1919, the respondents filed a motion to dismiss upon jurisdictional grounds, and also their return and answer. On this day, the cause was orally argued and submitted. Pursuant to the order of this court, the parties have been granted until October 23, 1919, to make up and complete the record in this matter.

Record Facts.—Substantially, the facts, as disclosed by the record, are as follows:

For many years, the relator bank has been engaged in the general banking business as a state bank at Fargo, North Dakota. On September 17, 1919, this bank was examined by department of the state examiner through one of its deputies, the respondent Halldorson, and report thereof filed with the department. This report had been considered by the state examiner, conferences were held with the officers of the bank, and the recommendations made by the state examiner were being carried out as the evidence of the state examiner discloses.

On September 25, 1919, the state banking board, of which the respondents Langer and Hall constitute a majority, passed a resolution which reads as follows:

Resolution.

"Whereas, an investigation of one of the banks or associations doing business in the city of Fargo, under the supervision of the state banking board, leads the banking board to believe that an attempt is being made to defraud some of the stockholders, and

"Whereas, this institution is in close relation to the other banking institutions in Fargo,

"Be it resolved, that the attorney general or his assistants, together with one or more bank examiners he may choose, proceed to Fargo immediately and conduct a thorough examination of any and all banking institutions doing business in the city of Fargo, North Dakota, under

the laws of this state; that said examination shall disclose the value of all stock of every nature and description, the amount of good and bad notes, together with all collateral, and any or all other things which, in the judgment of the attorney general, his assistants, or the men making the investigation, may be necessary to give the board complete information as to the value of the notes, the value of the loans, the value of the stock, and the value of the collateral within these various institutions, and that particular investigation be made to determine whether or not any crime has been committed on the part of any officers of the banks or institutions, and that the attorney general be given full power to act to protect any depositor, any stockholder, or the guarantee fund of the state."

The state examiner certifies to this resolution as secretary of the state banking board. On the same date he issued a letter to the respondent Halldorson, one of his deputy examiners, which reads as follows.

Mr. P. E. Halldorson, Deputy Examiner,
Fargo, North Dakota.
Dear Mr. Halldorson:—

You are hereby authorized to act under the direction of Attorney General William Langer in the examination of the Northwestern Savings & Loan Association of Fargo, and such other institutions in Fargo as he may deem necessary, with a view to ascertaining the truth of the charges made that this concern is attempting to freeze out some of its stockholders. You may also select any deputy examiner or examiners that you desire to assist you in this examination. Yours truly,

O. E. Lofthus, State Examiner.

On September 26, 1919, the respondent Sheets proceeded to Fargo, under the direction of the attorney general, possessed of the records and reports of the Northwestern Mutual Savings & Loan Association, a letter of authority to him and Attorney Lauder to fully act in the place and stead of said attorney general (which letters of instruction did not state upon what matter they should possess such authority), together with the letter from the state examiner to said Halldorson.

On September 27, 1919, Sheets in company with Attorney Lauder went to the bank, and, in accordance with the testimony of Sheets,

proceeded to go over the loans of the bank and check them. Attorney Lauder, in his affidavit, states that he is not a bookkeeper or accountant, and that he was not there for the purpose of making an examination himself, but to give advice upon any question of law that might arise. On September 28, 1919, the respondent Halldorson started to examine the bank, and on September 29, 1919, another deputy named Engemoen started to assist him.

Pursuant to this examination, Sheets, Halldorson, and Engemoen made and signed a report on October 1, 1919, covering a period of examination from September 27, 1919, to October 1, 1919, at 5 P. M., wherein they list various loans aggregating something over $734,000 as excessive loans, stating their general character to be extremely unsatisfactory, and the security in almost every case entirely inadequate. For many of these so-termed excessive loans the collateral or security is stated to the farmers' liabilities, represented by notes and postdated checks. For instance, there are four different loans described in such excessive loans list; namely: the Consumers United Stores Company, the National Nonpartisan League, the League Exchange, and the Publishers National Service Bureau list. These aggregate in round numbers, $443,000. The farmers' paper, which stands as collateral for such loans, amounts to over $970,000; there being some additional security amounting to over $29,000. The report estimates such farmers' notes to be not worth in excess of 50 per cent of their par value. As to the postdated checks it is their opinion that they are not collateral at all. That they are without validity or substantial value. There was also listed an itemized statement of bad debts amounting, in round figures, to $46,500, reported as of no value whatever. This report lists the resources and liabilities of such bank, showing that it had in loans and discounts (round figures given) $1,203,486; in deposits, private, $869,855; due to banks, $616,565, total deposits, $1,486,420; its capital, $50,000; surplus, $10,000; its cash on hand, $26,249; its amount due from banks, including collections in transit, $227,275; its excess expenses over undivided profits, $3,114. There is listed $169,973 past-due paper. The conclusion is reached that the bank is heavily overloaned, that its reserve is below the requirements of law, and, if figured in strict accordance with law, would be several hundred thousand dollars less than no reserve, and finally, somewhat rhetorically, it is stated

that this bank presents a vast unwieldly $1,500,000 financial monstrosity, unable to take care of its obligations. The recommendation is that the bank's door be closed to protect the interests of the bank and its patrons.

Apparently, without any delay after the receipt of this report, the state banking board, though the respondents Hall and Langer, took action; for at 11:20 A. M. on the next day, October 2, 1919, a telegram was sent to respondent Halldorson by the attorney general, to the effect that the banking board had adopted a resolution that the bank was insolvent to their satisfaction, and advising said Halldorson that he had been appointed a temporary receiver by such board, with power and authority to take charge of such bank.

In the meantime, on this day, something like a run was in course of progress against this bank. A depositor in the bank testifies that at 10 A. M. of that day he was advised to get his money out of the bank, as it would be closed. In St. Paul it was known at 10 A. M. that the bank was going to be closed. The clearing house in Fargo refused to clear the items of such bank in the morning; all the banks in Fargo demanded cash for their items. Such evidence is in the record not disputed. Upon receipt of the telegram, Halldorson secured a bond in the sum of $100,000, and thereupon took charge of said bank on that day about noon, and closed its doors.

The state examiner, who was absent from the state during this course of procedure by the respondents, as well as his chief deputy, Semmingson, who was the acting state examiner during his absence, both testify that the closing of such bank was without their knowledge or consent.

On October 4, 1919, Sheets, Halldorson, and Engemoen made a report to the attorney general supplementary to their original report, previously mentioned, wherein they refer to a "Kiting" arrangement with the Bank of Commerce and Savings, in Duluth, by which such Duluth bank would accept discounted paper indorsed without recourse by the relator bank as though it were purchased by them outright, and without any contingent or other liability, with the understanding that the amount carried should remain intact and on deposit with the Duluth bank for purposes of assisting the bank's financial status when a "call" or an examination was expected.

That in this regard in September, 1919, when Halldorson made his

regular examination, it was found that some $81,500 of paper had been charged to the Duluth bank and about the same time also some $14,000 more was so charged. Further, that the furniture and fixtures account which was carried on the books of the bank at $20,644, being as to that amount $2,000 in excess of that permitted by law, was, in fact, worth only $6,266.50 as determined by an appraisal made by one O'Shea, an architect. The conclusion is thereupon reached in this report that, by a consideration of the excess of expense over earnings, and the loss of the furniture and fixtures account, the capital is impaired to the extent of $7,492.77. The ultimate conclusion is then stated that this item, together with the past-due paper listed in the former report as bad debts and paper, which will result in a total loss, represent the facts upon which they have come to the conclusion that the bank is *hopelessly insolvent* without any reference to the condition of the excess loans. In this regard it may be noted here that the state examiner, in his evidence, however, states that this Duluth item was in fact charged back to the relator bank on September 17th, while Halldorson himself was there examining the bank for the reason that the Duluth bank wanted to hold such item as a credit not subject to check, and this arrangement was not satisfactory to the relator bank. Concerning the furniture and fixtures account, the state examiner states that the state architect has made an appraisal, and that the same justifies carrying such item within the legal limit $18,000, to which it has been reduced.

On October 6, 1919, application was made to this court by the relators. On October 8, 1919, this court issued its order herein pursuant to which the state examiner took charge of such bank until the further order of this court on October 8, 1919.

At the time of this hearing on October 15, 1919, he reports to this court that on the excessive loan list reported by Halldorson et al., $108,000 have been paid. That in many instances the amounts listed are incorrect, one credit item of $8,000 alone being noted in one instance. That he sees no apparent loss in the rest of the loans. That the total collateral securing the loans is $2,477,251.12. That the loans in the past few days have been reduced $169,000. That the legal reserve to-day (October 14th) is about $85,000 over besides $50,000 of Liberty bonds on hand. That he is satisfied the bank is not only solvent, but also retains its surplus and some undivided profits. He further finds

that said Halldorson's report is inaccurate, misleading and unjustifiable. He further states that the postdated checks of the National Nonpartisan League are desirable collateral, because they are in small amounts and spread over wide territory, and the history of their payment shows a wide margin of safety. The Equitable Audit Company of Minneapolis, a corporation chartered under the laws of Minnesota, in the accountant business, was employed by the relator bank to make an investigation and report on the condition of the bank. Such company made such investigation from October 7th to October 14th, 1919. Its report is in evidence before this court. It characterizes the report of Halldorson et al. in many respects to be incorrect and false. It reports that a thorough investigation has been made of the bank, and, in conclusion, states that the correct statement of the net worth of the bank is over $70,000, as follows: Capital stock, $50,000; surplus, $10,000; accrued profits, $10,000.

Halldorson has submitted no report to this court of his actions as temporary receiver. The state examiner testifies that Halldorson has refused to be checked out and be relieved of his responsibility. Remarkable as it may seem, Halldorson issued a signed letter to the state examiner that he was unable to identify or inform him as to the nature or quantity of the files and records removed from relator bank by Sheets during the time he assumed charge thereof. Deputy Examiner Engemoen, who signed the report with Halldorson, submits a sworn affidavit that his work in investigating the loans consisted of totaling up approximately $90,000 of loans. That about $1,113,000 of loans were not seen by him. That he did not investigate such loans and does not know anything of their value; that his conclusions were drawn mostly on statements made by Sheets and Halldorson, and that Sheets dictated the report. There are numerous affidavits concerning the specific loans questioned. They cannot be considered at length in this opinion. One illustration may be given. The Halldorson report lists loans to one Miller, aggregating $26,861.50, secured by a chattel mortgage on certain sheep and a second mortgage on a section of land in Clay County, Minnesota. This is listed as a dangerous loan, with security entirely inadequate, subject to a first mortgage for $15,000. There is evidence in the record, however, that this security is valued at $103,000, and that said Miller's personal net worth is over $207,000.

Various loans to Danielson brothers, aggregating $33,088, are likewise criticized as unjustified for the collateral behind the same. There is evidence in the record that Danielson has assets aggregating $199,000.

The officers of the bank have submitted a statement to the court bearing date October 14, 1919, and sworn to, concerning the list of bad debts classed as worthless by Halldorson and totaling the sum of some $48,000, as listed by him. Up to such date they show that six of such debts have either been paid in full or reduced. That much of such debts have either been removed or paid, the total amount thereof so removed or paid being $35,555.92.

The depositor's guaranty fund commission have submitted a statement to this court bearing date October 14, 1919, commending the state examiner, upon his report and that of the Equitable Audit Company, for the manner in which he has handled the affairs of the bank since he has been in charge.

On October 6th, before the district court of Cass county, North Dakota, an order to show cause was issued by the judge thereof in an action by the state on the relation of the respondent Langer, as Attorney General (leave to commence such action being granted), upon a complaint seeking to dissolve the relator bank as a corporation and to forfeit its corporate rights, privileges, and franchises, and to prohibit it from further carrying on the business of banking in this state. The complaint alleges as grounds simply that the liabilities of such bank are in excess of its assets, and that it is insolvent, and upon the further ground that it has made outstanding loans in excess of 15 per cent of its capital stock and surplus, setting forth a list aggregating $734,000, and that such bank has failed and refused to reduce such loans as requested by the banking board. The order to show cause was returnable October 13, 1919. The district court has proceeded no further in such action since the issuance of the original order of this court.

Bearing date of October 22, 1919, the state examiner and the president of the Equitable Audit Company have submitted an addendum statement concerning the relator bank, wherein there is shown as of date October 22, 1919, the net worth of such bank to be $71,284.71, being $11,284.71 over its capital stock and surplus. Also that the bank's reserve on that day was the sum of $372,661.91 or over $142,500 above the requirements of the state examiner's office. The state examiner re-

ports that of the amount due the banks, $572,902.10, each bank has stated its anxiety to co-operate, and will not withdraw its funds. That the Sisal Trust Loan, mentioned as an excessive loan in the Halldorson report, has been paid in full, being paid later than the compilation of the report. That the liquidation of notes, overdrafts, cash items, etc., aggregate $240,000; that the bank is in a good liquid condition. He requests that an order for reopening be given, the date thereof to be left to his discretion.

Since the oral argument the respondents have filed no additional evidence.

Jurisdiction.—Upon very technical grounds, the respondents assert that the preliminary order of the proceeding is neither process nor a writ, and that the court therefore acquired no jurisdiction. It is sufficient answer, without further consideration, to state that this court, in the exercise of its original jurisdiction, may frame its process as the exigencies require. State ex rel. Moore v. Archibald, 5 N. D. 359, 362, 66 N. W. 234. In matter of this kind it may issue an order to show cause as it has customarily done in a great number of cases for years.

The respondents further object to the jurisdiction upon the ground that no application was made to the attorney general to institute this proceeding. This technical objection is also without merit. It is true that ordinarily the consent or refusal of the attorney general should be secured in initiating the exercise of the original jurisdiction of this court, for the reason that ordinarily the attorney general is the legal representative of the interests of the state, its sovereignty, franchise, and liberties of the people. However, the contention is absurd that an application should be made to that officer in an action in which he is in fact one of the parties defendant, and which concerns his alleged wrongful acts, and seeks to restrain them. The law does not require futile acts. The original jurisdiction of this court is not to be denied merely because the attorney general happens to be one of the respondents. This court has heretofore held that it may exercise its original jurisdiction upon the petition of a private relator even though the attorney general expressly disapproves of the proceeding. See State ex rel. Moore v. Archibald, 5 N. D. 359, 376, 66 N. W. 234; State ex rel. Erickson v. Burr, 16 N. D. 581–586, 113 N. W. 705; State ex rel. Byrne v. Wilcox, 11 N. D. 329, 335, 91 N. W. 955; State ex rel. Shaw v. Har-

mon, 23 N. D. 513, 514, 137 N. W. 427; State ex rel. McArthur v. McLean, 35 N. D. 203, 212, 159 N. W. 847; State ex rel. Byerley v. State Canvassers, 44 N. D. 126, 172 N. W. 90.

Again the respondents further contend that this cause does not present a case requiring the exercise of its original jurisdiction in that it does not involve the sovereignty of the state, its franchises, or prerogatives, or liberties of its people; that the action is not of public concern, involving merely private rights on the relation of private parties.

Upon this record this contention is wholly without merit. This court has exercised its original jurisdiction in many other cases for years, upon much more remote grounds than those plainly evidenced herein.

For instance, in State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450, the relator formerly a tax commissioner, now a member of this court, invoked the original jurisdiction of this court to compel the state auditor to make payment of his salary as a member of the tax commission. In the recent action of State ex rel. Wallace v. Kositzky, 44 N. D. 291, 175 N. W. 207, the original jurisdiction of this court was exercised for a like purpose. In the very recent case of State ex rel. Amerland v. Hagan, 44 N. D. 306, 175 N. W. 372, on the relation of a private individual, this court invoked its original jurisdiction to consider the provisions of the Compensation Act as they affected the rights of such private relator. In the recent action of State ex rel. Stearns v. Olson, 43 N. D. 619, 175 N. W. 714, upon the application of a private relator, this court exercised its original jurisdiction to consider the right of such private relator to receive the payment of a voucher issued to him by the Workmen's Compensation Bureau from the state treasurer. In other actions now pending before this court (State ex rel. Farwell, O. K. & Co. v. Wallace, 45 N. D. 181, 177 N. W. 106, and State ex rel. Capital Trust & Sav. Bank v. Wallace, 45 N. D. 209, 177 N. W. 451) the original jurisdiction of this court is being exercised for the consideration of the rights of private relators to be exempt from taxation under the moneys and Credits Act enacted by the last legislature. See State ex rel. Granvold v. Porter, 11 N. D. 309, 91 N. W. 944; State ex rel. Buttz v. Lindahl, 11 N. D. 320, 91 N. W. 950; State ex rel. Mitchell v. Larson, 13 N. D. 420, 101 N. W. 315; State ex rel. Baker v. Hanna, 31 N. D. 570, 154 N. W. 704; State ex

rel. Linde v. Packard, 32 N. D. 301, 155 N. W. 666; State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583; State ex rel. Linde v. Hall, 35 N. D. 34, 159 N. W. 281; Etate ex rel. Linde v. Packard, 35 N. D. 298, 160 N. W. 150; State ex rel. Langer v. Packard, 40 N. D. 182, 168 N. W. 673; State ex rel. Twichell v. Hall, 44 N. D. 459, 171 N. W. 213. In a large number of cases since statehood this court has defined and exercised its original jurisdiction. It not only has determined that it does possess an original jurisdiction, in addition to its appellate jurisdiction and superintending control over inferior courts, but that the question of whether the original jurisdiction of this court so concerns the sovereignty of the states, its franchises, or prerogatives, or the liberties of its people, and is a matter of such public concern as demands the attention of this court, is peculiarly a matter addressed to the discretion and determination of this court. State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955; State ex rel. Erickson v. Burr, 16 N. D. 581, 586, 113 N. W. 705.

The relator bank is a large banking institution in this state; it has on deposit moneys of many other banks. There are also on deposit public funds of the state deposited through the Bank of North Dakota to the credit of the Agricultural College. The depositors' guaranty fund, enacted to protect bank depositors in 1918, is directly involved in its administration, and affects in a manner every state bank in this state. The powers and duties of the state examiner, and the authority of the state banking board under the laws of this state, are directly concerned.

Further, the acts of the respondents in suddenly closing this bank practically without warning, and installing a temporary receiver in charge thereof, without the knowledge or consent of the state examiner, and in suddenly causing telegrams to be sent to so-termed associated banks of such bank throughout the state, and in determining that certain forms of collateral held in this bank, as well as in many other banks of this state, is improper collateral and of doubtful value, have occasioned unprecedented public interest and public concern not only in this bank, but in the banks of this state concerning their solvency, concerning the operation of the banking laws of the state, and even the credit of the state. Upon this record it is indeed an idle assumption for the respondents to contend or assert that this cause involved merely

the private rights of the relator. It not only concerns the prerogatives of the state government and the liberties of its people, but it concerns in a very large manner the sovereign powers of the officers concerned and the rights of numberless depositors. It is of considerable importance, in view of the widespread consequences that might ensue from the action taken by the respondents, that this court should exercise, as it did exercise, its original jurisdiction in this matter.

The respondents further object, upon jurisdictional grounds, to the order of this court which placed in charge of the relator bank the state examiner of this state until the further order of this court. It is contended that the principle of law applies, that a preliminary injunction will not be granted to take property out of the possession of one party and transfer it to the possession of another. This general proposition of law has no application. At the time when the respondents acted and placed Halldorson in charge of such bank as temporary receiver, the bank was a going concern, operating under its own officials as a public bank. This court, by its temporary order, did not restore this bank to its bank officials. It indeed was necessary, upon the face of the petition as presented, to see that no further proceedings be taken through the acts of the respondents, so that the questions presented in the petition might become moot before this court was able to hear and determine the issues. This court might properly have appointed some third party to take charge of this bank. It saw fit to place in charge thereof the state examiner, the official ordinarily charged with that duty. The respondents contend, and thereby admit, that the state examiner as a relator is a total stranger, without any interest in the rights of such bank. They make no contention that he has not properly performed his duties while in charge of such bank, under the orders of this court. Indeed it amply appears from this record that this court very properly and timely placed in charge of such bank the state examiner in view of the admission in the record of said Halldorson, the temporary receiver of the respondents, that he did not know, during the time he was in charge, just what papers had been taken from such bank, by reason whereof he could not check out with his successor the state examiner.

Extent of original jurisdiction.—When this court takes cognizance of a cause in the exercise of its original jurisdiction, it has the authority

to determine every issue of the law and of fact that arises in the record, if deemed necessary for a consideration of the issues presented.

It may act as a court of equity; it may take testimony (Re Sidle, 31 N. D. 405, 154 N. W. 277); it may issue all necessary writs and all necessary orders to effectuate its jurisdiction as assumed (State ex rel. Moore v. Archibald, 5 N. D. 355, 66 N. W. 234; State ex rel. Poole v. Nuchols, 18 N. D. 233, 20 L.R.A.(N.S.) 413, 119 N. W. 632; State ex rel. Red River Brick Corp. v. District Ct. 24 N. D. 28, 32, 138 N. W. 988).

Accordingly this court may consider and determine fully the cause of the parties presented upon the record pursuant to legal or equitable principles of law that apply.

The merits.—In addition to the contentions concerning the jurisdiction of this court the respondents assert:

1. That the state banking board have the authority to appoint a receiver, upon being satisfied of the insolvency of a bank, without the knowledge or consent of the state examiner.

2. That the matter of determining a bank to be insolvent is within the discretion of such banking board, and that the act of the board so determining is not subject to review in this court, no matter whether the bank was in fact solvent or insolvent.

3. That the question of solvency or insolvency of such bank is not before this court, but only the question of the power of such banking board.

4. That postdated checks, constituting a large line of collateral in such bank, are not collateral at all, and of no substantial value.

5. That, in computing the legal reserve of banks under the law, there must first be deducted amounts of deposits due to banks.

6. That in any event, upon the report submitted, the relator bank is hopelessly insolvent.

In respect to the power of the state banking board to appoint a receiver of its own volition without the suggestion, consent, or knowledge of the state examiner, it is contended that this power is specifically granted in § 5146, Comp. Laws 1913, which is not in any manner repealed by chapter 53 of the Laws of 1915, which grants to the state examiner the power to appoint a receiver with the approval of the state banking board.

In order to understand the construction to be placed upon the existing provisions of law concerning the powers of the state examiner and the state banking board, it is quite proper to review briefly the legislation in this state in that regard.

In 1890 (Laws 1890, chap. 23) the public examiner was made *ex officio* superintendent of banks, with the power of examining banks. It was further provided that any bank refusing to comply with any lawful order of the examiner for a period of ninety days after demand in writing should be deemed to forfeit its franchise.

In 1893 (Laws 1893, chap. 27) it was provided that the public examiner, upon being satisfied of the insolvency of any bank after examination of the same, and, after having consulted with the board of directors, might forthwith apply to the district court for the appointment of a receiver.

In 1897 (Laws 1897, chap. 31) it was enacted that the state examiner, on becoming satisfied of the insolvency of a bank, after making an examination of the same, should forthwith take charge of such bank pending action of the court, and should immediately submit a statement to the attorney general, who should institute action in court against such bank.

In 1905 (Laws 1905, chap. 165) the state banking board was created. It became the duty of such board to examine all reports of banks which should be filed with it by the state examiner. It further provided that orders made by such board should be operative and remain in force until modified, amended, or annulled by the court of jurisdiction. It further provided (§ 29 which is now § 5176, Comp. Laws 1913) that any bank which refused to comply with any requirement lawfully made by the state banking board or by the state examiner, for a period of ninety days or for a lesser period as specified in the order after demand in writing by such board of examiner, shall be deemed to have forfeited its franchise, and failure to comply shall work forfeiture of its franchise. That in either case, the attorney general, upon demand of such examiner or board, must commence action for the purpose of annulling the existence of such bank. It further provided (§ 34 now § 5183, Comp. Laws 1913) that the state banking board, on being satisfied of the insolvency of any bank or of the violation of any provisions of such laws of 1905 by such bank, after examination of the same, shall forth-

with take charge of such insolvent bank pending action of the court. For that purpose it was made the duty of the board to appoint a temporary receiver, and such receiver, upon taking charge, is required to prepare and submit a statement to the state banking board, who should thereupon institute an action against such bank. It is further provided (§ 40, which is now § 5189, Comp. Laws 1913) that a bank shall be deemed insolvent in the following cases:

1. When the actual cash market value of its assets is insufficient to pay its liabilities.

2. When it is unable to meet the demands of its creditors in the usual and customary manner.

3. When it shall fail to make good its reserve as required by law.

4. When it shall fail to comply with any lawful order of the state banking board within any time specified therein.

In 1911 (Laws 1911, chap. 55) § 1 of chap. 165 of said Laws 1905, § 4635, Code 1905, was amended, in a respect material to this controversy, by providing, in addition to the authority theretofore granted and possessed by the banking board, that it was vested with the power and authority to appoint, by its own order, receivers for an insolvent corporation, with the same power as if appointed by the district court, but that nothing therein stated should be construed so as to take away from the court the power to appoint receivership of such institution of such bank at any stage of the proceedings. The board also were granted the power to make rules and regulations for the government of banking corporation. This is now § 5146, Comp. Laws 1913. This act in 1911 did not effect the other provisions of said Act of 1905, which have been carried into the 1913 Compiled Laws, as hereinbefore stated.

In 1915 (Laws 1915, chap. 53) § 5189, Comp. Laws 1913, which was § 40, chap. 165, Laws 1905, was amended and re-enacted. It provides, in addition to the instances when a bank is deemed to be insolvent, as follows.

1. That the property of a bank is not subject to attachment or levy, nor shall a receiver be appointed during such reasonable time as the state examiner may require for examination.

2. After such examination, if the state examiner shall deem best, he shall, with the approval of the state banking board, appoint a receiver who shall take possession under the direction of the state examiner of

books, records, and other property, collect the debts, sell or compound bad or doubtful ones, and sell all corporate property on such terms as the state examiner shall direct, etc.

3. He, the receiver, shall pay over all the moneys received by him, and make report of his doings to the examiner, at such times and in such manner as he may prescribe.

4. Whenever, after report by such officers and before the appointment of a receiver, said examiner shall find the bank in such condition that all creditors aside from stockholders can be paid in full from its assets, he may relinquish possession of its property to its proper officers, provided, however, that the bank shall pay the state examiner a fee of $10 per day and the hotel and traveling expenses of the state examiner or deputy state examiner who shall have been in charge of the bank during this period, and such bank may, with the consent of the state examiner, resume business upon such conditions as may be approved by him.

5. Upon taking possession of the property and business of such bank, the state examiner is authorized to collect moneys due to such bank and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof.

These provisions of chapter 53, Laws 1915, granting new and specific powers to the state examiner, are set forth fully for the reason that they have a material bearing concerning the powers of the state banking board, and the construction to be placed thereupon after the passage of said chapter 53.

In 1917 the Depositors Guaranty Act (Laws 1917, chap. 125) was enacted. It provides for a depositors guaranty fund commission, composed of the governor, the state examiner, and three members to be appointed by the governor. Such appointees to be members of the North Dakota Bankers Association. The act makes it the specific duty of such commission to pass upon the qualifications of every bank for admission under such fund. It provides that every bank in the state shall be subject to the provisions of such act. It further provides that, when the condition of any bank under such act becomes such as to cause the state examiner to doubt the advisability of permitting it to continue in business, it shall be within his power to require the advice and opinion of the commission thereupon. It is not denied nor doubted in this

proceeding that the relator bank becomes subject to the provisions of this act, and that its qualifications were passed upon by the commission, nor that this right to so be subject to the terms of such act has been either questioned or revoked by such commission.

A simple consideration of these provisions of the existing statutory laws, as enacted by the legislature (not as stated in the Compiled Laws), makes the rules of construction applicable so plain almost that "he who runs, may read."

The respondents contend that said chapter 53, Laws 1915, purported only to mean § 5189, Comp. Laws 1913, and that, therefore, it did not repeal § 5146, Comp. Laws 1913.

The Compiled Laws of 1913 are merely a compilation. They are neither a code nor a revision. It is plain to see that these provisions, as stated in chapter 28, Comp. Laws 1913 (§ 5146 to § 5191), are merely a restatement of the law as enacted in 1905 pursuant to chapter 165 thereof, excepting as they have been amended as to the provisions herein stated by chapter 55, Laws 1911.

Accordingly the provisions of the Laws of 1905 as amended in 1911 have been again amended by the Act of 1915, chapter 53. The power granted to the state examiner pursuant to the Act of 1915 is plain and definite. There is no difficulty in construing this power to be exactly as stated, to wit, that the state examiner, after he has made an examination, shall, if he deems best, with the approval of the state banking board, appoint a receiver, who shall take possession not under the direction of the banking board, but under the direction of the state examiner. In part this Act of 1915 was enacted through the litigation had and the legal situations resulting in the well-known case of Youmans v. Hanna, which finally found its way to this court, and was decided in 35 N. D. 479, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263. In that case a bank at Minot was closed through the action of the state banking board.

It is a well-settled rule of law, where two legislative acts are repugnant to or in conflict with each other, that the latest expression of the legislative will must control, even though it contains no repealing clause. 36 Cyc. 1073, chapter 53, Laws 1915, gave to the state examiner di-

rectly the power to appoint a receiver to take charge of insolvent bank, to investigate concerning insolvency, and to have charge of such bank during the process of a receivership.

Theretofore this power was possessed pursuant to § 5146, Comp. Laws, 1913, by the state banking board. The legislative intent in this act is clear. In the bill as first introduced in the legislature (House Bill No. 344) the act provided that the state examiner, alone, shall appoint a receiver. There was also a fifth provision, providing for a bank being deemed insolvent when its books of account are falsely or fraudulently kept. In the passage of the bill in the house, the provisions concerning keeping books falsely or fraudulently was stricken out. In the senate, the bill was amended by inserting, concerning the power of the state examiner to appoint a receiver, the words, "with the approval of the state banking board." This discloses clearly that the legislature had in mind the granting of this power expressly to the state examiner.

Under the law as now existing the state examiner is neither a puppet nor a figurehead. The law does not contemplate the banking board performing the duties of the state examiner. There is no difficulty in apprehending and making harmonious the duties of the state banking board. They have the power of regulating and providing rules for banking corporations in this state. They have the right to prescribe orders with which the banks must comply in this state. But the initiative action in securing compliance, in determining insolvency, in protecting through executive action the state depositors and stockholders, lies through the state examiner.

It is further to be noted under the now existing law (Laws 1915, chap. 53) it is specifically enacted that no receiver shall be appointed during such reasonable time as the state examiner may require for examination. Further, that even before a receiver is appointed, the state examiner may take possession, and thereafter release such possession to the bank officials, without the necessity of any receiver at all. The legislative idea and intent is plain and clear that there should not be a financial wrecking of banks in this state (for a receivership is ordinarily a financial wrecking of a bank as an institution), if otherwise, the best interests of the public of depositors, and of the bank itself, can best be subserved by the action of the state examiner himself. Indeed the act must have plainly intended to guard against the situation

created in the closing of the Minot Bank and such arbitrary action without warning as has been taken by the respondents herein.

The record discloses neither knowledge nor any initiative action by the state examiner in the proceedings which lead up to the receivership of the respondents. The first resolution passed by the banking board concerning the investigation of banks in Fargo gave no information to the state examiner that the relator bank was the bank against whom action was to be taken. The letter of the state examiner to his deputy, Halldorson, concerned not the relator bank, but another bank in Fargo; in fact, this resolution and this letter would appear on its face as an attempt indirectly and by subterfuge to secure the consent of the state examiner to examine all the banks in Fargo so that thereby initiative action might be taken against the relator bank as it was taken. It therefore follows that the action of the state banking board, through the respondents, who constitute a majority thereof, was illegal and unauthorized. Even though it should be conceded that the state banking board did possess the power to close such bank and appoint a temporary receiver thereover, nevertheless, the action as taken by such banking board was unreasonable, arbitrary, unjust, and cannot be upheld. It seems strange indeed that the respondents, who have constituted members of such banking board ever since January 1, 1917, and who by law are charged with the bounden duty of examining reports of banks, and who were therefore presumed to be familiar with the condition of this bank from that time, should act with such seeming haste, without the consent, knowledge, or action of the state examiner, at a time when he is out of the state, and in a manner so as to grant to such relator bank no time whatsoever to comply with any of its orders or demands. The closing of a bank, a large institution like this bank, is not a matter of idle concern, either public or private.

The act of the respondents, as initiated, and consummated, irrespective of the question of intent, accompanied with widespread publicity and specific notice to other banks in this state of their action, could not do otherwise than occasion alarm and doubt in the minds of the public and of depositors in the soundness of the banking institutions affected, as well as in all banking institutions in the state. Banking institutions, for their immediate solvency, depend upon the public confidence. No bank is immediately solvent if this public confidence is destroyed and it

cannot secure the aid of other banks to help in restoring this confidence. The acts of the respondents, as disclosed in this record, jeopardized this solvency of the relator bank as well as other banks.

From statehood to the present, the statutory provisions concerning the examination and regulation of banks have contemplated a course of conduct by state officials in enforcing the banking laws which would not create public alarm and distrust in banking institutions of this state, but which, by constant examination, supervision, and regulation would secure compliance with the laws. Throughout the statutes there is shown an intent to give time to a banking institution within which it may make compliance with any order or regulation of the authorities, if there is an ability on the part of the bank to so comply. No time whatever was granted by the respondents. The report of the state examiner while he has been in charge, the acts of the bank officials and stockholders, show that there was and is an ability and a readiness to comply with any lawful order that the respondents might have prescribed.

It is to be noted that the acts of the respondents, from the beginning up to the time this court interposed its original jurisdiction, disclose no desire and evidence no attempt to protect the public moneys, the guaranty fund, the moneys of depositors, or the property of the stockholders, by granting to the bank any chance or opportunity to comply with the findings of the banking board, or to rehabilitate itself in accordance with the board's determinations. No one of the respondents even suggests to this court that, if the receivership is continued under their supervision, the bank might or could restore itself as a solvent bank. On the contrary it is the contention of the respondents that this bank is hopelessly insolvent, which simply means that public moneys, the guaranty fund, and the moneys of depositors are imperiled. This contention was reenforced by the action which they instituted in the district court, seeking to dissolve the bank corporation and forfeit its franchise.

There is no other manner in which this procedure can be characterized other than arbitrary, and contrary to both the spirit and letter of the law. It both merits and receives the condemnation of this court.

The question of whether this bank is insolvent is before this court. If this relator bank at the time of its close had assets of actual cash market value sufficient to pay its liabilities; if it was able to meet the

demands of its creditors in the usual and customary manner; if it was able to make good its reserve as required by law; if it was able, within a time specified, to comply with the lawful orders of the state banking board, it was not insolvent, and the action of the respondents declaring it so to be was merely arbitrary and without justification. The record discloses no specific order of the banking board that this relator bank has not complied with, or was not able to comply with in a specific time. The record does not disclose inability of the relator bank to make good its reserve fund as required, in accordance with the contention of the respondents.

The record does not disclose that, on the day this bank was closed, it was unable to meet the demands of its creditors in the usual and customary manner. On the contrary, it is shown that it was able to and did do so. The only remaining ground is whether its assets are of sufficient actual cash market value to pay its liabilities. If they are not, and the capital and surplus are thereby impaired, the statute specifically provides for a method of rehabilitation of such capital and surplus. Comp. Laws 1913, § 5186. Neither demand was made nor time given by the respondents for restoration of the capital and surplus which, under the contentions of the respondents, were impaired. The facts that under the charge of the state examiner, this bank, in the space of a few short days, has been able to collect on paper that was deemed worthless by the examiner Halldorson; that he has been able to cause payment upon, or a reduction of, many of the so-termed excessive loans; that he has been otherwise able to collect a large amount of money on paper due the bank,—justly throw discredit upon the report and conclusion adopted by Halldorson and his associates. The fact that there are excessive loans carried, or that improper banking methods have been carried out, does not itself prove insolvency of the bank. The very fact that upon the loans listed as worthless debts, something like $10,000 of debts were paid by the persons themselves and some $25,000 by the directors or stockholders of the bank, shows an ability to respond to the demands of the banking authorities. These facts, indeed, do not indicate lack of assets or of ability on the part of the bank to pay its liabilities. Instead of indicating a state of insolvency, they rather demonstrate, on the contrary, solvency.

The respondents finally resort to the contention that the legal reserve

of the bank, at the time of the closing of such bank, was not, and for a long period of time had not been, maintained as required by law. In support of this contention they quote the statutory provisions which require a bank, in computing its legal reserve, to deduct therefrom deposits of banks owing by it.

No order is disclosed to this court that the banking board have so required the state banks in this state. On the contrary the practice customarily shown and necessarily known to the respondents has been to treat such deposits of banks as demand deposits. The reserve required by the laws of this state for state banks is high. It is known to be higher than that required of Federal banks. Section 5170, Comp. Laws 1913, does require that the legal reserve of a state bank be computed by deducting therefrom the amount due other banks.

Judge Engerud, in his legal opinions for bankers of the North Dakota Bankers Association (1909–1916) p. 32, states as follows:

"The above provisions of law to which you call my attention is certainly a very peculiar one. It is apparently a discrimination against state banks in favor of national banks. The language of the provision literally construed indicates that the amount due to other banks from a state bank must be constantly kept on hand, and that such fund must be deducted from the available funds in computing the reserve required by law. I can think of no good reason for such a provision, unless it was intentionally put in as a discrimination against state banks.

"I might suggest, however, that in actual practice in the administration of national banks, it is the practice in commuting the reserve required by law to distinguish between individual deposits and bank deposits. In the administration of the National Bank Act the amount due to other banks, not reserve agents, is taken to be the difference between the total amount due to other banks and the total amount due from other banks. This difference is added to the total individual deposits, and the lawful money reserve computed on that sum."

The respondents, however, assert that such is the law. That the statute (Comp. Laws 1913, § 5189) states the failure to maintain its legal reserve is a ground of insolvency. That, therefore, the insufficiency of such legal reserve of the bank formed a ground for the action of the respondents declaring such bank to be insolvent even though their own receiver Halldorson, the state examiner, and banking board itself,

had not theretofore required the banks of this state to so conform to the strict requirements of the statute.

This simply serves to emphasize the nature of the discrimination sought to be applied to this bank in order that it may be deemed insolvent.

Upon this record the respondents are not in a position to justify their action in declaring the bank to be insolvent, upon the grounds of its failure to maintain its legal reserve. Not in this manner may be banking board play fast and loose with its powers. The statute (Comp. Laws 1913, § 5170) specifically prescribes that the banking board shall give notice to a bank, when its legal reserve is not as required by law, to make good such reserve; that if, within a period of thirty days after such notice, it shall fail to so restore its reserve, the banking board may impose a penalty as prescribed in the statute. No notice order of proceeding of this kind by the banking board has been disclosed in this record.

The respondents must now resort, for purposes of establishing insolvency, to the list of loans mentioned in their report consisting of about $740,000, which they assert to be secured by insufficient and improper collateral, consisting largely of farmers' notes and farmers' postdated checks, the amount of which aggregates over $1,400,000. The contention is made that a postdated check is not collateral, that farmers' notes should not be estimated over 50 per cent of their value. That, therefore, this large list of notes owing to the bank are without sufficient security and should be removed or discounted accordingly. To support a conclusion in this regard they have simply a hearsay statement that large amounts of such farmers' paper did not pay out or paid up poorly. This hearsay statement contained in the record is denied by the persons whom they state were the authors thereof. There is much evidence in the record, as well as the report of the state examiner that this farmers' paper is good collateral; that there is a good margin of safety on the security offered, and that uniformly it has paid out well, in percentages from 75 per cent to 85 per cent. There is neither reason nor justification for declaring farmers' paper to be worth only 50 per cent of its value; on this record there is not presumption, and certainly should not be in this state dependent on agriculture and owing its prosperity to the farmers of this state, that farmers' paper is any worse or poorer than any other paper of private individuals.

There is more reason for declaring farmers' paper to be of a certain percentage of value than there is for declaring lawyers', doctors', or merchants' paper to be of a certain percentage value. In all instances it is a question of the financial worth and integrity of the individual whose paper is pledged.

The respondents, however, contend that a postdated check is a bill of exchange payable on demand. That when accepted by the payee it ceased to be a check, and becomes a bill of exchange, and that the maker and indorsers are relieved from all responsibility, and if matured it becomes a certified check. That a bill of exchange is like a postdated check in that, until it has been accepted by the payee or accepted in writing, all legal defenses attached thereto; that it is not a negotiable bill of exchange, and any bank taking the same as collateral is securing not collateral, but the probability of a lawsuit. This is indeed a novel exposition for a legal argument, and far from the law. A check is a negotiable instrument. Comp. Laws 1913, §§ 7069, 7171. It is true that it is defined that a bill of exchange drawn on a bank is payable on demand. The maker and indorser of a postdated check are liable in accordance with the same rules that apply to negotiable paper. The indorser, as well as the drawer, engages that upon due presentment it will be accepted or paid or both according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be held to pay it. Comp. Laws 1913, §§ 6951, 6946. The fact that a postdated check is negotiable prior to the day of its date does not put purchasers upon inquiry by reason of that fact. See notes in 29 L.R.A. (N.S.) 375, and 44 L.R.A.(N.S.) 405. A postdated check, by its very terms, is not due or payable on demand at the date thereof. Payment cannot be legally taken from the drawee bank prior to that time. Prior to that time the drawee bank ordinarily has no right to certify concerning the same. L.R.A.1917F, 1099. Judge Engerud, a former member of this court, has well stated the principle of law applicable in his book "Legal Opinions for the North Dakota Bankers Assoc. (1909–1916) p. 167, as follows:

"A postdated check would be analogous to an ordinary bill of exchange payable at a future time, the time of payment being the date of the check; and can consequently be negotiated like any other bill of

exchange, and every party through whose hands it passes who indorses it becomes liable as an indorser. When you receive such a check you would take it the same as any bill of exchange payable in the future, and on the due date present for payment, and if dishonored give the proper notice of dishonor. All prior indorsers would then be liable to you for the amount of the check and the protest fee."

It is apparent, therefore, that the acts and contentions of the respondents in attempting to establish by presumptive fiat that postdated checks are of no substantial value, and thereby, at one fell sweep to render practically valueless or insufficient all paper for which such postdated checks, as well as other farmer notes, stand as security, are not only presumptious, but without foundation in law.

What was the intention of the respondents herein in the acts performed, this court does not deem necessary to determine.

The acts themselves, however, are judged by this court. It is determined that there is such a thing as a public conscience, and that these acts, upon the record submitted to this court, were unwarranted, unreasonable, and without foundation of law. The record in this case discloses that the state examiner placed in charge by this court has been diligent in performing his duties, that he has made every effort to conserve both public and private interests, that by his energies the bank, through the co-operation of its officials, his disclosed an ability to comply with all of the lawful orders of the banking authorities of this state; that, in accordance with his report, such bank is not only solvent, but retains both its original capital and surplus unimpaired, as well as some undivided profits. The interests of this state and the credits of its financial institutions at hand and abroad have been needlessly jeopardized, and public alarm has been likewise needlessly created. It is therefore ordered that the order of this court placing the state examiner in charge of the relator bank be made permanent, with full right to such state examiner to grant permission to such relator bank to resume business whenever he deems it proper for them so to do; and it is further ordered that the temporary restraining order issued against the respondents herein be made permanent as to such respondents and all agents and employees of such respondents. It is further ordered that all costs of the relators herein be taxed against the respondents before the clerk of this court, and that the relators have judgment and execu-

tion therefore as provided by law. Let judgment be entered pursuant to this order.

ROBINSON and GRACE, JJ., concur.

ROBINSON, J. (concurring). This case must be of public concern and of no small importance; from the start special and high-priced counsel have been employed at the expense of the state, and in the newspapers it has been the leading subject of discussion. The case presents a quarrel between the governor and his political family, and it involves an attack on the Farmers' Nonpartisan League and their managers because of their dealings with the bank.

The state banking board consists of the governor, the attorney general, and the secretary of state, with the state examiner as secretary. Some three weeks ago, on the ground that the bank was insolvent, the attorney general and the secretary of state made an order that Halldorson take possession of the bank as temporary receiver. It was done against the protest of the governor, and with an affected and hostile purpose of putting the bank out of business. Then, on October 7, 1919, on due application, this court made an order that defendants show cause why they should not be enjoined from closing or interfering with the bank, and that, pending the hearing, defendants relinquish to the state examiner possession and control of the bank. Now, on the arguments and proofs submitted, it devolves on the court to determine the matter.

This, the proof does fairly show.

1. The proceeding against the bank was commenced and conducted in a hostile and unfriendly spirit, with needless force, high-priced attorneys and accountants, regardless of expense, and that defendants proceeded to take possession of the bank and to give out reports highly detrimental to it and its stockholders and depositors. The bank was not insolvent, and it is entirely clear that were it not for the timely action of this court it would have been "bled white" and put out of business, to the great loss and damage of the state and public welfare. In six days after the examiner took possession, his report to the court shows that the bank is not insolvent; that it has in cash $350,000, and that, on paper which defendants rated as not bankable, the examiner has col-

lected $169,000. Now, on this October 23d, the day set for the final submission of proof, the report of the examiner shows the bank is solvent and that it is well prepared to do business. It has on hand in the vault $200,000, and with approved banks, $129,000, and Liberty bonds over $43,000, and that a large amount due from other banks is available so that the bank is in good liquid condition.

But it is insisted that this court has not jurisdiction, and that it should now follow the example of him who took water and washed his hands, saying: I am innocent of the blood of this just man, see ye to it. Then in the language of Scripture, it might be well said: Therefore is judgment far from us, neither doth justice overtake us; we wait for light but behold obscurity; for brightness, but we walk in darkness. We grope for the walls like the blind, and we grope as if we had no eyes; we stumble at noonday in the night. And judgment is turned away backwards and justice standeth afar off, for truth is fallen in the street and equity cannot enter. But such is not the condition; the supreme court is supreme. It has justice over all other courts, state banking boards, and all other such administrative boards, and it may say to each of them: Thus far shalt thou go, and no further. Manifestly it is within the power and duty of the supreme court to use and adopt such measures as may be necessary to enforce and protect all the constitutional guaranties of life, liberty, and property. It is not competent for the lawmakers to give arbitrary power to any board or body of men. Every power is given on condition that it must be used justly, fairly, and honestly, and not in an arbitrary manner. If two members of the banking board have power to override the governor and the state and the public examiner and to appoint a receiver, the act must be justified by the statute and by some special emergency. The governor is chairman of the board, and the public examiner is secretary. His special duty is to know when a bank is insolvent. Even the full board cannot appoint a receiver of a bank unless it is actually insolvent. Comp. Laws, § 5146. The board has no discretion whatever only in cases of actual insolvency. Thus, by statute, the live-stock board is given power to kill animals affected with contagious and infectious diseases. § 2686. But, as the court has held, the board has no power to kill animals that are not actually infected with the disease. The ani-

mal must be actually insolvent. Neer v. State Live Stock Sanitary Bd. 40 N. D. 340, 168 N. W. 601, 18 N. C. C. A. 1.

Now as it appears that the bank is not insolvent, and, on the contrary, its solvency is fully assured, and the defendants have no right to insist that they be permitted to wreck it. Indeed they have no legal interest in the matter; they have no rights to protect. They represent neither the bank nor its creditors, depositors, or stockholders; neither the state nor the public welfare. Hence, the judgment of this court is, and must be, to the effect that the bank be restored to the full right to do and transact its ordinary business without let or hindrance, and that all proceedings against it be dismissed, with costs.

Filed October 31, 1919.

BIRDZELL, J. (dissenting). I dissent. At the time the original application in this matter was presented to this court I was of the opinion that this court did not possess, under the Constitution, the requisite original jurisdiction to deal adequately with the matters presented in the complaint. The matter of jurisdiction required decision then if the court was to issue the order prayed for; for the plaintiffs requested that a restraining order issue at once which would have the effect of removing Halldorson, the receiver appointed by the banking board, and of placing the bank in the control of the public examiner. It was also asked that the banking board be immediately restrained from invalidating postdated checks as collateral security. This restraining order was asked for without notice and upon an *ex parte* application. It appeared clear to me that it should not issue unless this court was possessed of the requisite jurisdiction not only to disturb the existing status to the extent requested, but to determine fully the merits of the controversy foreshadowed by the complaint. I was of the opinion that this court did not possess, under the Constitution, the requisite original jurisdiction, and further reflection has confirmed that opinion. The majority of the court, however, assumed jurisdiction and issued the order. That action brought the matter here for such future proceedings as might be deemed appropriate. It was a justifiable assumption at the time that, upon the return of the order to show cause, the temporary order would be dissolved, if sufficient showing were made by the respondents to justify them continuing the course they were pursuing, or, if not, that it would be continued pending a trial of the

issues on the merits. But so far as the assumption related to a trial on the merits, it proved to be altogether too liberal, as will appear presently.

Prior to the return day the attorney general had asked for an interpretation of the injunctional order with reference to its effect upon certain proceedings which had been begun by him, under §§ 7990 or 8004, Compiled Laws of 1913, in the district court of Cass county. These proceedings were predicated partly upon the alleged insolvency of the Scandinavian American Bank, and were brought for the purpose of having a judicial determination of that fact, and for the further purpose of having its affairs administered in accordance with the statutory law especially made applicable to the situation. In the application it was stated that the district judge before whom the case was pending had construed the order previously issued by this court as preventing further proceedings in that action; and the majority of this court, which is the same majority that has joined in the principal opinion herein, declined to place an interpretation upon its previous order that would permit the attorney general to exercise his statutory authority to prosecute the action referred to in district court. Later, another application was made by the attorney general for a modification of the order that would permit him to retain certain documents which he represented to be material as evidence in criminal proceedings against officers of the bank. This request was also denied by the majority, the minority considering that reasonable provision should be made to secure for the state the benefits, if any, of such original evidence. On the return day the defendants requested an opportunity to examine witnesses in case the court should be desirous of passing upon the solvency or insolvency of the bank and the merits of the controversy. The case already stood at issue, both upon a motion to quash for lack of jurisdiction and upon an answer putting in issue all the principal facts alleged in the complaint. But at the close of the argument, instead of granting this request, the court entered an order permitting the respondent to file affidavits upon any matters concerning which they desired to submit proof up until October 23d. It was understood by the court that this order should not be construed as either a denial or a granting of the request of the respondents made at the time of argument; but that such request should be dealt with in the future in

the light of such facts as might be developed by the affidavits filed, and as the need for further proof might appear to this court. As is stated by the majority no additional affidavits were filed by the respondents. But on October 21st the attorney general petitioned for a modification of the order entered on the day of argument which would permit him to examine witnesses that he might subpœna to appear before a district court. The petition practically amounted to a renewal of the request made upon argument, and it was based upon the representation that there were some five or six persons whose testimony under oath was material and who had refused to give affidavits. While this petition was pending before it, the court, acting by the majority members, considered the proofs closed, and proceeded to determine the merits of the controversy in the manner indicated in the majority opinion. These facts are not stated in the majority opinion, and I state them as preliminary to the expression of the reasons for dissenting in order that the basis for the dissent may be clear. I dissent from the majority opinion and from the ultimate disposition of this case upon the grounds: First and secondarily, of lack of original jurisdiction in this court, and second and primarily, on the ground of the improper method of conducting the trial; or, to speak more accurately, *upon the ground that no trial has been had.* I shall present my views of these questions in the logical order, though it be in the inverse order of their importance.

Jurisdiction.—There are no allegations of fact in the complaint which show that the questions involved concern the governmental franchise of the state or the liberties of its people. It is stated that there was on deposit in the bank over $100,000 belonging to the Agricultural College of the state, and that the state guaranty fund would be affected if the receiver should be permitted to dissipate the funds of the bank; that Halldorson's appointment as receiver was without legal authority, and that the defendants were usurping the powers and responsibilities of the public examiner. These are all the allegations in the complaint that afford any basis for the exercise of original jurisdiction. There are other allegations which are intended to invoke the equity powers of the court; such, for instance, as the allegations respecting irreparable injury. In the majority opinion these allegations are all mingled, and it is made to appear that, unless the equity powers of this particular

court are exercised in the manner prayed for, an injury of great concern to a large number of people will result. There is no apparent reason for assuming that any court of general jurisdiction would act contrary to the equities of the case. Now I do not understand it to be the law of this state or of any other state, where the Constitution vests the supreme court with only appellate and superintending jurisdiction and power to protect the governmental franchise by the issuance of prerogative writs, that all suits capable of being adjudicated by injunctive relief can be brought in the supreme court merely because there may be a large number of persons interested in the result, or because irreparable injury might result from the failure of prompt judicial action.

These may be the very considerations which induce a court of original equity jurisdiction to act in any case, and to grant a temporary injunction to prevent threatened irreparable injury, but they certainly do not afford a reason for interference by a court whose original jurisdiction is limited to superintending control, and prerogative causes. Re Court of Honor, 109 Wis. 625, 85 N. W. 497. Should any district court fail to properly safeguard the subject of litigation by appropriate restraining orders, an appeal could be promptly taken from its orders refusing relief, which appeal would be speedily determined in this court. Sections 7528 to 7536 inclusive and §§ 7833 and 7841, Comp. Laws of 1913. It should be perfectly plain that the interest of the state as a mere property owner is not a ground for original jurisdiction. If it were, why would the legislature expressly provide for suits against the state in the district court of Burleigh county, or where the property is situated? Comp. Laws 1913, § 8175.

Every justice of the peace, every county court of increased jurisdiction, and every district judge in the state, is constantly deciding matters which are of more or less interest to the state as a whole, and which call for the application of laws designed to protect the public welfare. There may be as much general interest, upon occasion, in the result of a coroner's inquest as in a decision of this court upon a grave constitutional matter. A cause does not appeal to the original jurisdiction of this court merely because of the general interest in the decision of the issues presented, or on account of its significance from any other than the strictly governmental standpoint. But when the state is prevented by the acts of private individuals from controlling its own insti-

tutions through its own officers, selected according to law, its governmental franchise is involved. State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234. Or when a department, which is vested with the exercise of an important power of the state to govern in certain matters, is paralyzed because of the action of other officers of the state who threaten in fact to prevent the legal exercise of the governing franchise, this court may prevent the threats from becoming effective by compelling the performance of those ministerial duties upon which depends the operation of the governmental franchise through such department. See State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A. (N.S.) 67, 142 N. W. 450.

The case just referred to does not hold, as the majority have indicated, that a request for the salary of a public officer presents a proper appeal to the original jurisdiction of this court, and one reading the case is at loss to understand how the majority could have gained such an impression; certainly the allegations showing the effect of the threatened action upon a department of government were fully set forth there, as they are not in the instant case. It would serve no good purpose in this dissenting opinion to refer at length to cases where original jurisdiction was not exercised. Among such may be cited: State v. Nelson County, 1 N. D. 88–101, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33; State ex rel. Byrne v. Wilcox, 11 N. D. 329, 91 N. W. 955; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385; Duluth Elevator Co. v. White, 11 N. D. 534, 90 N. W. 12; State ex rel. McDonald v. Holmes, 16 N. D. 457, 114 N. W. 367; State ex rel. Madderson v. Nohle, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141; State ex rel. Miller v. Norton, 20 N. D. 180, 127 N. W. 717.

Reference to the foregoing cases will disclose that this court has consistently refused to exercise its original jurisdiction through prerogative writ where the questions presented involved merely the private rights of relators or applicants, or where the subject-matter was of local, municipal, as distinguished from general governmental, interest. It appears that in such cases jurisdiction is declined even though the case be one calling for the interpretation of some ambiguous provision of a state law in which a large number of persons are interested. The above cases establish beyond peradventure the proposition that the pre-

rogative jurisdiction of this court is never properly invoked except where the franchise of government is itself *directly* involved.

Of the allegations in support of jurisdiction the only one which, in my judgment, tends in the least degree to support it is that with reference to the usurpation of the powers of the public examiner by the banking board. This may perhaps be thought to involve the governmental franchise of the state in that it concerns the prerogatives of an office created by the legislature for the protection of the public. But assuming that this allegation does present a sufficient cause for original jurisdiction, it does not follow that this court should make of that jurisdictional fact a dragnet to draw to it the entire controversy. It could readily determine the jurisdictional matter, and the cause would remain for trial on the other features if the plaintiffs should desire to press the same before the district court. In other words, if it should be determined that the banking board had no authority to appoint a receiver, then the possession by the public examiner is in every way legal; but if it were determined that the banking board had authority to appoint a receiver, then there would remain for consideration the question as to who ought to have possession of the bank pending the determination of the further issues raised by the allegations on one side of official misconduct by the banking board, the condition of the bank, etc., and the denial of the other. Upon such issues the final judgment in the case would necessarily be based. After the determination of the preliminary jurisdictional question, then the case resolves to one involving merely private rights, and it should be dealt with accordingly.

Under an identical constitutional provision the supreme court of Wisconsin has had occasion to consider this question, and, both in a *per curiam* opinion and in an opinion by Mr. Justice Winslow, have held that they will not go further than to decide the questions that do affect the prerogatives of the state. In the *per curiam* opinion it was said (129 Wis. page 672): "Serious questions as to the construction of the primary law and the duties of executive officers thereunder may properly be considered as questions affecting the prerogatives of the state and the liberties of the whole people, and on that account this court may properly consider them in the exercise of its original jurisdiction, because the decision of such questions necessarily prescribes a

rule of conduct for all election officers in the state, though the case in which they arise may affect only the nomination for a local office. . . . In the Rinder Case the question whether the certificate issued to Rinder or the one afterwards issued to Packard by the canvassing board is controlling upon the county clerk in printing the ballots is considered a question within the original jurisdiction of this court; but this court will not go into the question as to which candidate received the most votes either by counting the ballots or by taking other testimony." In Judge Winslow's opinion in the same case, at a later stage of the proceedings, it was explained that (page 677), "if original jurisdiction were to be assumed for this purpose, the question then presented itself whether the question as to whether Rinder or Packard actually received the more votes, though a mere local controversy, should not be also entertained and decided as ancillary to the main question. The proposed action was an action in equity, and the proposed complaint alleged that Rinder in fact received the greater number of votes. This allegation might well be put in issue. No reason was perceived why, if the action were allowed to proceed as an action in equity, Packard should not be interpleaded for his own protection, and be entitled to plead and prove that he himself received the greater number of votes, and thus convert the action substantially into an election contest over a nomination for a local office. If this were to be done for one, it should be done for all in a similar situation, and thus the court would in effect become a tribunal for the settlement of all contests over primary nominations for all offices, state or local, or, in other words, an appellate canvassing board for the entire state." Then follows an explanation as to why the court declined to entertain the proposed equity action but did direct the issuance of an alternative writ of mandamus. It decided only the question upon which jurisdiction was based. State ex rel. Rinder v. Goff, 129 Wis. 668, 672, 677, 9 L.R.A.(N.S.) 916, 109 N. W. 628.

I am satisfied that the wiser course is that indicated in the Wisconsin case cited. It would enable this court to determine questions which are in fact *publici juris,* without the complications arising out of litigation in which private rights are vitally concerned; and it would properly relieve an appellate court of the necessity for determining, originally, questions of fact except such as may be necessary to a deci-

sion of questions of public importance involving the governmental franchise. Furthermore it would be more consistent with the spirit of the constitutional provision which precludes jury trials in this court, and which authorizes this court to send questions of fact to the district court for trial. N. D. Const. § 87.

In another Wisconsin case in which the prior decisions of that court —and there are many—relating to the question of jurisdiction were reviewed (State ex rel. Bolens v. Frear, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147), certain general propositions for which the decided cases are thought to stand are stated. Among the negative propositions said to be established is this: "(2) A case involving a mere private interest, or one whose primary interest is to redress a private wrong, will not be entertained." There can be little doubt upon the record before this court in the present case, that the primary purpose of this action is to redress a private wrong, and that it falls directly within the class which the above authority says will not be entertained. It will be noticed that the judgment here provides even for the taxation of costs in favor of the so-called relators, thus recognizing the private character of the litigation.

The majority have adopted a peculiar style of reasoning upon this question. A number of cases are cited which were decided by this court upon original application of suitors; such, for instance, as cases involving the constitutionality of laws or the propriety of a given course of ministerial official conduct, generally involving questions of statutory construction. It is, of course, well known to the majority that applications are frequently made to this court where the members have the gravest doubt as to whether the controversy justifies its interposition by prerogative writ, and that in such cases it has become the custom to reserve all questions of jurisdiction. And they are also familiar with the further fact that in the great majority of such cases opposing parties and counsel were equally interested in obtaining a decision of the questions involved, and realized that, until decided by the opinion of this court, there could be so satisfactory determination of the matter. In such situations the cases are of no importance whatever as precedents for the proper exercise of original jurisdiction. But, on the contrary, they may and do represent only the extent to which this court will go in the interest of practical expediency. The majority

know full well that, in several of these cases which are cited as precedents, the deliberate judgment of the court has been that the case did not present a proper appeal to the original jurisdiction of this court, because involving no question *publici juris* in any proper sense. Judicial expediency at once gives way when a party comes in relying upon the constitutional delegation of original jurisdiction to the district courts. In no case cited, and, I confidently assert, in none that can be found, has a court of appellate, superintending, and prerogative jurisdiction, only, interfered at the instance of private suitors to change an existing statute *ex parte,* and prevent executive officers of the state from performing what they conceive to be their official duties under the statutes.

Respectful deference to the views of the majority on the question of jurisdiction, however, requires a further discussion of the interpretation of the statute (chapter 53 of the Laws of 1915), which give rise to the alleged conflict of authority between the banking board and the public examiner. I have no desire to treat this case as turning upon any view as to jurisdiction merely, but in so far, under my views of the case, as the other questions may properly be considered, I deem it a duty to express an opinion. The matter is here for determination. The issue now in hand is one of law.

I have not the least doubt that the banking board, under our statutes, has authority to appoint a receiver for a bank, who, when appointed, may hold possession of the bank until he is succeeded by a receiver appointed by a court or removed by the authority that appoints him. I disagree entirely with the majority in the construction of chapter 53 of the Session Laws of 1915, wherein they hold that chapter to repeal by implication those provisions of §§ 5146 and 5183, Compiled Laws of 1913, which specifically authorize the banking board to appoint receivers. Chapter 53 of the Session Laws of 1915 only purports to amend one section of the Compiled Laws, and that is § 5189, which defines insolvency. In the amendment the definition of insolvency is in no way changed, but additions are made to the section with respect to the procedure upon insolvency. For instance, immediately after the definition, it is provided, "But its property shall not be subject to attachment or levy, nor shall a receiver be appointed during such reasonable time as the state examiner may require for examination." This

limitation does not apply in the instant case, for the reason that the receiver was not appointed during any reasonable time required for the examination, but after the examination, such as it was, had been completed. Furthermore, the very language of the limitation implies the existence of a power outside the examiner to appoint. This is the power that is not to be exercised during the time he requires for examination. In the following sentence it is provided that if, after the examination, the examiner shall deem best, he shall, *with the approval of the state banking board,* appoint a receiver, who shall take possession," etc. This clearly does not indicate a desire on the part of the legislature to supplant the appointing power of the state banking board with only an optional power in the state examiner. It will be noted that all the discretion the state examiner has in such matters is to be exercised *with the approval* of the banking board. If he is precluded from coming to an independent decision regarding the appointment of a receiver, is it reasonable to suppose that his nonaction was intended to detract from the power expressly given to the banking board in other sections of the Code? If the views of the majority are correct, the legislature has said to the examiner: "If you conclude not to appoint a receiver your determination is final, but if you decide to appoint one you must appeal to the banking board and first obtain their approval." And the only reason for concluding that the examiner's negative determination is final is the giving of the subordinate, conditional authority. The reasonable construction, as I view the statutes, is that the banking board has the same authority with regard to the appointing of receivers as was previously vested in it by the two sections referred to, except that it cannot be exercised during such reasonable time as the examiner may require for examination. And, at the conclusion of the examination, the examiner may appoint a receiver with the approval of the banking board, or the banking board itself may appoint one under § 5183 or § 5146. It seems to me that the whole theory of the regulatory statutes is ignored by the majority. The statutes throughout make the banking board the responsible regulating agency. The Act of 1915 fully recognizes this in subordinating the examiner's powers of appointment to the will of the board. I confess my inability to follow the reasoning of the majority in support of the repeal by implication of §§ 5146 and 5183, though their construction is said to be so

plain that "he who runs may read." The foregoing is not to be taken as an expression of approval of the action taken by the banking board in this case. That question, as will presently appear, hinges on the determination of questions of fact, which cannot, in my judgment, be determined with any degree of propriety upon the record now before this court.

Denial of judicial due process.—The question of transcendent importance in this case is not the question of jurisdiction, or the related matter of the construction of the statute. This case has been heard upon affidavits, merely; and that over the protest of defendants who were all the time insisting upon their constitutional right to a trial according to due process of law, before the rendition of a final judgment. But the majority denied the requests, considered the case submitted, and proceeded to render a final judgment involving the decision of the issues of fact. Compared to a denial of judicial due process, all other questions are as chaff to the wheat. It seems to me that this proceeding is most extraordinary. I have searched in vain for and precedent for such action. My researches have failed to bring to light any case where a court of last resort has held to be proper the rendition of a final judgment based upon a trial by affidavit had upon the return of an order to show cause. On the contrary, it appears that the very few times such proceedings have found their way to appellate courts they have been promptly held to be erroneous. Collins v. Carr, 112 Ga. 868, 38 S. E. 346; Chicago, P. & St. L. R. Co. v. St. Louis, P. & N. R. Co. 79 Ill. App. 384; Weaver v. Toney, 107 Ky. 419, 50 L.R.A. 105, 54 S. W. 732; State v. Booth, 28 La. Ann. 726; Whitehurst v. Green, 69 N. C. 131; Jackson v. Bunnell, 113 N. Y. 216, 21 N. E. 79; Gross v. Wieand, 151 Pa. 639, 25 Atl. 50; Hornesby v. Burdell, 9 S. C. 303; Adams v. Crittenden, 4 Woods, 618, 17 Fed. 42; Day v. Snee, 3 Ves. & B. 170, 35 Eng. Reprint, 443; 22 Cyc. 952. High, Inj. § 1591, says there is no precedent for granting a permanent injunction on affidavits. His statement seems to be amply warranted, but it must now be qualified.

The following quotations taken from the cases cited will illustrate the soundness of the foundation upon which this dissent is based. The supreme court of North Carolina in the Whitehurst Case, supra, says:

"Making an order, decree, or judgment, by whatever name it may be

called, for a perpetual injunction against issuing an execution on a judgment at law, heard upon a motion and affidavits, is a proceeding without precedent in the annals of the judicial procedure in any court claiming an English original. . . .

"Our surprise that the learned judge should have granted a perpetual injunction on motions and affidavits, is only equaled by our surprise that the learned counsel should have made the motion.

". . . It may be that the order for a perpetual injunction meets the merits of the case, but that cannot warrant a departure from all forms and precedent, either under the old or the new mode of procedure."

In Gross v. Wieand, 151 Pa. 639, 25 Atl. 50, the supreme court of Pennsylvania, in speaking of the procedure in the case where the trial court, upon application for preliminary injunction, had considered the cause submitted and made a final decree on the merits in favor of the plaintiff, said (page 646):

"Of course it was premature to decide the case as upon final hearing, and to grant the permanent relief prayed for in the bill, upon such a state of the pleadings and in such a condition of the proofs.

In Hornesby v. Burdell, 9 S. C. 303, the court said (page 307):

"While it is undoubtedly true that a circuit judge may, in a case of which he has jurisdiction, upon a proper showing, grant an interlocutory or temporary injunction, at chambers, to continue until the final hearing of the case on its merits, it is very clear that a perpetual injunction cannot be granted until the case is fully heard upon its merits and the issues raised determined by the tribunal having authority to make such determination."

Mr. Justice Wright, in the Illinois case cited (79 Ill. App. at page 385), says:

"Where issues of fact are formed in the case, it is the right of the parties, unless waived, to have the evidence heard, either by deposition or orally, in open court, and thus be secured in the right of cross-examination of the witnesses. . . . This cause not having been submitted to be heard on the merits, the court was not permitted to and did not enter a final decree."

In Federal court case (Adam v. Crittenden, 4 Woods, 618, 17 Fed. 42), it is said (page 44):

"So that it may be considered that up to the final decree all the parties and the judge himself held and treated the first injunction as temporary only. The terms of the injunction are to that purport. At the first hearing it does not appear that any evidence was taken or considered. It was neither regular nor proper to have issued a perpetual injunction at that stage of the case."

Of course if it is proper practice to determine the merits of an injunction suit in this court by proof limited, over the protest of one of the parties, to affidavits, it would clearly be the proper practice in the district courts. A parallel, hypothetical case may serve to emphasize the erroneous character of this practice. (Both parties, of course, have recourse to the same remedies and practice.) Suppose that in the matter in question here the governor, acting as chief executive and member of the banking board, had instructed the bank examiner to take charge of the bank, and that the other members of the banking board had, upon the examiner's report, deemed it proper to appoint a receiver, who, when appointed, was refused admission to the bank by the examiner acting upon instructions from the governor. Assume an action to have been begun in district court to restrain the examiner from interfering with the attempt of the purported receiver to obtain possession of the bank, followed by the issuance of a preliminary injunction and a hearing upon affidavits, only, upon the return day of the order to show cause. The matter stands at issue on questions of fact, and the examiner (who has already been ousted by preliminary injunctional order), requests a trial. The district judge tells him he may file some affidavits instead, and then, in the course of a few days, enters a judgment permanently enjoining him. Perhaps the majority of this court would be prepared to say that a trial so limited is consistent with due process. I must confess I scarcely think so. The authorities above cited speak with one voice against it. But yet such is the practice sanctioned in this case.

To my mind, the error is fundamental and far reaching. It strikes at the very foundation of judicial due process of law. Can it fairly be said that a hearing at which no witnesses were sworn in open court on behalf of the plaintiffs, at which no opportunity was afforded for cross-examination of the persons whose *ex parte* affidavits the court takes as proof of the facts alleged in the complaint, and at which the defendants

are denied the privilege of subpœnaing witnesses in their behalf, is consistent with the law of the land, as mentioned in Magna Charta, and which, with us, is commonly expressed as the law that "hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial?"

I am sure that this court would not hesitate to condemn the exercise of arbitrary power by the other departments of government, and this fact affords a weighty reason why it should not transgress beneficent constitutional safeguards. Justice White, now Chief Justice, of the United States Supreme Court, has given expression to the seriousness of the question in a way that surpasses other attempts that might be made in the same direction. In the case of Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, it was held that due process gives even the defendant in a contempt proceeding the right to be heard in his defense, and that the court had no power, as a punishment for contempt, to refuse the person in contempt the right to defend the main case upon the merits. In the course of his opinion, he said (pages 417, 418):

"Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative to the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which, if done under express legislative sanction, would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

Cooley on his work on Constitutional Limitations, 7th ed., has said (page 526):

"In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suf-

fered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law."

And certainly what the legislature cannot do in contravention of judicial due process does not become legal, constitutional, or just when done by a court.

In recognition of the salutary constitutional requirement of due process, be it said that the legislature, in so far as it has spoken upon the practice in connection with injunction and the order to show cause, has made provision in every way consistent with the full enjoyment of the constitutional rights of suitors. Code Civ. Proc. art. 3. In §§ 7528–7536, Compiled Laws of 1913, ample provision is made for the issuance of preliminary injunctions upon affidavits, and for a subsequent hearing, also upon affidavit, upon motion to vacate. Counter affidavits are also allowed. But it is expressly provided (§ 7530) that a period longer than six months must not be allowed to elapse *"before the hearing of the merits of the case shall be had for the purpose of deciding the question as to the justice or necessity of making the temporary restraining order permanent."* It is too elementary to require discussion that, where issues of fact are joined in an equity action praying for a permanent injunction, the hearing of the merits involves the trial of the facts in the ordinary manner. The only hearing that there can be upon the order to show cause in such matter (Comp. Laws 1913, § 7533) is a hearing upon the question of the temporary injunction, and this may be upon affidavit. The legislature has not attempted to prescribe any new or different mode of trial applicable to an injunction suit than that which originally obtained. This court should not lend its sanction to a mode of trial that could not constitutionally be prescribed by the legislature.

The issues in the case were important. We know not what the evidence might have been. No emergency can justify the denial of a trial in a court of justice. If an exigency arises, final judgment might better be suspended than rendered upon insufficient hearing. I can con-

ceive of no judicial function calling for greater delicacy in its exercise than passing judgment upon the good faith, the motives, or even the wisdom (if this is ever permissible) of executive officers in the exercise of executive or quasijudicial powers, and, speaking for myself, I shall positively refuse to do so except after a full hearing at which opportunity shall be given to swear and examine witnesses in their behalf, and to cross-examine the opposing witnesses. A man who puts the state upon proof of the commission by him of the slightest offense has this constitutional measure of protection, and I know of no reason why it should be denied officers elected by the people, who are accused of the grave offense of wilful and wanton breach of official duty. It is no answer to say that a trial of the very issues raised by the complaint and the answer might, of itself, have the effect of inflicting irreparable injury upon the plaintiffs. If considerations of this character are once made controlling to the extent of precluding trials, then government by injunction will become the accepted rule, instead of the odious exception. To dispose of this case without trial, on the supposition that a trial itself would deprive the plaintiffs of the benefit of a favorable decision, if one were ultimately reached, is of course to prejudge the entire merits of the controversy, or rather to dispose of the case as though the merits lay all on one side, and this without a full inquiry as to whether such be the law and the fact. Courts of equity have exceedingly broad powers and flexible remedies for conserving any subject-matter in litigation before them. This should make them all the more reluctant to judge of the merits of a controversy without the fullest opportunity for a hearing.

Perhaps the defendants merit the censure expressed by the majority; perhaps they have been guilty of the matters found against them; but I cannot find it in my conscience to say so judicially in the absence of a trial conducted according to the principles of Anglo-Saxon jurisprudence.

So far as the plaintiffs are concerned, it is to be hoped that the condition of the bank is such as to justify the reopening which closely followed the announcement of the majority opinion. Possibly an immediate trial on the merits might have given added assurance to the correctness of findings which are now based on a showing only sufficient for a prima facie case required for a temporary injunction.

Viewing the matter as I do, I can only regard the final judgment as being void for lack of a trial conducted in accordance with due process of law. The final judgment should be set aside, and the case should either be held in abeyance upon proper application or referred to a district court for trial on the merits.

CHRISTIANSON, Ch. J., concurs.

Filed December 6, 1922.

BIRDZELL, J. (dissenting further). Since the foregoing opinion was written, the writer of the original majority opinion has deemed it necessary to supplement his opinion at some length. The supplement, like the original opinion, it seems to me, largely evidences its own error; but there are some statements in it regarding the procedure which might be thought to disagree with some statements in the foregoing dissenting opinion. I deem it proper, therefore, to restate some of the facts, as they may conduce to a more accurate understanding. It is stated by Judge Bronson: "In this regard, however, the respondents in this case had full opportunity to take evidence, and full opportunity to orally examine and orally cross-examine all witnesses that they might have desired to produce." It is stated in the original opinion that "pursuant to the order of this court, the parties have been granted until October 23, 1919, to make up and complete the record in this matter." If these two statements be linked together, it might readily appear that full opportunity was accorded for a hearing, but such is not the fact. The order entered on the day of argument is not as stated in the majority opinion. Nothing is said in the order as to any time limit for *completing* the record, nor does the order relate to the *completion* of the record at all. It only provides for the submission of additional affidavits if either party should desire to do so, and, as stated in the foregoing dissenting opinion, it was distinctly understood by the members of this court that, in entering the order referred to, it should not be considered as denying the application of the attorney general, requesting an opportunity to cross-examine witnesses and submit testimony in case the court entertained jurisdiction and determined to go into the controversy of its merits; and that such request should be dealt with in the future in the light of such facts as might be developed by the affidavits filed. The case was never set down for hear-

ing upon the merits at all. The only hearing conducted was upon the order to show cause, and the matter has never, at any time, been heard on its merits in this court or any other court, or before any referee. Neither was it ever set down for any such hearing. Just before the majority opinion was filed the last request of the attorney general for a hearing was denied by the majority.

Obviously, then, it is idle to talk of an opportunity for a hearing and for taking depositions. Until this court should take some definite action upon the application of the attorney general, it could not even be known by that officer before what court the hearing would be had, as this court has authority to refer questions of fact to a district court for trial (Const. § 87). Consequently, he could not know whether or not the witnesses whose testimony he desired could be present, or whether it would be either necessary or permissible for him to resort to depositions. Until the attorney general knows before what court the facts are to be tried, how can he know what witnesses can be compelled to respond to subpœnas (Comp. Laws 1913, § 7876)? or in what instances depositions may be resorted to, as the latter are only admissible in the instances provided by statute (§ 7889)? Furthermore, until that action were made known, how could the defendants be assured of an opportunity to cross-examine the witnesses whose affidavits the majority considers proof? Subpœnas by statute (§ 7873) are required to apprise the witnesses of the particular time and place that they are required to attend. Pray tell, at what time and place a witness could have been subpœnaed to enlighten the supreme court of the state of North Dakota upon the issues of fact in this case, when the defendant's request for a hearing was not definitely acted upon until the filing of an opinion disposing of the case upon the merits of the very issues to be tried, and when and where would the majority have had the witnesses appear? They have never said. Perhaps the attorney general was remiss; perhaps he should have anticipated that this illegal procedure would be indulged in. But I prefer to think that he was rather justified in assuming that the procedure universally recognized as constitutional and proper would be observed.

It is suggested that the method of taking testimony by affidavit is recognized by § 7883, and the broad intimation is that the affidavits, then, were necessarily evidence in a legal sense in this case. Just four

sections removed from the section cited, § 7887, expressly limits the use of affidavits by providing that they may be used "to verify a pleading, to prove the service of a summons, notice, or other process in an action, to obtain a *provisional* (not final) remedy, an examination of a witness, a stay of proceedings, or upon a motion and in any other case permitted by law." The majority, of course, are unable to support a trial by affidavits as being permitted by any law existing outside the majority opinion in this case, and it is perfectly obvious that the legislature does not recognize the use of an affidavit as proof sufficient to support a final judgment in a case where issues of fact are joined.

In view of the criticism for not having fully expressed the foregoing dissenting views in conference, it may not be improper to review the manner in which the decision was reached and announced. The lengthy and exhaustive majority opinion, prepared by Mr. Justice Bronson, was circulated on the evening of October 23d, at the conclusion of a day upon which oral arguments had been heard in three causes. The following day, after the hearing of oral arguments in three causes, and in the latter part of the afternoon, a conference was called at the suggestion of the writer of that opinion. The time between the argument of this case on the return day, October 15th, and October 23d, which was the last day set for the filing of additional affidavits, had been largely consumed in the hearing of causes. It will thus be seen that very little time was available within which to give judicial consideration to this matter. But at the time of the conference I was of the opinion that it was improper to dispose of the case in the manner indicated in the majority opinion, and the dissent then announced amply indicated that fact. The views of the dissenting members on the jurisdictional question were already well known to the majority, and on the question of the hearing the dissenting members at the same conference voted against the denial of the attorney general's application. If the majority members of the court cared for a more adequate expression of the reasons leading to that dissent, they might readily have secured this advantage, if advantage it be, by waiting a few days before filing the opinion. Up to that time only twenty-four hours had elapsed since the expiration of the time for filing affidavits, and, under the preliminary order issued, the bank was in the possession of the same parties who were entitled to continue in possession under the majority opinion.

So it is apparent that no great damage could have resulted from the taking of a little time to give judicial consideration to the views of every member of the court before the filing of opinions. Whatever credit attaches to the prompt despatch of the decision in this case the majority is entitled to receive. Indulgence, however, for one week or less would have given them the full benefit of the foregoing dissenting views.

The foregoing statement is not written to provoke further controversy nor as an extension of the dissenting opinion, already perhaps too long. It is written solely for the purpose of presenting in a more detailed way than originally deemed necessary some of the facts in this case.

Filed November 22, 1919.

CHRISTIANSON, Ch. J. (dissenting). I concur fully in the excellent opinion prepared by Mr. Justice Birdzell. He has covered some of the matter so fully that little can be added. Hence, I shall not endeavor to cover all the aspects of the case with the same detail I should otherwise have felt obliged to do; and what I shall say will, in a measure, be supplementary to what is said in that opinion.

On October 7, 1919, there was presented to this court an application for an original writ. The application was dated and verified on that day. The majority members voted that the application be granted, and on the day following there was issued out of this court an alternative writ returnable October 15, 1919. The writ, among other things, provided: "That in the meantime, and until the further order of the court:

"The defendants and respondents, each and all of them, are hereby enjoined and restrained and prohibited from exercising the powers and prerogatives of relator Lofthus, and from further interference with the possession of said bank, its assets, and business; and that pending this case the defendants relinquish to the state examiner possession of the bank and all its securities, and the state examiner shall have control of the bank until the further order of the court, and that either party be permitted to examine the records of the bank for the purpose of preparing and ascertaining facts material to this proceeding.

"That the defendant and respondent Halldorson is enjoined, restrained, and prohibited from exercising any right, privilege, or author-

ity as such pretended receiver, or otherwise, over the business, assets, and control of said bank.

"That the said banking board of the state of North Dakota, or the members thereof, are enjoined and restrained and prohibited from invalidating postdated checks as collateral security; and

"That said defendants and respondents are hereby enjoined and restrained from further continuance of their unlawful acts and interferences in this petition complained of."

The application for the writ was not verified by any of the relators, but was verified by one of the relators' attorneys, on information and belief. The application was accompanied by affidavits of the directors of the Scandinavian American Bank, and the affidavits of Thatcher, Strom, and Friedman. Thatcher's affidavit gives his views as an expert accountant as to the standing of the bank, and the collectability of the postdated checks held by it as collateral security for some of its loans. The affidavit of Strom is to the effect that he had handled many thousands of dollars worth of postdated checks made payable to the Nonpartisan League, and "that of such checks made by persons residing in North Dakota ultimately 85 per cent are paid in full." The affidavit also sets out a telegram to The Courier News, signed by fifteen persons, who state they are League members in McKenzie county, and pledge themselves that "their post dated checks, when due, will be worth par, which is more than are Liberty bonds on the Wall street market." Friedman's affidavit is to the effect that he is a depositor in the Scandinavian American Bank, that on October 2d, he had a conversation with Halldorson, the then acting receiver of the bank, wherein he says that Halldorson stated, in reply to questions propounded by Friedman, that the bank might never reopen, and that it might take two or three years before the depositors received all of their money. These were the papers upon which the court assumed jurisdiction and directed that the writ issue. The moving papers were not accompanied by any affidavit made by any officer of the state; not only was there no affidavit by the relator Lofthus, but it was stated that he was out of the state at the time the bank was closed, and had not yet returned. In these circumstances, and upon the showing mentioned, this court issued its unprecedented writ against a board consisting of elective, constitutional officials of this state. The writ was issued without notice, al-

though the principal respondents maintain their offices in the same buildings where this court transacts its business.

The first question which naturally presented itself upon the presentation of the application was that of jurisdiction. I was of the opinion then that the application failed to present a prima facie case for the exercise of original jurisdiction by this court. That opinion has not been weakened, but strengthened, by subsequent consideration.

It has been said by one of the majority members that "the supreme court is supreme. It has jurisdiction over all courts, state banking boards, and all such administrative boards, and it may say to each of them thus far shalt thou go, and no further." This appears to be a very easy and happy disposition of the question of jurisdiction, and is perhaps the best of which the case admits. But the statement is based upon an erroneous premise. The supreme court is supreme only in the sense and to the extent the Constitution has said it shall be supreme, and not otherwise. The court is a creature of the Constitution, and its powers are fixed thereby. The Constitution distributes the powers of government among three separate co-ordinate departments—the legislative, executive, and judicial. The supreme court is invested with judicial power only, and it and the judges thereof are, by express declaration, precluded from performing any duties except as are judicial. Const. § 86. The people by their Constitution sought to insure in this state a tribunal of dignified impartiality to sit as final interpreter of the laws of the state. To that end they not only precluded the court and the judges thereof from exercising executive and legislative duties, but said that a member of this court should be ineligible to any other than a judicial office "during the term for which he was elected or appointed such judge." Const. § 119.

Nor does the Constitution confer unlimited judicial power upon the supreme court. The power with which it is vested is consonant with the place which the court was intended to occupy in the scheme of our state government. The primary function of the supreme court is that of an appellate court of last resort. It is not invested with original jurisdiction in ordinary causes. Such jurisdiction is vested in the district courts.

The Constitution provides: "The district courts shall have original

jurisdiction, except as otherwise provided in the Constitution, of all causes both at law and equity." And "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." Const. § 103.

The supreme court, except as otherwise provided in this Constitution, *shall have appellate jurisdiction only,* which shall be coextensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law. Const. § 86.

The powers of the supreme court, in addition to those granted by § 86 of the Constitution, are those granted by § 87 thereof, which latter section reads: "It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same; provided, however, that no jury trial shall be allowed in said supreme court, but in proper cases questions of fact may be sent by said court to a district court for trial."

It will be observed that these sections vest in this court three independent and distinct grants of jurisdiction: (1) Appellate jurisdiction; (2) general superintending control over inferior courts; and (3) original jurisdiction to issue certain writs, and to hear and determine the proceedings so instituted.

The third grant of jurisdiction, *i. e.,* the original jurisdiction, alone is involved in this proceeding. The extent of such jurisdiction is no longer—if indeed it ever was—an open question in this state. It seems clear, however, that the framers of the Constitution had definitely in mind the purpose and limits of the original jurisdiction which they proposed that the people confer upon this court. For a provision substantially the same in the Wisconsin Constitution had been fully explained and elucidated in two masterly opinions prepared by Chief Justice Ryan, of the Wisconsin supreme court, a quarter of a century before the North Dakota Constitution was framed. See Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425; Atty. Gen. v. Eau Claire, 37 Wis. 400.

In those cases the Wisconsin supreme court had announced that the

grant of power to the supreme court to issue certain writs was not intended "in the same sense and with the same measure of jurisdiction" as the power granted in the Constitution to the circuit (in this state district) courts to issue the same writs. The court said: "The writs are given to the circuit courts as an appurtenance to their general jurisdiction; to this court for jurisdiction. Those courts take the writs with unlimited original jurisdiction of them, because they have otherwise general original jurisdiction. *Other original jurisdiction is prohibited to this court, and the jurisdiction given by the writs is essentially a limited one.* These courts take the prerogative writs as part of their general jurisdiction, with power to put them to all proper uses. *This court takes the prerogative writs for prerogative jurisdiction, with power to put them only to prerogative uses proper.*" The original jurisdiction of this court is not only limited to prerogative writs, but it is confined to prerogative causes." That the prerogative jurisdiction of the court was conferred because "contingencies might arise wherein the prerogatives and franchises of the state, in its sovereign character, might require the interposition of the highest judicial tribunal to preserve them." That the court was given original jurisdiction of certain writs, because they are designed for the very purpose of protecting the sovereignty and its ordained offices from invasion or intrusion, and, also, to nerve its arm to protect its citizens in their liberties, and to guard its prerogatives and franchises against usurpation." That "it is not enough to put in motion the original jurisdiction of this court, that the question is *publici juris;* it should be a question *quod ad statim republicae pertinet;* one affecting the sovereignty of the state, its franchises, or prerogatives, or the liberties of its people." That "to bring a case within the original jurisdiction of this court, it should involve, in some way, the general interests of the state at large."

It would seem that when this state adopted the provision relating to the original jurisdiction, it also adopted the construction which the Wisconsin supreme court had placed thereon. In any event that construction, in the early history of the state, received the approval of both this court and of the legislature. The question of original jurisdiction first arose in state v. Nelson County (decided April 21, 1890) 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33. In that case it was sought to enjoin the issuance of seed-grain bonds by the de-

fendant county, on the ground that the issuance of such bonds would contravene the Constitution. The court took occasion to point out that the original jurisdiction of the supreme court might be invoked "only in cases *publici juris* and those affecting the sovereignty of the state, its franchises, and prerogatives, or the liberties of its people." It said: "The case at bar affects only the local concern of the county of Nelson and its taxpayers, and hence does not fall within the limited class of cases indicated above, and in which alone this court will assume original jurisdiction." 1 N. D. 101. Attention was also called to the fact that the provision in our Constitution relating to original jurisdiction is substantially the same as the provision in the Wisconsin Constitution on the same subject, and the two Wisconsin cases heretofore referred to were approved. In 1891 the legislative assembly of this state, by enactment, provided that the supreme court "shall exercise the said original jurisdiction only in habeas corpus cases, and in such cases of strictly public concern as involve questions affecting the sovereign rights of the state or its franchise or privileges." Laws 1891, chap. 118; Comp. Laws 1913, § 7339. This statute has never been repealed or amended. The correctness of the rule announced in the Nelson county case, and in the statute mentioned, has never been questioned, but has repeatedly been reaffirmed. As was said by this court, speaking through Chief Justice Morgan, in State ex rel. Steel v. Fabrick, 17 N. D. 532, 536, 117 N. W. 860: "These sections [Const. §§ 86 and 87] have been under consideration in many cases by this court. From these cases it is established without dissent that the jurisdiction is not to be exercised unless the interests of the state are directly affected. Merely private rights are not enough on which to base an application for the issuance of original writs by this court. The rights of the public must appear to be directly affected. The matters to be litigated must not only be *publici juris,* but the sovereignty of the state or its franchises or prerogatives or the liberties of its people must be affected. Before the court will, in the exercise of its original jurisdiction, issue prerogative writs, there must be presented matters of such strictly public concern as involve the sovereign rights of the state, or its franchises or privileges. The often quoted statement of the rule as to the original jurisdiction of the supreme court to issue writs of a prerogative character, as given in Atty. Gen. v. Eau Claire, 37 Wis. 400, is well ex-

pressed and clear; 'To warrant the assertion of original jurisdiction here, the interest of the state should be primary and proximate, not indirect or remote; peculiar, perhaps, to some subdivision of the state, but affecting the state at large in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state in its sovereign character.' This statement of the rule has been approved in many cases in this court."

Is this action one which "affects the sovereignty of the state, its franchises, or privileges, or the liberties of its citizens?" Unless this question can be answered in the affirmative, this court has no jurisdiction, and it is the sworn duty of the members of the court to say so. The court has no discretion. Discretion exists only in cases which fall within the rule stated, but "in cases, not within said rule, no discretion is vested in this court." State ex rel. McDonald v. Holmes, 16 N. D. 457, 114 N. W. 367. The question of jurisdiction is not technical, as has been intimated. It lies at the very foundation of official action. In reality there can be no official or judicial action without it. Where jurisdiction is absent, *i. e.*, where officials exercise powers which have not been conferred upon them, they cease to be agents of the people, and become usurpers. It is at least as much the duty of officials to refrain from exceeding their powers, as to exercise the powers conferred. That is true of all officials. It is peculiarly true of the courts, whose function it is to interpret laws.

The original jurisdiction is a great power. It was vested in this court for use upon prerogative occasions only. It was limited both in scope and purpose,—it was limited to certain writs, "designed for the very purpose of protecting the sovereignty and its ordained offices from invasion or intrusion; to nerve its arm to protect its citizens in their liberties, and to guard its sovereign prerogatives and franchises against usurpation."

The Scandanavian American Bank of Fargo is purely a private business concern. It is owned by its stockholders, and its business affairs conducted by its officers and directors. The profits of its business belong to its stockholders, and its losses must be borne by them. It is not an instrumentality of the state government. It exercises and possesses none of the sovereign power of the state. It performs no govern-

mental function, and is in no sense an adjunct of the state government. It stands in precisely the same position as any other banking corporation, and, if our Constitution still functions, it is subject to the same rules and laws as other institutions of its class. If its rights are invaded, it and its officers are given ample opportunity to obtain protection through the ordinary processes of law provided under our Constitution. So far as the alleged conflict of power between the state examiner and the banking board is concerned, it is limited to this specific controversy. So far as this case is concerned, that controversy is important only as it may affect the rights of the bank. Clearly, it does not affect the sovereign rights of the state. The various decisions cited in the principal majority opinion fall far short of sustaining the views of majority members in this case. And the various reasons advanced for assuming jurisdiction are excuses rather than reasons, and, like excuses generally, they tend to aggravate rather than diminish the very faults they attempt to palliate.

The decision of the majority members that chapter 53, Laws 1915, by implication repeals those provisions of §§ 5146 and 5183, Comp. Laws 1913, which specifically authorized the banking board to appoint receivers of insolvent banks, is, in my opinion, violative of the most elementary and fundamental rules of statutory construction. The purpose and scope of chapter 53 have been so fully considered in Judge Birdzell's opinion that it would be needless repetition to restate them here. The act does not purport to repeal any existing law whatever. Nor does it purport to alter or amend any law relating to the powers or duties of the banking board. The section which the act amends is the one defining insolvency of banks. It is elementary that repeals by implication are not favored. Legislators are presumed to be men of intelligence. It is presumed that laws are passed with some deliberation, and with knowledge of existing laws on the same subject. Chapter 53 was introduced by a banker. Doubtless, at least, he and the members of the legislative committees to whom the measure was conferred, were entirely familiar with the then existing laws. If there had been any intention of curtailing or abrogating the powers of the banking board, the legislature would doubtless have said so expressly. "It is a reasonable presumption that all laws are passed with a knowledge of those already existing, and that the legislature does not intend to repeal

a statute without so declaring." Lewis's Sutherland, Stat. Constr. 2d ed. § 267. "The intention to repeal will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance." "A later and an older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, when such seems to have been the legislative purpose." "It is the duty of the court to so construe the acts, if possible, that both shall be operative." "There must be such a manifest and total repugnance that the two enactments cannot stand." "One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. 'It is not enough that there is a discrepancy between different parts of a system of legislation on the same general subject; there must be a conflict between different acts on the same specific subject.' When there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed." Lewis's Sutherland, Stat. Constr. 2d ed. § 247. "An implied repeal on the ground of repugnancy will not result in any case unless both the object and the subject of the statutes are the same; and if their objects are different both statutes will stand, though both relate to the same subject, because in such case the conflict is apparent only, and when the language is restricted to its own object, the two will run in parallel lines without meeting." 26 Am. & Eng. Enc. Law, p. 727. "A subsequent statute which institutes new methods of proceeding does not, without negative words, repeal a former statute relative to procedure." Lewis's Sutherland, Stat. Constr. 2d ed. § 260. In such case the new remedy will be deemed cumulative. These rules are fundamental. They were dictated by common sense and have the support of all the authorities. They have received the sanction of wisdom and experience, and are so well defined and uniform that—as the Supreme Court of the United States has said—"on the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist." United States v. Fisher, 2 Cranch, 358, 386, 2 L. ed. 304, 313; The Paulina v. United States, 7 Cranch, 52, 60, 3 L. ed. 266, 268; Cary v. Curtis, 3 How. 236, 239, 11 L. ed. 576, 578; Davis

v. Packard, 8 Pet. 312, 8 L. ed. 957. Difference of opinion can exist only in the application of the principles.

Clearly there is no irreconcilable conflict between chapter 53, Laws 1915, which authorizes the state examiner to appoint a receiver of an insolvent banking corporation, "with the approval of the state banking board," and the provisions of § 5146, Comp. Laws 1913, which authorizes the state banking board "to make such rules and regulations for the government of such (banking) corporations as in its judgment may seem wise and expedient;" and "to appoint by its own order, receivers for insolvent (banking) corporations." Section 5146 is the provision which created the state banking board and defined its powers. Chapter 53, Laws 1915, does not, by its terms or by necessary implication, purport to legislate with respect to the state banking board. There is no legitimate reason why chapter 53 and § 5146 cannot stand together in their entirety. And under the elementary rules of construction, above quoted, it is the duty of the court to so construe them. I fail to see how they can be construed otherwise. While the majority say that the legislative intent, evidenced by chapter 53, to take away from the state banking board the power to appoint receivers conferred by § 5146 and to vest such power in the state examiner, is so plain that "he who runs may read," it strikes me as more likely that one who believes he has seen such intent must have been running while reading,—and running so fast as to be unable to observe the plain and unmistakable signboards along the way which indicated the true legislative intent.

Reference is made in the principal majority opinion to the case of Youmans v. Hanna, 35 N. D. 479, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263; and it is stated that the closing of the Youmans bank at Minot was in part responsible for the enactment of chapter 53. In other words, the inference is drawn that the legislature believed that some wrong had been done by the banking board in connection with the closing of that bank, and that to remedy the mischief shown to exist in the former law, the legislature decided to take away from the state banking board the power to appoint receivers for insolvent banks, and vest this power in the first instance in the state examiner.

Let us see what foundation there is for the inference drawn by the majority. The complaint of the plaintiff is set forth at the commencement of the opinion of Youmans v. Hanna. See 35 N. D. 481-488.

A reading of that complaint will disclose that the plaintiff there claimed that the state examiner was the principal official offender. With respect to the closing of the bank, the complaint alleges: "On the following Monday, October 20, 1913, the plaintiff being unable to put the $48,000 of additional cash capital into said Savings Deposit Bank to satisfy the unlawful and fraudulent demands of said Severtson, pretending to act as chief examiner of North Dakota, the said Severtson and one of his deputies took actual physical possession of said bank and kept its doors closed; placing a sign on the front door, reading as follows: 'Bank closed: state examiner in charge.' *No steps were taken or contemplated by the chief examiner or the state banking board for the appointment of a temporary receiver of said bank.*" 35 N. D. 486. While the complaint also alleged that the members of the state banking board had entered into the conspiracy with the state examiner and the other defendants, there was no pretense or attempt to show, by any evidence whatsoever in that case, that the state banking board had any other connection in the matter, except to act upon and carry out the recommendations of the state examiner. The evidence was undisputed that he was the only official on the ground. He was the only official who had any actual connection with the closing of the bank. In fact this was recognized even by Judge Robinson, who filed a very strenuous dissent. As Judge Robinson specifically pointed out in his opinion that "there was no sense or reason for making any other person a party to the action," except "those who were present aiding, abetting, or profiting by the wrecking." This language could only have reference to the members of the banking board, as all the other defendants were actually present and participated in the transactions connected with the closing of the bank, and the transfer thereof to the parties who took the same over. Hence, it is apparent that even Judge Robinson was of the opinion that there was no cause of action whatever established against the members of the banking board.

Of course, Youmans v. Hanna et al. had not been decided at the time chapter 53 was enacted. But, it is true, the legislative assembly which enacted chapter 53 was fully aware of the controversy which had arisen as a result of the closing of Youman's bank. Youmans had published a pamphlet, about the closing of the bank, entitled "Legalized Bank Robbery." On February 2, 1915, a resolution was introduced in

the house of representatives for the appointment of a legislative investigating committee, consisting of two representatives and one senator; "with full authority to examine the said publication, the files, records, and papers in the bank described in said publication, and the records and reports of the examiner's department relating to said bank, for the purpose of ascertaining the truth or falsity of the charges preferred, said committee to make a report of said examination to the legislative assembly, and, in order to make a full and complete report thereof, such committee is authorized to issue subpœnas and compel the attendance of witnesses, and to make findings and report the same to the legislature." The resolution stated that the charges preferred in the pamphlet were such "as will bring discredit upon the state and its public officials, and subject the examiner's department, *particularly*, to serious criticism." See House Journal 1913, p. 350.

On March 2, 1915, the investigation committee's report was submitted to and approved by the senate (Senate Journal, p. 877). It was submitted to the house of representatives on the same day. House Journal, p. 1459. The report was quite extended and completely exonerated the state examiner. The concluding paragraph in the report was as follows: "We think that the actual cash market value of the assets of the Savings Deposit Bank on October 20, 1913, were insufficient to pay its liabilities. And from the foregoing facts, our conclusions are that the examiner, S. G. Severtson, while acting under the authority from the state banking board, made a demand and order on the Savings Deposit Bank, with which there was a failure to comply, and that under all the circumstances, taking into consideration the reports of prior examinations of said bank, the methods used by Mr. Youmans in the management of the bank and the trust company, and the condition of the assets in October, 1913, that the examiner, S. G. Severtson, had a perfect right to take the steps which he did in protecting the depositors of the bank, and that he acted within the authority of the law in closing the bank October 20, 1913; and we will further say that Mr. S. G. Severtson is entitled to credit, rather than censure, for his acts in this matter." Chapter 53 was placed upon its final reading and final passage on the same day that the report was adopted by the senate. It was passed without a dissenting vote, and the senate member of the investigation committee voted for it. Senate

Journal, p. 915. The act received the approval of Governor Hanna, who was chairman of the state banking board at the time the Youmans bank was closed. These facts speak for themselves, and it is beyond my comprehension how anyone can draw the inference therefrom which the majority members say may be drawn.

Little can be added to what has been said by Judge Birdzell upon the question of the denial to the respondents of a trial according to the law of the land. In fact it should hardly be necessary to say anything at all on this subject, except to point out the facts,—that the only proofs received in this case consisted of *ex parte* affidavits; that the respondents were denied an opportunity to cross-examine a single person who made affidavit against them, or to produce and examine in court a single witness in their own behalf. For in this country, it is a fundamental rule, familiar not only to lawyers, but to every intelligent citizen, that every person proceeded against in a court is entitled to an opportunity to be heard, and to defend, in an orderly proceeding adapted to the nature of the case. In other words, in this country, the law must hear before it condemns, and proceed upon inquiry, and render judgment only after trial. 6 R. C. L. pp. 446, 447. In this case the judgment of this court as announced by the majority not only in effect finds the respondents guilty of wrongful official action, but for good measure pronounces "condemnation" and mulcts them for costs. This is done without affording them an opportunity to be confronted by their accusers or to cross-examine a single person who bore witness against them. It is done over their protest, and in denial of their specific request that they be afforded an opportunity to cross-examine such persons. The right of cross-examination is recognized as a valuable one. A denial thereof in an ordinary action is a denial of a substantial right guaranteed by the law of the land, which of itself will invalidate the judgment and require a new trial of the case. Only a short time ago every member who concurred in the majority opinion also concurred in another opinion whereby a judgment of the district court was reversed because they deemed that the cross-examination of a certain witness had been too restricted. See German-American State Bank v. Erickson, 41 N. D. 548, 170 N. W. 854. That case involved the ownership or right of possession of a horse. This case—so the majority say—involves questions of transcendent importance,—ques-

tions affecting the sovereignty of the state or its franchises or privileges, or the liberties of its citizens, and in this case cross-examination is not only restricted, but wholly denied.

Reference has been made by one of the majority members to the trial of Christ. Even upon that trial the right to be confronted by the accusers and witnesses was not denied. That is true both of the trial before the Jewish Sanhedrin and before Pilate. For it is written: "And the high priest stood up and said unto him, Answerest thou nothing? What is it which these witnesses say against thee?" Matt. 26:62. And Pilate said: "Behold, I have examined him before you, have found no fault in this man touching those things whereof ye accuse him." St. Luke, 23:14.

It has been suggested that the respondents might have taken their evidence by deposition. This of course ignores the fact that the respondents would still have been denied the right of cross-examination. It also ignores the fact that, by the express terms of our statute, depositions "may be used only in the following cases:

"1. When the witness does not reside in the county where the action or proceeding is pending, or is sent for trial by change of venue, or is absent therefrom.

"2. When from age, infirmity, or imprisonment the witness is unable to attend court or is dead.

"3. When the testimony is required upon a motion or in any other case when the oral examination of the witness is not required." Comp. Laws 1913, § 7889.

But respondents had no reason to suppose that it would be necessary for them to take depositions. For upon the argument, in response to questions propounded by members of the court, respondents' counsel stated specifically that the respondents would not consent to a submission of the case for final disposition upon affidavits. Request was then made by such counsel that, in event the court assumed jurisdiction, opportunity be afforded for the oral examination of witnesses, and reference was made to specific persons who had made affidavits for the relators, and to particular facts in such affidavits upon which cross-examination was deemed essential. At that time it was not intimated by the court, or a single member thereof, that the parties ought to proceed to take depositions. The first notice the respondents had that they

would be denied an opportunity to examine witnesses in their own behalf, and cross-examine witnesses for the adverse parties, was when the decision as promulgated by the majority was handed down.

It has been suggested that the exigencies of the case required an immediate disposition, and that it would have occasioned too much delay to send the case to the district court for trial of the issues of fact. Of course, the mere fact that it might have taken longer time would not justify a denial to the respondents of a proper trial. The same reason might be advanced in a majority of, if not in, all important cases. There is generally need of speedy determination. There was, however, no reason why oral examination of witnesses should have delayed determination of the case. The argument was had on October 15th. The parties were subsequently, without request from either side, given until October 23d in which to submit additional affidavits. If the court had desired, and had so ordered, the trial could have commenced on the 16th of October. Surely if the court could deny all right to examine witnesses, it could have limited the time allowed for such examination, and required that the result be certified to the court by a specified date, —say October 23d. This would have given several days for an orderly trial. But the court was not required to send the case to the district court. There was nothing to prevent this court itself from hearing oral evidence. The law allows it. It was done by this court in Re Sidle, 31 N. D. 405, 154 N. W. 277. That was a habeas corpus case, involving the custody of a child. The court as then constituted deemed it improper to determine the disputed questions of fact there involved without affording the parties opportunity to examine witnesses orally.

I agree with Judge Birdzell that the question of the solvency or insolvency of the relator bank is in no event before the court. I cannot conceive of that being a question "affecting the sovereignty of the state or its franchises or prerogatives." The question of the solvency or insolvency of said bank was, however, directly involved in the action which the attorney general had instituted in the district court of Cass county prior to the commencement of this proceeding. The record shows that the attorney general applied to the district court for and obtained leave to bring such action. It also shows that the summons and complaint, application for appointment of receiver, and order to show cause therein, were served upon the president of the relator bank

on October 6, 1919. The application for the appointment of receiver was set for hearing on October 13, 1919. That action was concededly one within the constitutional jurisdiction of the district court. It must be assumed that the district court would have decided correctly the questions involved in that action. There was no justification for this court interfering with the orderly disposition of that cause. Manifestly there could have been no such intention at the time the alternative writ was issued; for in the petition of the relators in this case it was alleged "that no action or proceedings have yet been started against said bank by the state banking board; and relators have no speedy and adequate remedy at law."

It may also be noted that the statute creating the state banking board, and defining its powers, provides a specific remedy for a party aggrieved by any order of the banking board, *viz.*,—an action in a court of competent jurisdiction for modification or annulment of such order. See § 5146, subd. 3, Comp. Laws 1913.

While I do not deem the question of solvency or insolvency here, and would in no event attempt to determine it without a trial and legal evidence upon which to base my conclusion, it is only fair to the members of the banking board to point out that their action was taken upon a very extended report signed by two deputy state examiners and an assistant attorney general, wherein the examiners stated as their opinion that the bank was "hopelessly insolvent." One of the examiners is a man of large experience, and has served many years in the state examiner's department in his present capacity. The report shows, among other things, that the bank has $50,000 capital, and $10,000 surplus; that its loans and discounts aggregate $1,203,486.06; that more than $725,000 of such loans are excessive, *i. e.*, made in amounts in excess of what the law allows a bank to loan to any one borrower; that (exclusive of such excessive loans) over $46,000 are "bad debts" (the directors have subsequently charged off the bank books $25,000 of these loans, and paid over cash to the bank therefor); that more than $169,000 of the loans and discounts consist of past-due paper, and that over $104,000 of such past-due paper in in the hands of attorneys for collection; that over $26,000 of the loans have been made to officers of the bank, and that one of the excessive loans has been made to its president; that the legal reserve of the bank is more than $400,000,

and the cash reserve is more than $70,000, below the statutory requirement.

With all due deference to the views of the majority members, I believe that the practice which they have adopted and sanctioned in this case is contrary to the letter and spirit of our law; and that their decision is erroneous in its entirety. As it is without precedent in judicial annals, so do I hope it will not become a rule to be followed in future determinations.

BIRDZELL, J., concurs.

Addendum filed November 25, 1919.

BRONSON, J. The dissenting opinion of Justice Birdzell was circulated on October 31, 1919, seven days after the decision of this court, and the final determination of this case. The dissenting opinion of Justice Christianson has this day, November 22, 1919, been circulated.

In discussing the powers and the jurisdiction of this court, Justice Birdzell has brought into his opinion, as a basis for some of his reasoning, *ex parte* applications made by the attorney general, after this court assumed original jurisdiction. It has heretofore been considered not necessary, in determining the questions in this case, to make mention of these applications; they now, however, will be mentioned and discussed. After this court issued its original order restraining the defendants from exercising unlawful and arbitrary power, as alleged in the petition, and as found, the attorney general made an application (October 8, 1919) to retain certain papers that had been seized by him and his assistants, upon the ground that they desire to use the same in certain criminal proceedings then pending. This application was promptly denied; it was evidently an attempt to embarass this court in the consideration of this case. The attorney general had, and still has, full opportunity, as he well should know, to secure such evidence as otherwise fully provided for by law. The attorney general then applied (October 11, 1919) for permission, in effect, to proceed with the action in the district court, again evidencing an attempt to embarrass this court in its consideration, knowing full well that the action in the district court was based entirely upon the proceedings taken by him and the banking board. This application was denied. Upon oral argument the respondents, through the attorney general (October 15,

1919) again sought delay by seeking the remand to the district court, for purposes of taking testimony. This again was evidently, on its face, an attempt to secure delay.

There was then presented and submitted to this court legal questions of the statutory power of the respondents, unquestioned, uncontroverted, and concerning which no further evidence was necessary; namely, the statutory authority of the respondents under the specific statute upon which they relied to do the acts questioned. This application, therefore, could serve only to delay the determination of this question of power, and thereby perhaps, through delay, render effective the action taken by the respondents, even though without power and arbitrary. Mere delay in itself, under the circumstances of the case, would be as effective in destroying the relator bank, and the powers of the state examiner in regard thereto, as perhaps the actions as taken by the respondents. This court, instead of providing for sending this case back to the district court to take oral testimony, on the same day (October 15, 1919), of its own order, granted to the respondents eight full days to submit any other records or evidence before this court; not a scrap of paper of any kind was filed by the respondents to show any facts of any kind or character, which would even offer or give any indication to this court that they possessed any other evidence or could secure any other evidence than that which was submitted by them upon the oral argument. On October 21, 1919, two days before the expiration of the time when the respondents could file or submit additional evidence, another application by the respondents was made, in effect, asking for further delay and permission to take certain testimony of some witnesses whom they asserted were unwilling to testify. Such application mentioned neither the witnesses nor the nature of the testimony sought to be secured. They sought to take oral testimony before some court; the application was principally grounded upon the statement that they desired to use this testimony, so to be secured, in certain other criminal proceedings pending. This application was not granted. The dissenting members of this court knew of all these acts and proceedings by the attorney general; no motion was made by them or action taken seeking to secure further additional oral testimony in this case. This court well understood and perceived the evident attempt being made to delay the determination of this cause, and to use this court as an adjunct

improperly, in connection with certain criminal proceedings pending in a district court.

In the dissenting opinion of Justice Birdzell, an attempt is made to build up an argument that this proceeding did not conform to the law, for the reason that the respondents were not accorded an opportunity to take or submit oral testimony, with the right of cross-examination. The dissenting opinion of Justice Christianson likewise so contends. This argument, upon the real facts of this case, is supported neither upon principal nor authority. It is, in my opinion, merely an attempt to justify the arbitrary action and the proceedings of delay evidenced in this record, from beginning to end, on the part of the respondents. Well do the dissenting members of this court recognize and know that no oral testimony of any kind upon this record was necessary so far as the question was involved of the statutory power of the respondents to take the action that they did. The respondents asserted the right to act under a specific statute; they claimed no power otherwise. This statute, by this court, was determined to be repealed. This left the respondents without power.

Upon this construction alone, this case was determined against the respondents as far as the issuance of the writ herein is concerned. The dissenting opinions, therefore, with reference to the question of oral testimony and the right of cross-examination, affect only that portion of the majority opinion which, assuming for purposes of argument that the respondents did possess the statutory power for which they contended, characterizes and determines the acts of the respondents so taken as arbitrary and illegal.

In this regard, however, the respondents in this case, *had full opportunity to take evidence, and full opportunity to orally examine and orally cross-examine* all witnesses that they might have desired to produce.

Under the statute of this state there are three methods of taking the testimony of a witness: (1) By affidavit; (2) by deposition; (3) by oral examination. Comp. Laws 1913, § 7883.

After this case was at issue, and even before the oral argument of this cause, the respondents had full opportunity and full right to take any evidence desired by depositions, before any judge or clerk of the

supreme court, or district court, or before other officers, including notaries public. Comp. Laws 1913, § 7891. These could have been taken upon commission or notice. Comp. Laws 1913, §§ 7894 and 7895. In the taking of such depositions all of the rights of examination and cross-examination would accrue to the respondents the same as if before any court. These depositions could have been commenced at any time after the appearance of the defendant in the action. Comp. Laws 1913, § 7890. These rights the respondents had continually until October 23, 1919. The depositions, if so taken, could have been used before this court; they could have been admitted; not only by statute, but under the power of this court. Comp. Laws 1913, § 7889. The very citations, to wit, § 7889, Comp. Laws 1913, quoted by Judge Christianson, show the authority of this court to receive a deposition in such a proceeding.

The respondents did not choose to even make offer to take evidence by deposition. They did not even offer to produce before this court a single witness; they did not even submit, after October 15th, one single additional affidavit. They sought, apparently, the only course considered available to them, under the circumstances; namely, delay, and a demand for remanding this case to a district court for trial, for the taking of testimony which could as well be accomplished by statutory methods already existing for them.

It is therefore evident how groundless the contentions are that no opportunity was granted to the respondents to take evidence, to examine and cross-examine witnesses orally.

Chief Justice Christianson speaks of issuing a writ of preliminary order in this cause without notice to the respondents. It is illuminating, indeed, concerning this argument, to view the acts of Justice Christianson himself in many cases within recent years where he himself has caused or countenanced the exercise of the original jurisdiction of this court, without notice to other respondents who were present in the Capitol building where this court sits.

Concerning the question of original jurisdiction of this court the facts in the record speak sufficiently for themselves. Justice Birdzell, however, would have this court determine only one small question involved in the exercise of such original jurisdiction,—the question of the power of the banking board and of the state examiner,—and leave

the other questions for the prolonged consideration of other courts to be finally determined by this court in the exercise of its appellate jurisdiction; that is to say, determine the prerogatives of the state, and then, after making such determination in words, set the parties adrift; and, if perchance these prerogatives of the state are jeopardized and made ineffective through delay both as state institutions and as private institutions, then finally answer that the parties nevertheless have had their day in court; the law finally has prevailed, and the relators finally have received a paper decision through judiciary process, even though, long since the subject-matter involved had been determined alone by the elements of time.

The answer to this sort of argument is the old, well-worn maxim oft repeated and frequently made the basis of complaint concerning judiciary action; namely, "that justice delayed is justice denied."

The chief justice maintains that chapter 53, Laws 1915, which gave specifically to the state examiner power to appoint a receiver with the approval of the state banking board, did not repeal the power theretofore possessed by the state banking board alone to appoint a receiver without the initiative action or consent of the state examiner. He argues and contends, through a lengthy discussion, that the well-known case of Youmans v. Hanna affords no inferences such as are drawn by the majority opinion; he refers to the complaint in the Youmans v. Hanna actions; he refers to the action of the senate in the Youmans Bank investigation; he refers to the resolution adopted by the senate, finding in favor of the authority exercised by the state examiner and his actions as taken. The chief justice was not a member of the senate at the time these proceedings took place; the writer of the majority opinion was. Many things and occurrences took place in the senate beyond and in addition to the allegations contained in the complaint before the court; it serves no useful purpose to discuss them at length. The best answer, however, to the entire situation is the suggestion, "Why was chapter 53, Laws 1915, *enacted* giving the *specific power* to the state examiner with the approval of the state banking board, if everything in connection with the Youman Bank matter and the activities of the state banking board were considered proper, correctly carried on, and entirely supported by existing statutory provisions?"

The justification for this addendum opinion lies in the importance

of this cause, its far-reaching results, and in the definite understanding that the judiciary in this state should administer justice not only impartially, but with prompt despatch.

Two courses were open before this court, one which, through the delay of the respondents or through its arbitrary and illegal power, pointed out a way of wreck and ruin concerning the credit of this state, financial institutions, and the safety and trust of depositors in state banking institutions. The other way lead to the prompt consideration and the prompt despatch of the issues before this court, and to a conclusion which determined promptly that the powers exercised by the respondents were not possessed by law, and, even though assumed to be possessed, were arbitrarily and illegally exercised.

Through the prompt action and consideration given this cause by this court, through its majority members, there has been no jeopardizing of state finances; the powers of the state examiner have been made effective, without injury or destruction to any institutions or parties; the rights of the relators have been preserved and depositors protected. The relator's bank, and banks similarly connected, to-day are going institutions, recognized by the public as solvent, and receiving the confidence of the public in deposits and in business, greater than ever before. Both upon principles of law and justice the exercise of the original jurisdiction of this court to its full extent has been fully justified.

No lengthy arguments, through abstruse reasoning, or upon legal technicalities concerning due process of law, or upon grounds of narrow construction or deduction, can wipe away or eliminate the bold, clear, and undisputed facts submitted on the record in this case, which require the necessity of action. The principles of law involved herein have become matters of contention more through the great public interests and the great public importance involved in this case.

In ordinary cases, time and again, this court has exercised original jurisdiction involving questions of fact, and no difficulty has been met in determining a method for solving such questions of fact. Freely has original jurisdiction in this court been exercised in this state, and very freely indeed have the dissenting members of this court been parties in securing and upholding the exercise of this original jurisdiction for the purpose not only of determining matters admitted upon the

pleadings, but asserting the power and the right to determine issues of fact as an inherent power of this court.

BRONSON, J. Justice Birdzell has circulated (November 26, 1919) still another dissenting opinion, deeming it necessary, apparently, to add to the already long opinion heretofore prepared by him. Soon we may expect a daily addition of dissenting opinion; soon we may look for a personally conducted debating school among the members of this court. Although this court has long since entered judgment in this matter, nevertheless Justice Birdzell takes the strange position of treating and stating such judgment to be void, even though rendered by the court of which he is a member. It is peculiar, indeed, that the dissenting members of this court, when conference was had at the time this case was determined, should offer no suggestions, should quietly sit by, mum as oysters, and, when asked by a majority member of this court whether they had anything to say, should simply reply by the statement that they dissented and reserved the right to file a dissenting opinion. The whole tenor of the argument contained in the late opinion of Justice Birdzell is one that speaks for delay, and concerns alone questions of practice in cases of original jurisdiction before this court.

One indeed would be constrained to believe, from the argument contained in such opinions, that this case was up for trial before a lower court. When this case was up for consideration before this court all of the issues there presented were for the consideration of this court, not for the consideration of the trial court or any other court. The case was presented to this court upon a petition like a complaint, and upon a return and answer; the issues were framed; the cause was pending; the merits were then here. Upon these merits the parties did submit evidence; well did the respondents realize the necessity of prompt action if the *status quo* of the relators' rights was to be preserved; they had ample opportunity to furnish or submit additional evidence if they so desired. The respondents sought delay, realizing, perhaps, that, if they were without the power in the statute cited by them, the delay which might be occasioned would be fully as effective as if they had the power. The dissenting members of this court have now stepped into the shoes of the respondents, and are attacking the jurisdiction exercised and the prompt decision rendered in this case, by ar-

guing and contending that proceedings of delay should have been afforded. This case was set for hearing and determination on October 15, 1919, all of which the parties and the court well knew. It has never been set for hearing and determination on any other day. The reasoning in Justice Birdzell's opinion is indeed illuminating, which suggests, and even contends, that the parties did not know before what court they were to produce their witnesses.

Upon his present dissent, he is forced into the position of contending for proceedings of delay in a trial or district court to take additional evidence in a case of original jurisdiction before this court, even though the determination of this court, that the respondents possessed no statutory power to appoint a receiver without the initiative act or consent of the state examiner, settled this cause, and obviated the further necessity of taking any additional testimony in any event.

To bolster up their contentions for the taking of testimony before a trial court, and for delay, did they desire an accounting to be taken of every note and obligation of the relator bank, through a long course of accounting in a trial court.

In this cause the determination of the respondents' lack of power, upon the conceded facts, determines the case against them. In addition, the action of the respondents upon report, inaccurate, false as to the records investigated, and erroneous as to the law applicable, was determined to be arbitrary and unjust. Time was for some court when mere rhetoric and logic based upon an assumed premise sufficed, through the law's delay and legal technicalities, to defeat justice, no matter how clear the case might otherwise appear; the complaint of the American public, long and persistent has been heard by the bench and the bar of this country; the argument of the dissenting members is the old constitutional argument that the "i's" must be dotted; that the "the" in front of the word "state" must be stated in an indictment to protect the constitutional rights of the accused. Constitutions were established to protect, not to destroy, people's rights. In straining over a constitutional argument, the dissenters fail to observe this.

Again, it is well, in discussing fundamental questions of jurisdiction, to refer to the constitutional provision (N. D. Const. § 87) which states that the supreme court shall have power to issue writs of injunction and such other original and remedial writs as may be necessary to

the exercise of jurisdiction and shall have authority to hear and determine the same. Likewise, to § 7340, Comp. Laws 1913, which provides that the supreme court shall always be open for the issue and return of all writs and process which it may lawfully issue, and for the hearing and determination of the same, subject to such regulations and conditions as the court may prescribe. December 6, 1919.

Justice Birdzell has circulated December 5, 1919, a revised copy of the dissenting opinion of November 26, 1919. It needs no further discussion other than stated in the above opinion.

EARL MORRELL, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, a Foreign Corporation, and Walker D. Hines, Director General of Railroads of the United States, Appellant.

(179 N. W. 922.)

In an action brought against a carrier to recover damages for the failure to deliver to the consignee at Chicago certain live stock which the plaintiff loaded for shipment at Killdeer, North Dakota, where the evidence showed that the cattle delivered were not the cattle originally loaded, but were of inferior grade, and less valuable, the defendants introduced no evidence. It is *held:*

Pleading — omission of shipper to allege reliance on special shipping contract held cured by carrier's answer setting up such contract.

1. Where the complaint recites delivery to the defendants under a contract, shipping receipt, or bill of lading, but does not allege the failure of the defendants to deliver as a breach of the shipping contract, and the defendants plead the shipping contract in their answer, the omission, if any, of allega-

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NOTE.—Notwithstanding the stipulation in a written contract that the owner or person in charge of stock shall give notice in writing of his claim thereof, to some officer of the railroad or its nearest station agent, it is held that, where there has been no delivery of the property, a stipulation for the presentation of a claim for damages within a certain time is not applicable, as will be seen by an examination of a note in 31 L.R.A.(N.S.) 1180, on applicability in case of nondelivery of provision in shipping contract requiring presentation of claim for damages.

On liability of Director General of Railroads to statutory penalty for delay in shipments, see note in 8 A.L.R. 978.

tions showing reliance upon a special shipping contract is cured by the answer.

Carriers — requirements of written notice within ninety days after delivery of stock held inapplicable in suit for nondelivery.

2. The provision in a shipping contract which requires the shipper, as a condition precedent to the right to recover damages for delay in transit or for loss or injury to the stock, to give notice in writing of his claim to some officer or station agent of the defendant "within ninety days after delivery of such stock at destination," is not applicable where it appears that the stock was never delivered at destination, and the damages claimed are based upon its nondelivery. (U. S. Comp. Stat. § 8604.)

Carriers — liability for nondelivery of stock not qualified to contract recital that shipper would care for stock.

3. Where the agent of a carrier knows that neither the plaintiff nor any agent of his is accompanying live stock being transported by it, its liability for nondelivery is not qualified by provisions in the contract which recite that the shipper will care for the stock and furnish attendants.

Carriers — unrebutted proof as to delivery to carrier and nondelivery of stock to consignee held to create presumption of negligence.

4. Where the plaintiff proved delivery of live stock to the defendants and its nondelivery to the consignee, also the delivery of other and inferior stock in purported fulfilment of the shipping contract, a presumption of negligence arose which, being unrebutted, entitled the plaintiff to a recovery.

Carriers — instruction that carrier was liable only for negligence in action for nondelivery properly refused.

5. It was not error to refuse an instruction that the defendants, under their shipping contract, were only liable for negligence, where no evidence had been introduced to overcome plaintiff's prima facie case, or to warrant a finding by the jury that the defendants were not negligent.

Carriers — evidence of value of cattle at point of shipment held admissible, although damages for nondelivery measured by value at destination.

6. Where the testimony concerning the value of cattle at Killdeer, North Dakota, is shown to have been based upon a knowledge of the Chicago market, it was not error to admit testimony of the value at Killdeer, though the damages are properly measured by the value at Chicago.

Railroads — road under Federal control not liable for damages to shipment.

7. Where a shipper sustained loss or damage to freight carried over a railroad during the period of Federal control, the railway company is not liable.

Appeal and error — failure to dismiss as to railroad company held not prejudicial error as to Federal railroad administration.

8. Where no motion for dismissal as to the railway company was made until

the close of the plaintiff's case, and where no facts appear in the record showing that the defendant railroad administration was denied a fair trial by reason of the joinder of the railway company as defendant, failure to dismiss the action as to the railway company is not prejudicial error requiring a reversal as to the Federal railroad administration.

Opinion filed October 25, 1920.

Separate appeals by the Northern Pacific Railway Company and Walker D. Hines, Director General of Railroads, from District Court of Dunn County, *F. T. Lembke,* J.

Reversed as to the Northern Pacific Railway Company and affirmed as to the Federal Railroad Administration.

Young, Conmy, & Young, for appellant.

In an action against a carrier for loss of goods, the failure of the declaration to allege compliance with a provision of the bill of lading requiring notice of claim for injuries renders the declaration subject to demurrer. Williamsport Lumber Co. v. B. & O. R. Co. 77 S. E. 333; Cooke v. N. P. R. Co. 22 N. D. 266.

The rules and regulations, duly published and filed, which in any wise affect the rates or the value of the service to be rendered, are controlling upon both parties to the shipping contract. Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 112; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 98; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 515; Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 285.

There was a complete failure to show compliance with the terms and conditions of the shipping contract, particularly with paragraph V., relating to written notice. Cooke v. N. P. R. Co. 22 N. D. 266; St. Louis R. Co. v. Starbird, 243 U. S. 592; Kalma v. N. P. R. Co. 76 Pac. 438; Georgia R. Co. v. Blish Mill. Co. 241 U. S. 190.

T. F. Murtha (*T. H. Thorson,* of counsel), for respondent.

The complaint sets out an action upon the shipping contract, and need not allege that "the plaintiff has complied with all the terms and conditions of the contract on his part to be kept and performed." 31 Cyc. 763 to 778; Zenia Real Estate Co. v. Macy (Ind.) 47 N. E. 147.

Giving of the notice is not a condition precedent, and need not be

alleged. Comp. Laws 1913, § 7461; Hatch v. Railroad, 15 N. D. 490; 31 Cyc. 107; Root v. Childs (Minn.) 70 N. W. 1087.

The carrier must feed and water live stock notwithstanding a contract requiring the shipper to do so, where shipper does not accompany the stock. 10 C. J. 96, § 109, notes 52–56.

Under Federal Railroad Control Act, § 10 (U. S. Comp. Stat. § 3115¾j), authorizing actions to be brought against carriers as provided by law, action could be brought against the carrier in its corporate name, and general order No. 50 of the Director General, requiring actions to be brought against the Director General, is invalid. Gowan v. McAdoo (Mich.) 173 N. W. 440; West v. Ry. (Mass.) 123 N. W. 621; Franke v. Ry. (Wis.) 173 N. W. 701.

On Rehearing.

BIRDZELL, J. This is an action brought by a shipper to recover damages of the defendants for their failure to deliver to the consignee at Chicago certain live stock which the plaintiff loaded for shipment at Killdeer, North Dakota. The proof shows that on September 19, 1918, the plaintiff shipped from Killdeer 24 head of cattle, 21 steers, and 3 heifers, in car No. 84,945. When this car reached Chicago several days later, it did not contain the stock originally loaded in it, but it did contain some 22 cows and 22 calves. It appears that these were sold by the commission company, to which the plaintiff had consigned the stock originally contained in the car, and the net proceeds, amounting to $1,650.49, were remitted to the plaintiff. The stock which plaintiff had loaded in the car was of much higher grade and more valuable than that contained in the car when it reached Chicago. The jury, in its verdict, has given defendants credit for the amount received by the plaintiff as proceeds of the sale of the inferior stock which admittedly belonged to somebody else. The difference in the value of the cattle delivered to the carrier and those delivered at the destination represents the damages which were awarded by the jury in the sum of $2,750. The defendants introduced no evidence at the trial, and upon this appeal they rely upon errors which will be considered below.

It is first contended that the action should have been dismissed for the reason that the proof showed the shipment to have been made under

the terms and conditions of a special contract, which was not alleged in the complaint. It is claimed in support of this contention that the complaint is predicated upon the common-law liability of the carrier, whereas the proof shows that the liability, if any, was for breach of the special contract. In this connection, too, may be considered the contention advanced by the appellant, that the action should have been dismissed for the failure of the plaintiff to show compliance with the terms and conditions of the same contract.

In the complaint the plaintiff alleged the delivery of the stock to the defendant company as a common carrier, "and that the defendant railway company on that date at Killdeer, North Dakota, undertook and agreed, for a consideration thereafter to be paid, to so transport said live stock over its lines of railroad and over the lines of its connecting common carriers, and issued to the plaintiff its contract, shipping receipt or bill of lading, whereby the defendant railway company became liable to the plaintiff for any loss or damage to said stock during such transportation, and for failure to deliver said stock to said consignee. . . ."

The failure to deliver is not alleged in the complaint as a breach of the shipping contract, but it is nevertheless alleged. In their answer, the defendants, among other things, plead that the cattle were received and transported under the terms and conditions of the special written contract, a copy of which is made a part of their answer. Elsewhere in the answer, defendants set forth and rely specifically upon one of the provisions of the contract. From these references to the pleadings, it will readily be seen that, even if the complaint were considered deficient in allegations showing reliance upon the special contract of carriage, the omission is rendered entirely immaterial by the answer which specifically admits that the shipment was made under the special contract. The omission, if any, is wholly cured by the answer. Phillips, Code Pl. § 84; Bliss, Code Pl. 2d ed. § 437; Pom. Code Rem. 4th ed. § 575; Heffernan v. Supreme Council, A. L. H. 40 Mo. App. 605; Price v. Patrons' & F. Home Protection Co. 77 Mo. App. 236; Whitley v. Southern R. Co. 119 N. C. 724, 25 S. E. 1018. As this special contract was in evidence, there was clearly no failure of proof in the sense contended for under the appellants' first point.

Since, in our consideration of this case, we shall regard the right of

the plaintiff to recover under the pleadings and proof as being dependent upon the contract, the case of Cooke v. Northern P. R. Co. 22 N. D. 266, 133 N. W. 303, and 32 N. D. 340, L.R.A.1916D, 345, 155 N. W. 867, relied upon by the appellants, is not deemed applicable.

The appellants contend that the action should have been dismissed for the failure of the plaintiff to allege and prove notice of his claim within ninety days in accordance with the stipulation in the contract. It is pointed out that the shipment was an interstate shipment, and controlled by the acts of Congress so far as applicable (Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Northern P. R. Co. v. Wall, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493; 10 C. J. 136, 140), and that the stipulation in question with reference to notice is one specifically authorized by § 8604a, Comp. Stat. 1918. The stipulation reads:

"As a condition precedent to the shipper's right to recover any damages for delay in transit or for loss or injury to any of the stock, the shipper must give notice in writing of his claim therefor to some officer or station agent of the company within ninety days after delivery of such stock at destination."

This court, in the case of Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 490, 107 N. W. 1087, held that it was not incumbent on the plaintiff, in the first instance, to either allege or prove the giving of notice for which the shipping contract provided. The shipping contract in that case, in regard to notice, was quite similar to the present one.

It is contended that, in view of the decisions of the United States Supreme Court with reference to the waiver by carriers of the benefit of stipulations in shipping contracts, the rule of the Hatch Case, supra, can no longer stand. The decisions referred to firmly establish the rule that the waiver would amount to discrimination among patrons, and as such is prohibited and void. See Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Phillips Co. v. Grand Trunk Western R. Co. 236 U. S. 662, 59 L. ed. 774, 35 Sup. Ct. Rep. 444; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541; Missouri, K.

& T. R. Co. v. Ward, 244 U. S. 383, 61 L. ed. 1213, 37 Sup. Ct. Rep. 617; Baltimore & O. R. Co. v. Leach, 249 U. S. 217, 63 L. ed. 570, 39 Sup. Ct. Rep. 254. We do not find it necessary to determine in this case whether the rule in the Hatch Case can be reconciled with the decisions last referred to. It is clear, however, that if it can be reconciled, the case must be held to go no further than to prescribe rule of procedure rather than a rule of substantive law.

The stipulation before us requires the giving of notice of claim within ninety days "after delivery of such stock at destination." From the facts established beyond dispute it appears that the stock covered by the contract was never delivered at destination, and that the recovery is based upon its nondelivery. The purpose of such a provision is doubtless to enable the carrier to investigate claims while the evidence is fresh, and thus to afford a means of protection against fraudulent and exaggerated claims. That it was not intended to shield carriers from liability occasioned by their negligence may well be inferred from the provisions of § 8604a, U. S. Comp. Stat. which recognizes not only the right of carriers to require ninety days' notice of claim, but which further provides that "if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

In the instant case it appears prima facie that the loss of the cattle was due to negligence, and it would, therefore, seem to be a case controlled by the proviso above quoted, wherein the carrier is prohibited from requiring notice as a condition precedent to recovery.

In addition to this, it seems well settled that stipulations which limit the time for filing notices from the delivery of the property at destination are not applicable where the property is never delivered. See 10 C. J. § 487, p. 335; 4 Elliott, Railroads, § 1526; 4 R. C. L. 991; Southern R. Co. v. Webb, 143 Ala. 304, 111 Am. St. Rep. 45, 39 So. 262, 5 Ann. Cas. 97; Merchants & Miners Transp. Co. v. Moore, 124 Ga. 482, 52 S. E. 802, 19 Am. Neg. Rep. 138; Cleveland, C. C. & St. L. R. Co. v. C. & A. Potts & Co. 31 Ind. App. 564, 71 N. E. 689; Sheldon v. New York C. & H. R. R. Co. 61 Misc. 274, 113 N. Y. Supp. 676; Patterson v. Missouri, K. & T. R. Co. 24 Okla. 747, 104 Pac. 31; Tolmie v. Michigan C. R. Co. 19 Ont. L. Rep. 26–29. For these reasons

we are of the opinion that compliance with the stipulation requiring notice was not a condition precedent to the plaintiff's right of recovery.

It is contended that the plaintiff cannot recover, because his brother and agent, Jesse Morrell, in entering into the shipping contract on his behalf, signed the plaintiff's name in the blank on the back of the contract, intended to identify any person or persons accompanying the stock in transit. The contract provides that the shipper will care for the stock while in possession of the company and will furnish one or more attendants; that if the shipper fails to furnish one or more attendants, anything done by the company with respect to the care of the stock shall be considered as done at the shipper's request and as his representative. The evidence shows that the carrier knew that no one was accompanying the shipment. It was, therefore, not relieved of its duties with respect to the care of the stock. 6 Cyc. 438; 10 C. J. 109; 4 R. C. L. 982. The failure of the shipper to comply with this provision clearly does not make the act of the carrier in delivering the stock to the wrong person or in converting it to its own use, the act of the shipper. It was still charged with performing its duty as a carrier and of making delivery under the contract.

It is also contended that the instructions were prejudicial in that the court charged the defendants with liability as insurers, and refused proffered instructions to the effect that the defendants were not insurers, but only liable for negligence. It must be borne in mind that the plaintiff proved the delivery of the stock to the defendants and its nondelivery at destination, and that no evidence was introduced by the defendants. Neither in the cross-examination of the plaintiff's witnesses were any facts adduced that would explain in any manner the failure of the defendants to deliver the plaintiff's stock at destination. From proof of such facts a presumption of negligence arises, and, though this presumption be one of fact and rebuttable, the jury, under the state of the evidence offered, would not have been justified in drawing any other inference. So, if full effect be given the stipulation in the shipping contract, whereby the liability of the carriers is limited to negligence, it does not follow that error was committed in refraining from instructing the jury that they could not find for the plaintiff unless they found the defendants to have been negligent. There was no evidence to over-

come the presumption of negligence arising upon the plaintiff's proof. The error, if any, was not prejudicial. As said in 10 C. J. 247:

"The custody of the goods being shown to have been in the carrier, and their loss or the failure to produce them being established, the burden of showing that there was no negligence, or at least of explaining the loss in a manner not prima facie negligent, is usually held to rest on the carrier. . . . The presumption of negligence raised by a proof of failure to deliver goods on demand is not rebutted by mere proof that the goods cannot be found without any affirmative explanation of their disappearance. Ordinarily, the question of negligence is for the jury; but where there is no dispute as to the facts, the question of whether the goods have been properly cared for may become one of law." See also 4 R. C. L. 993.

Errors are assigned upon the admission of evidence bearing upon the measure of damages. Various witnesses testified to the value of the stock at Killdeer, North Dakota, and it is claimed that the proper measure of damages is the value at Chicago. The plaintiff should have proved the value at Chicago. From a reading of the testimony, however, it appears that the value at Killdeer, as testified to, was based upon the Chicago market. In the absence of a showing that the market had declined between the date of shipment and the date delivery should have been effected under the contract, the defendants were not prejudiced by the testimony which established the value at Killdeer. We cannot assume that they were prejudiced. Consequently, there is no merit in this contention.

At the close of the case, the attorney for the defendants moved to dismiss the action as to the Northern Pacific Railway Company on the ground that the company was not operating its railroad at the time, the same being under Federal control. For the reasons stated in McGrath v. Northern P. R. Co. ante, 303, 177 N. W. 383, this motion should have been granted. It is contended, however, that a new trial should be awarded the defendant Walker D. Hines, Director General of Railroads of the United States, on the ground that the defense of the government was prejudiced by reason of the failure to dismiss the action as to the Northern Pacific Railway Company. It does not appear that any motion for substitution was made under order No. 50 of the Federal Railroad Administration, nor that the trial preliminary to the ver-

dict was in any way prejudiced or hampered by reason of the Northern Pacific Company being joined as a defendant. No substantial reason is assigned or facts stated from which we can say that the defendant railroad administration has been prejudiced by the joinder of the railway company. The judgment will, therefore, be affirmed as to the latter defendant, and the action dismissed as to the Northern Pacific Railway Company. It is so ordered.

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

BRONSON, J. I concur in result.

GRACE, J. (dissenting). The action is one against the defendant for conversion of certain ordinary live stock intrusted to it for shipment to a company at Chicago. The facts are quite fully stated in the majority opinion, and need not be restated here.

The shipment was made under a particular contract. The complaint, as well as the answer, pleads a contract. The contract offered in evidence is the contract upon which the shipment was made. It is the one relied upon by the plaintiff as well as the defendant.

The rights of the parties were fixed by the written contract and by the Commerce Act. One of the provisions of the written contract, relied upon by defendants to defeat recovery, provides:

"As a condition precedent to the shipper's right to recover any damages for delay in transit, or for loss or injury to any of the stock, the shipper must give notice in writing of his claim therefor, to some officer or station agent of the company, within ninety days after delivery of such stock at destination."

Section 8604a, U. S. Comp. Stat. provides "that it shall be unlawful for any such common carrier to provide, by rule, contract, regulation, or otherwise, a shorter period for giving notice of claims, than ninety days, and for the filing of claims, for a shorter period than four months, and for the institution of suits, than two years; provided, however, that, if the loss, damage, or injury complained of was due to delay or damage, while being loaded or unloaded, or damaged in transit, by carelessness or negligence, then, no notice of claim, nor filing of claim, shall be required as a condition precedent to recovery."

It is conceded that this is an interstate shipment, and that the whole transaction was interstate commerce, and one controlled by the acts of Congress, as far as they have application thereto. From this, it must necessarily follow that the construction of the bill of lading is a Federal question.

In this case, there was no notice of claim of loss or damage, or of failure to deliver, or of misdelivery, given the defendant, as required by the bill of lading or contract, between the parties, nor is there any proof that a claim was filed therefor within four months.

The proof of notice required to be given within ninety days is, as we view the matter, a condition precedent, which the plaintiff must allege and prove, before he may maintain an action to recover for the damages alleged to have been sustained by him. That was a condition agreed to by him in the contract, and it was one authorized by the law under consideration. It was a term of the contract, which could not be waived either by him or the defendant; and one which could not be ignored by either.

The responsibility of carrier is that fixed by the agreement made under the authorized and published tariffs, and under the regulations and requirements in § 8604a, and Commerce Laws amendatory thereof.

This must be true, or otherwise opportunity would exist for discrimination, one of the abuses intended to be corrected. This is virtually the conclusion which is reached by the Supreme Court of the United States in the case of Georgia F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 197, 60 L. ed. 952, 36 Sup. Ct. Rep. 541.

In that case the court, speaking through Justice Hughes, discussing the requirement of notice of claim, said: "It is not to be doubted that if, in the case of an interstate shipment, under a through bill of lading, a terminal carrier makes a misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice of claims "in case of failure to make delivery," a fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods."

And the court, further, there said:

"The parties could not waive the terms of the contract, under which the shipment was made pursuant to the Federal act; nor could the car-

rier, by its conduct, give a shipper the right to ignore these terms, which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations.

"A different view would antagonize the plain policy of the act, and open the door to the very abuses at which the act was aimed."

In the majority opinion, the case of Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 490, 107 N. W. 1087, is relied upon to sustain the conclusion at which they have arrived. It is apparent, upon the most casual examination of the decision in that case, that the conclusion there is diametrically opposed to the purpose and intent of that part of the Commerce Act above set forth.

If the rule in the Hatch Case is correct, then the requirements of the Federal act, as to notice and filing of claims, and the time within which to bring an action, are of no real force nor effect, either as expressed in the act, or as incorporated into a contract based upon its provisions, and hence the door would thereby be opened to all abuses sought to be prevented by the act; that is, a carrier, though it could not give a favorite shipper a different rate than that prescribed by the published tariffs, as fixed by the Interstate Commerce Commission, it could recognize damages claimed to have been suffered by such shipper, in a substantial amount, when no great amount of damage had been suffered; and if there were no formal notice or statement of amount of claim required to be filed with the carrier, there would be nothing in the carrier's records from which it might be ascertained whether the claim was legitimate or not, and thus the opportunity is afforded the favorite shipper, of receiving, in effect, a rebate. This procedure, if carried on to any considerable degree, must necessarily result in other shippers paying a higher rate; in short, result in discrimination among shippers.

It may be true, as stated in the Hatch Case, that the notice required is not a part of the cause of action; and that the cause of action is complete before the condition becomes operative, but, in this case, it was necessary to serve the notice of claim pursuant to the act and the contract based upon it, before the court acquired jurisdiction.

It is a condition precedent to the bringing of an action, which must be observed, and this, upon the broad ground of public policy, to prevent discrimination and rebating among shippers.

It should also be remembered that the Hatch Case was decided prior to the time when the Carmack Amendment became effective. If this court follows the rule in that case, it appears to us it will be in the same position on principle as that stated by the Supreme Court of the United States in the case of Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556. There, the court, in the syllabus, said: "A decree of a state court, denying to the defendant the benefit of a Federal statute, compliance with which was set up in the answer, and supported by testimony tending to show the truth of the allegations thereof, is an adverse ruling on a Federal right, which, under the Judicial Code, § 237 (36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. § 1014, 5 Fed. Stat. Anno. 2d ed. p. 723), warrants bringing the case up to the Federal Supreme Court by a writ of error."

And so we are convinced, in this case, that the adherence to the rule in the Hatch Case is a denial of defendant's rights, under Federal act, and the interpretation thereof, as contained in Georgia, F. & A. R. Co. v. Blish Mill. Co. supra.

In this case, it was no hardship for plaintiff to have complied with the contract and the requirements of the act. If he had pleaded and proved that he had served a proper notice upon any agent of the defendant (and there are thousands of them, and many near at hand where plaintiff resided), and had proved that he had filed a claim, the judgment which he has recovered might then properly be affirmed; but that was not done, and we think, for that reason, the judgment cannot stand.

It is evident that, if such notice and proof is not required, then the act becomes ineffective, and public policy, which is its basis, is entirely disregarded; and the abuses abolished by it will again rise and flourish.

In the construction of this law, we must apply one rule or the other. Either the one requiring pleading and proof of notice, which leads to order, uniformity of treatment of shippers, and the sustaining of the sound public policy of the act, or we must take the other, where pleading and proof of notice is immaterial, which leads to chaos, favoritism, discrimination, and rebating, and the throwing down of the sound public policy of the act.

The act is Federal. The legal construction of it has been ascertained

and enunciated by the highest Federal judicial authority. I feel that our position is in harmony with that authority.

We think, for the reasons above stated, and for those reasons only, the trial court should have directed a verdict for the defendant. We think the judgment appealed from should be reversed, and the case remanded for a new trial.

E. M. TRUAX, Appellant, v. CHAS. ALTON, Respondent.

(179 N. W. 992.)

Appeal and error — vacation of default will not be disturbed excepting for abuse of discretion.

1. Where the district court has made its order opening and vacating a judgment entered by default against a garnishee, for the purpose of permitting a meritorious defense, its action, as a rule, will not be disturbed, unless an abuse of discretion appears.

Garnishment — vacation of default against garnishee on terms held not error.

2. In a garnishment proceeding in the district court the disclosure of the garnishee was taken thirty-three days after the service of the garnishee summons. On the same date, the defendant served his answer claiming the proceeds as disclosed to be exempt. Nevertheless, the plaintiff, upon an affidavit of default, entered judgment against such garnishee. Thereafter, the court, upon motion made for relief from such default, vacated such judgment and permitted the answer served to stand as an answer in such action. It is *held* that the trial court did not err in so doing.

Opinion filed October 25, 1920. Rehearing denied November 23, 1920.

Appeal from an order vacating a default judgment against a garnishee, in District Court, Divide County, *Fisk*, J.

Affirmed.

Brace & Stuart, and *John E. Greene*, for appellant.

"Exemptions are favorably considered by the court, but in order that one may come within the protection of the statute the statute must be obeyed. . . . If, therefore, he does not assert his claim within the

time and in the manner prescribed by law, his rights are waived." Bursell v. Goldstein, 23 N. D. 257.

In the majority of jurisdictions the rule is laid down that a voluntary general appearance on the part of the garnishee waives all irregularities in the garnishment proceedings, such as defects in the writ or summons, or in the service, at least in so far as the rights of the garnishee are thereby affected. 20 Cyc. 1057; McShane v. Knox, 103 Minn. 269, 114 N. W. 955.

George P. Homnes, for respondent.

BRONSON, J. *Statement.*—This is an appeal from an order vacating a judgment against a garnishee. The facts necessary to be stated are as follows:

On May 21, 1919, the plaintiff instituted an action in district court against the defendant to recover for goods sold. At the same time he issued a garnishee summons against A. H. Anderson, agent for the Continental Fire Insurance Company, based upon an affidavit for garnishment that such insurance company had money in its possession belonging to the defendant. On June 24, 1919, said A. H. Anderson, agent, made his affidavit admitting that the said insurance company was indebted to the defendant for loss by fire under an insurance policy amounting to $800, $300 of which was assigned by indorsement on the policy. On the same date, June 24th, the defendant served an answer to the garnishment proceedings, claiming that the proceeds of such policy were exempt. On the same date, one of the attorneys for the plaintiff made his affidavit that more than thirty days had elapsed since the service of the process; that the defendant had not served an answer or demurrer and had not made any appearance in the action; but that he served in the garnishment proceedings on June 24, 1919. Pursuant to this affidavit for default the trial court on June 25, 1919, ordered judgment for $904, and interest and costs against the defendant in the main action, and against A. H. Anderson, as agent of the Continental Fire Insurance Company, garnishee, for $500. Pursuant to this order, on July 1, 1919, judgment was entered accordingly. On November 28, 1919, an execution was issued upon the principal judgment. Pursuant thereto, on December 1, 1919, the sheriff levied upon the $500 so disclosed by the said Anderson. On January 2, 1920, the defendant

served a motion to vacate the judgment entered against said Anderson, stating, among other grounds, that the judgment was entered without notice to the defendant, and that he was surprised by the entry thereof; and requesting that his answer served be allowed to stand as his answer in the garnishment proceeding. This was supported by the affidavit of the defendant, which stated, among other things, that on May 19, 1919, his home and furniture were destroyed by fire; that the policy of fire insurance was upon the furniture and household goods; that within three days after the service of the garnishment summons upon him, he served upon the officer by whom the garnishment summons was served, a notice of his claim for exemptions; and a schedule of all his personal property, which at such time consisted of said fire insurance policy. That, thereupon, he demanded a copy of the complaint, which was served on him on May 24, 1919; that said Anderson did not receive any money accruing upon such policy until June 24, 1919, more than thirty days after the garnishee summons was served upon him; that the defendant made his answer in the garnishment proceedings, claiming exemptions, on the same date that said Anderson made his disclosure; that the $500 was the proceeds of his insurance upon such household goods; that the same was exempt; that he had no notice of any further proceedings, or that a judgment was entered, until the execution was issued and the money seized by the sheriff of the county, and not until then did he know that his claim for exemptions was ignored. Thereto attached also is an affidavit of one Prickett, that the claim for exemption was served on the constable on May 22, 1919, and thereto appended is the schedule of his personal property and his affidavit. The schedule shows this policy of fire insurance. The affidavit states that the same is statement of all his personal property; that he is the head of the family and is a resident of the county of Divide, North Dakota.

Upon this motion the trial court, after hearing, entered its order vacating the judgment against said Anderson and permitting defendant's answer to stand as such in the garnishment proceedings. In this order the court, among other things, stated that the defendant suffered a loss by fire of his home and furniture on May 19, 1919. That the $500 owing by the Continental Fire Insurance Company was the proceeds from the fire insurance policy upon such furniture. That said

Anderson received such proceeds on June 24, 1919; that on that date the defendant demanded such proceeds, and claimed the same as exempt from garnishment or execution, and that immediately he served such demand and claim upon the attorneys for the plaintiff, and served his answer therefor. The plaintiff had notice of defendant's claim of exemption; but nevertheless entered judgment against such Anderson for such sum without notice to the defendant.

Opinion.—We are clearly of the opinion that the trial court did not err in vacating such judgment against the garnishee. Pursuant to § 7483, Comp. Laws 1913, the trial court was authorized in its discretion to allow an answer to be made to this garnishment proceeding even after the time limited. The answer, upon its face, presents a meritorious defense. In such cases, where the court has made its order opening and vacating a judgment entered by default for the purpose of permitting a meritorious defense, its action will not, as a rule, be disturbed, unless an abuse of discretion appears. Citizen's Nat. Bank v. Branden, 19 N. D. 489, 493, 27 L.R.A.(N.S.) 858, 126 N. W. 102; Keeney v. Fargo, 14 N. D. 419, 423, 105 N. W. 92; Cline v. Duffy, 20 N. D. 525, 527, 129 N. W. 75; First State Bank v. Krenelka, 23 N. D. 568, 137 N. W. 824. It certainly may not be deemed an abuse of discretion to permit an answer in a garnishment proceeding to be interposed on the same day that the disclosure in such garnishment proceedings is taken. See Braseth v. Bottineau, 13 N. D. 344, 100 N. W. 1082. The order in all things should be affirmed.

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

ROBINSON, J. I dissent.

FIRST NATIONAL BANK OF CRARY, Respondent, v. HERBERT MILLER, Ella Miller, Earl Miller, and George Thompson, Appellants.

(179 N. W. 997.)

Bills and notes — guaranty — conditional delivery defenses between original parties to note.

1. Plaintiff brought action to recover upon an $800 promissory note. The defense was that it was delivered conditionally and for a special purpose. The

action is between the original parties, and no question of a purchaser for value, before maturity, in due course, is involved. The defenses interposed are, under § 6901, Comp. Laws 1913, available.

Bills and notes — guaranty — no recovery by payee after accomplishment of conditions for which note was delivered.

2. The evidence showing that the note was delivered conditionally and for special purpose, and the conditions and special purpose having been accomplished, and the note being of no further effect or validity, the plaintiff was not entitled to recover on the same, and the judgment of the trial court in his favor is reversed.

Bills and notes — guaranty — after accomplishment of special purpose of note, maker and guarantors not liable.

3. Defendant, the maker of the note, and the remainder of the defendants as guarantors, executed and delivered their note to the plaintiff for the special purpose of procuring money with which to complete the amount of a cash bail for one Earl Miller, charged with a criminal offense, the money to be placed with the state's attorney, and, if the bail were exonerated, to be returned to the plaintiff, and the note to be returned to the defendants.

The bail was, by order of the court, exonerated. In these circumstances, proof of the conditions and special purpose being quite conclusive, it is *held* that neither the maker nor the guarantors are under any further legal liability upon the note.

Evidence — as to conditions in which and special purpose for which note was delivered did not vary terms of the note.

4. It is *held* that the introduction of evidence to show the conditions under which, and the special purpose for which, the note was delivered, did not tend to vary the terms of a written instrument, the note, in view of the right, under the above statute, to show that it was delivered conditionally or for a special purpose.

Opinion filed October 27, 1920. Rehearing denied November 26, 1920.

Appeal from a judgment of the District Court of Ramsey County, *C. W. Buttz*, J.

Judgment reversed and new trial ordered.

H. S. Blood and *E. T. Burke*, for appellants.

NOTE.—Authorities discussing the question of admissibility of parol evidence to show that a bill or note was delivered upon condition are collated in notes in 18 L.R.A.(N.S.) 288, and L.R.A.1917C, 306.

It is always competent to prove by parol what the real consideration of a written instrument is. Comp. Laws 1913, § 6901; Grebe v. Swords, 28 N. D. 330; 7 Cyc. 706; First State Bank v. Kelly, 30 N. D. 84.

Rollo F. Hunt, for respondent.

A banking corporation cannot lend its credit to another by becoming surety, indorser, or guarantor for him. 7 C. J. 547, 815; 3 R. C. L. 425; 32 L.R.A.(N.S.) 545, note.

When suing upon a contract which is ambiguous or uncertain in its provisions, when applied to the subject-matter of litigation, the pleading should so state, and by averment point out wherein plaintiff claims the contract to be uncertain. Johnson v. Kindred State Bank, 12 N. D. 336.

GRACE, J. This is an action brought by plaintiff upon a promissory note in the sum of $800, dated December 20, 1917, and due October 1, 1917, bearing 10 per cent interest, against Herbert Miller, as maker, and Ella Miller, Earl H. Miller, and George Thompson, as guarantors.

The complaint is in the ordinary and usual form in such cases. Each of the defendants answered separately. Herbert Miller admits making and delivering the note, but in his answer shows that this was done conditionally, in that the same was delivered as security and indemnity for bail for one Earl H. Miller, one of the guarantors of the note, who was confined in the county jail on the criminal charge of rape; that it was agreed that when the bail was exonerated, the note would be released and returned to the indorsers. It is alleged there was no other or further consideration for the note than above stated.

The guarantors by proper allegations show the conditional delivery of the note, in substance, as above stated; and also that it was agreed by plaintiff and them, and Allen Miller and William Miller, when said note was indorsed, that the plaintiff would make no loans to defendant Herbert Miller, on account of said note, or advance to him any money, or pay any money to any of his creditors, or to itself, on account of said note, and that none of the indorsers would assume any liability for any of the debts or obligations of Herbert Miller, by indorsing the note, and that the only liability they would assume was to reimburse plaintiff

in case it should be required to pay the amount of the bail. They deny any other consideration of the note.

The bail was first fixed at $5,000; it was subsequently reduced to $2,000, on condition that the bail be furnished in cash. The bail was furnished in cash, as follows: By Mr. Smith, president of the plaintiff bank, $400; by Charles Doyon, $400; by W. C. Hegdar, $400; all of which was deposited with clerk of court of Ramsey county, and which was returned to them when the bail was exonerated by order of the court.

Herbert Miller gave his check, certified by the bank, to Hunt, for $800; it and the above amounts aggregated the sum of $2,000, the amount of cash bail fixed. Hunt as state's attorney presented the $800 certified check to the plaintiff bank for payment, and received from it a cashier's check payable to him as state's attorney, which was deposited by him with the clerk of court unindorsed, until after the trial of Earl H. Miller, who at his trial was acquitted and discharged, and his bail, by order of court, exonerated. After the order of the court exonerating his bail, and while the cashier's check was yet, by Hunt, unindorsed, the sheriff of Ramsey county levied upon it under execution issued on a certain judgment against Herbert Miller.

It was claimed by the defendant indorsers, that a third-party claim was made by the bank, upon the sheriff, for a return of the check, and that the bank afterward abandoned and withdrew this claim. The check being payable to the order of Hunt as state's attorney, after the order of the court exonerated the bail, and while the check was unindorsed, and after the levy of the execution thereon, the sheriff procured what is denominated a writ of certiorari directed to Hunt, ordering him to show cause why he should not indorse the check, so that the sheriff might cash it and use the money for satisfying the execution.

At the conclusion of the hearing of the order to show cause, the court ordered Hunt to indorse the check, which he did. The sheriff cashed the check, the bank paying him the money on it. The bank then brought suit on the note.

Defendants assign four errors, all of which may be considered under the charge, that the court erred in directing verdict in favor of the plaintiff for the full value of the note, in view of the evidence showing, or tending to show, that the note was made and delivered conditionally,

in the manner claimed by defendants, and by the court excluding certain evidence and offers of certain evidence, tending to establish the conditions upon which payment of the note was indorsed and guaranteed, and erred in refusing to grant defendants' motion for a directed verdict made at the close of the case.

Section 6901, Comp. Laws 1913, reads thus: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between the immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the *delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument.* But when the instrument is in the hands of the holder in due course, a valid delivery thereof, by all parties prior to him, so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

In this case no question of a holder in due course arises, and hence no consideration of that subject is necessary. The defendants have pleaded, in substance, that the note was delivered conditionally, and for a special purpose. That special purpose was the furnishing of cash bail for Earl Miller, and for that purpose, and upon the condition that the note would be returned when the bail was exonerated, the note was delivered to the plaintiff bank.

It was also a condition that the note, or its proceeds, were not to be used to pay any of the private debts of Herbert Miller. It was not delivered for that purpose. It was delivered to the bank for the special purpose of procuring the balance of the bail money, which was to be returned if the bail were exonerated, and the note returned to the maker and the indorser. This was the true and only purpose of executing and delivering the note.

It appears the plaintiff bank, being a national bank, was under restrictions of law, relative to its powers and duties, in regard to signing bonds. Perhaps it may have determined that that restriction would ex-

tend to a cash bail bond. Whatever may be the facts in this regard, we think, from the history of the whole case as presented here under the evidence, and circumstances shown by it, that the drawing of the check upon the bank by Herbert Miller, for an amount equaling the note, was simply a means adopted to procure the balance of the cash bail.

The character of the transaction was not changed in the least by the state's attorney cashing the certified check which Herbert Miller gave him, and receiving instead thereof a cashier's check from the plaintiff bank. Herbert Miller's check, certified by the bank, was equally as good as the check of the cashier. We think it conclusively appears from the testimony, and the circumstances surrounding the transaction which appear in the evidence, and from the undisputed facts, that the money was to be, and was in fact, used as bail money, and that the note was executed and delivered conditionally, and for a special purpose.

The note did not become the property of the bank for any other purpose than the special one, nor was it delivered to and received by it, except under the conditions and special purpose conclusively shown. If money were advanced by it upon the note, it was done for and in accordance with the special purpose to accomplish which the note was delivered.

Under the evidence it was not a loan to Herbert Miller. It was not delivered to him for that purpose. It was a condition, particularly emphasized, that it should not be used for the payment of his debts.

The special purpose of giving the note was completed, and there should be no further or different liability on the promissory note than was intended and covered by the special purpose and conditions upon which it was delivered. And we are of the opinion, and it is held, there is none.

At the very moment the court signed the order, defendant's bail was exonerated. The levy of the execution by the sheriff, upon the check payable to the state's attorney, was of no effect. It was not the property of Herbert Miller, and hence not subject to levy. The promissory note had become of no value as soon as the defendant's bail was exonerated. The money should have been returned to the bank, as it was intended it should be; and the note returned to the maker and in-

dorsers, thus carrying out the special purpose for which the note was delivered.

The order of the court compelling the state's attorney to indorse the check makes plaintiff's position no stronger. If the check had been indorsed by the state's attorney, at the time of the levy, defendant's bail having been discharged, the levy of the execution would have been of no effect. There was in fact nothing upon which the sheriff could levy.

The statute we have above cited, with reference to the right to allege and show that the instrument in question was delivered conditionally and for a special purpose, is plain, and the principle is supported in Grebe v. Swords, 28 N. D. 330, 149 N. W. 126, and in First State Bank v. Kelly, 30 N. D. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044.

There is no merit in respondent's contention that certain evidence offered by the defendants tended to vary or contradict the terms of a written instrument. It is clear that the introduction of that evidence was not for the purpose of varying or contradicting the terms, but to show the conditions under which, and the special purpose for which, it was delivered; and that, otherwise, it never became operative nor of any legal existence as a contract.

Under the statute we have set forth, the condition and special purpose may be alleged and shown, and that is all that the evidence, claimed to be inadmissible, would tend to show.

There was substantial evidence excluded and offer of proof thereof denied, which, if received, would show, or tend to show, that the note was executed and delivered conditionally and for a special purpose. The exclusion of such testimony, and denial of the offer of proof, are reversible error. The court erred in directing a verdict in favor of plaintiff.

We are further satisfied that there is sufficient evidence now in the record to conclusively show that the note was delivered for the special purpose above mentioned. The evidence excluded would be additional proof of that fact. A new trial upon that point would be useless. That is the only material point in the case. We have considered the case fully, and, in our opinion, the judgment should be reversed.

The judgment is reversed and the case remanded to the trial court, and a new trial ordered. Appellants are entitled to their costs and disbursements on appeal.

BIRDZELL and ROBINSON, JJ., concur.

BRONSON, J. I concur in result.

CHRISTIANSON, Ch. J. (concurring specially). In my opinion the defendants might assert as a defense that the note in suit was delivered for a special purpose only, and that such purpose has been accomplished. The evidence offered by defendants tending to establish this defense should have been admitted, and the resulting issue of fact, if any, submitted to the jury.

CATHERINE CALE and John Becker, Appellants, v. PHOEBE C. WAY, Respondent.

(179 N. W. 921.)

Deeds — evidence held to show delivery.

As the heirs of Frederick Becker, deceased, the plaintiffs and appellants claim some title to a quarter section of land which, about a year prior to his decease, Becker conveyed to his sister, the defendant. She did not record the deed or take possession of the land until after the decease of the grantor, and there is some evidence that she had in her mind a secret purpose to give back the title to her brother in case he should survive her. Hence it is contended that the delivery of the deed was conditional, and not effectual. However, the clear, positive, and uncontradicted testimony shows that the delivery of the deed was absolute, and not conditional.

Opinion filed October 29, 1920.

Appeal from the District Court of Ramsay County, Honorable *A. G. Burr*, Judge.

Affirmed.

Adamson & Thompson and *Rollo F. Hunt*, for appellants.

A deed executed by a wife to her husband, and delivered to him upon the understanding that it was not to be recorded unless the husband survived the wife, was not delivered so as to pass title. Elliott v. Murray, 225 Ill. 107, 80 N. E. 77; Bigley v. Sawyer (Mich.) 8 N. W. 98.

To constitute delivery of a deed it is not sufficient that there be a mere delivery of its possession, but this act must be accompanied with the intent that the deed shall become operative as such. 2 Boone, Real Prop. § 295a; Black v. Sharley, 104 Cal. 281, 37 Pac. 939; Denis v. Velati, 96 Cal. 227, 31 Pac. 1; Harris v. Harris, 59 Cal. 622.

Cuthbert, Smythe, & Wheeler, for respondent.

A delivery of a deed to the grantee upon a condition not expressed therein was held to be an attempt to deliver the deed in escrow; and as such delivery cannot be made to the grantee, it was further held that the title passed absolutely. Wipfler v. Wipfler (Mich.) 16 L.R.A. (N.S.) 943; Thomas v. Singer Sewing Mach. Co. 117 N. W. 156.

If by the terms of the instrument the right of the interest passes at once, subject to a contingency over which the grantor has no control, it is a deed, and irrevocable, even though the enjoyment of the thing is postponed until his death. Pentico v. Hays, 9 L.R.A.(N.S.) 224 and note (Kan.) 88 Pac. 738; Crocker v. Lowenthal, 83 Ill. 579; Munro v. Bowles, 187 Ill. 346, 54 L.R.A. 865 and note; Dickson v. Miller (Minn.) 145 N. W. 112; Wickerlund v. Lindquist (Minn.) 113 N. W. 631 (N. B. In this case the court determined the action on the testimony of the attorney drawing the deed); Haeg v. Haeg (Minn.) 53 N. W. 1114.

Robinson, J. This is an action to determine adverse claims to a quarter section of land in Ramsey county. The plaintiffs and appellants aver that they have an estate and interest in the land, without in any way disclosing the nature of their title. The defendant by answer avers that she is the owner in fee simple of the land under a deed of conveyance made to her on April 25, 1917, by Frederick Becker, the owner of the land. It was stipulated that at the time of the making of the deed Frederick Becker was the owner of the land and a brother of the plaintiffs and the defendant; that he died on October 25, 1918.

The plaintiffs claim title as the heirs of Frederick Becker, and the defendant claims title as his grantee. The case presents no question only on the delivery of the deed. The plaintiffs contend that the delivery was conditional, and not effectual, because the grantee did not record her deed or take possession of the land till after the decease of her brother, the grantor, and because of a secret intent to give back

the title to the grantor in case he should survive the defendant. As the evidence shows beyond any dispute, she did not take possession of the land or record the deed until after the death of the grantor; and it may well be inferred and conceded that she had in her mind a secret purpose to give back the land to her brother in case he should survive her; but that was merely her own thought, and it was in no manner communicated to her brother, and it did not in any manner affect her title to the land. The grantor made the deed in good form, granting the land to the defendant, her heirs, and assigns forever. Excepting the printed form, the deed is written with pen and ink. It is signed by two witnesses and duly acknowledged. As the testimony of attorney Henry G. Middaugh shows, he was long intimately acquainted with the parties. He drew the deed; it was signed and acknowledged and delivered in his presence. Becker turned to his sister, saying, "Here is the deed," or words to that effect, and she took it and kept it,—and such is the testimony of Mrs. Way, and it stands uncontradicted. Hence, there is no reason for spinning out a lengthy discussion.

Judgment affirmed.

CHRISTIANSON, Ch. J. (concurring). I concur in the opinion prepared by Mr. Justice Robinson. The only question presented, either in the trial court or in this court, is whether there was in fact a delivery (within the contemplation of the law) of the deed under which the defendant claims title to the land in controversy.

Our statute provides: "A grant cannot be delivered to the grantee conditionally. Delivery to him or to his agent as such is necessarily absolute; and the instrument takes effect thereupon, discharged of any condition on which the delivery was made." Comp. Laws 1913, § 5497. The undisputed evidence is to the effect that Frederick Becker, after executing and acknowledging the deed, handed it over to the defendant, and that she ever since has retained it in her possession.

The trial judge filed a memorandum decision, wherein he reviewed the evidence, and arrived at the conclusion that the deed was in fact delivered unconditionally. In my opinion the decision of the trial court is clearly in accord with the weight of the evidence, and must be affirmed.

M. M. ECKROM and O. B. Gunderson, Respondents, v. CARL SWENSEID and John Watson, Appellants.

(179 N. W. 920.)

Husband and wife — parties — husband acting as principal cannot assert agency for wife; defect of parties defendant waived by failure to answer or demur.

Defendant Carl Swenseid appeals from a judgment for $304.30 on a verdict against him and his codefendant. The judgment is for services performed for and at the request of the defendant in the threshing of grain at $15 an hour. The answer of the appellant was merely a general denial. Yet, on the trial, his real defense was that in leasing the land on which the grain was grown and in all matters pertaining to the seeding, harvesting, and threshing, he acted as the agent of his wife, to whom he had conveyed the land. However, as he acted as the principal and real party, and did not by answer disclose that his wife had any interest in the matter, he is justly chargeable as principal.

Opinion filed October 29, 1920.

Appeal from a judgment of the District Court of Nelson County, Honorable *A. T. Cole,* Judge.

From a judgment in favor of plaintiffs' defendant appeals.

Affirmed.

Bangs & Robbins, for appellants.

The relationship between Swenseid and Watson was that of landlord and tenant. Mpls. Iron Store Co. v. Branum, 36 N. D. 355, L.R.A. 1917E, 298, 163 N. W. 552; Clark v. Cobb, 121 Cal. 595, 54 Pac. 74; State v. Municipal Ct. 123 Minn. 377, 143 N. W. 978; Van Dyke v. Anderson, 83 N. J. Eq. 568, 91 Atl. 593; Neal v. Brandon, 70 Ark. 79, 66 S. W. 200; Smithwick v. Oliver, 94 Ark. 451, 127 S. W. 706; Brock v. Haley, 88 S. C. 373, 70 S. E. 1011; Jones, Land. & T. § 51.

The relationship was not a partnership. Jones, Land. & T. § 50; Williams v. Rogers, 110 Mich. 418, 68 N. W. 240; State v. Superior Ct. — Wash. —, 184 Pac. 348; Cedarberg v. Guernsey, 12 S. D. 77, 80 N. W. 159; Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087; Texas Produce Exch. v. Sorrell, — Tex. Civ. App. —, 168 S. W. 74; Wagner v. Buttles, 151 Wis. 668, 139 N. W. 425.

A recovery under the statute would be variance between the plead-

ings and proof. 13 C. J. p. 755, ¶ 923, (3); Comp. Laws 1913, §§ 5841 & 7395; Tucker v. Gaines, 86 S. C. 500, 68 S. E. 670; B. & G. R. N. Co. v. Jackson, 170 Ala. 496, 54 So. 512.

There was no privity between the plaintiffs and the defendant, Swenseid. Parlin v. Hall, 2 N. D. 473, 52 N. W. 405; Fry v. Ausman, 20 S. D. 30, 135 N. W. 708; 30 L.R.A.(N.S.) 150.

C. N. Frich and *Engerud, Divet, Holt, & Frame,* for respondents.

It was a joint liability on the part of the landlord and tenant for the whole bill. Comp. Laws §§ 5767, 5919; 1 Parsons, Contr. p. 11; Brady v. Reynolds, 13 Cal. 31; Dumanoise v. Townsend (Mich.) 45 N. W. 179; Quinn v. O'Daniel (Tex.) 23 S. W. 850; Knowlton v. Parsons (Mass.) 84 N. E. 798; Alpaugh v. Wood (N. J.) 23 Atl. 261; Gummer v. Mairs (Cal.) 74 Pac. 26; Moring v. Weber (Cal.) 84 Pac. 220.

ROBINSON, J. In this case the defendant Carl Swenseid appeals from a judgment for $304.30 against him and his codefendant. The complaint avers that in September, 1916, the plaintiffs performed services for and at the request of the defendants by threshing from shocks a crop of grain at $15 an hour, amounting to $352.50, which defendant promised to pay, and did not pay, except $115.10. The answer is a general denial. Only that and nothing more. It does not in any way indicate the nature of the defense made by appellant. Under the pleadings the case was fairly submitted to the jury, and the only question is on the sufficiency of the evidence to sustain the verdict. The appellant avers that there is no evidence that he made any contract under which he became liable to the plaintiff. The evidence shows that in 1916 the appellant made with his codefendant an oral contract or farm lease. The latter agreed with appellant to farm 240 acres of land during the year 1916 on these terms; appellant to furnish the seed, to pay half the twine bill and half the thresh bill, and to receive half the crops. Watson seeded the land, harvested the grain, put it in shocks. Then it became necessary to thresh the grain, in which each defendant had an undivided half interest. After the grain was harvested and put in shocks, each party owned the same as tenants in common, and neither party could recover his share without first threshing the grain. The threshing was done for the joint and several benefit of the defendants; their

liability was joint and several. Each one or both had a right to contract for the threshing. Each one talked with the plaintiffs concerning the threshing. Each knew when it was to be done. Each received from the machine his share of the wheat. The threshing was not done in secret, without the consent and knowledge of each cotenant. There was no dispute concerning the price to be paid for the threshing, only that the plaintiffs claim that the agreed price was $15 an hour and the defendants claim $165 a day. The difference is of no account. The question of price was one for the jury, and it is settled by the verdict.

However, on the trial appellant sought to evade any liability by proving that a short time prior to the oral contract with Watson he had deeded the land to his wife, and that in contracting he acted as her agent. Yet it does appear that, in contracting and in all matters pertaining to the crop and the grain, appellant acted in his own name and as principal, without disclosing to anyone that his wife had any interest in the matter.

By statute a party may demur to a complaint when it appears on the face thereof that there is a defect of parties plaintiff or defendant, and when the defect does not appear on the face of the complaint, the objection may be taken by answer. If not taken by answer or demurrer, the defect is waived. Comp. Laws, §§ 7442–7447. The purpose of a pleading is to indicate fairly the nature of the claim or defense, so that, if necessary, the adverse party may amend his pleading so that he may know the real issues, and may not be taken by any surprise at the trial.

In September, 1916, the threshing was done. The plaintiffs threshed as follows: On September 1, eight hours and twenty minutes; on September 2, nine hours and ten minutes; on September 4, six hours and thirty minutes.

Both the defendants were present when the work was done; both received the benefits and both should pay for it. He who takes the benefits must bear the burdens. There has been a fair trial, and the verdict is well sustained.

Affirmed.

GRACE and BIRDZELL, JJ., concur.

BRONSON, J. (specially concurring). I concur in the affirmance of

the judgment. The complaint alleges an express contract made by the defendants for threshing the crops involved. The answer interposed a general denial. The evidence adduced discloses that an arrangement was made for threshing the crops involved by both the defendants. As the wife of one of the defendants testified, the trouble arose because the plaintiffs charged threshing by the hour, whereas they took the threshing by the day. Upon this record the trial court properly charged that the jury should determine what this contract was; the amount of work actually done under it, and the amount due the plaintiffs thereunder. The verdict returned by the jury is amply sustained by the evidence. Upon this record the questions raised upon this appeal, of the liability of the landlord for the tenant's threshing bill, or of the liability of the husband for the tenant's threshing bill, when the property stands in his wife's name, do not require determination. The pleadings aver and the proof shows an express contract made by the defendants.

CHRISTIANSON, Ch. J., concurs.

STATE OF NORTH DAKOTA, Respondent, v. E. R. DAVIDSON, Appellant.

(180 N. W. 31.)

Banks and banking — criminal law — proof under allegations of false entries in books of bank held not a variance; officer imitating false entry in book of original entry is criminally liable; proof that falsity of item was affected by other transactions is unnecessary; gain to bank officer or loss to bank is immaterial; conclusion which jury can draw from evidence properly excluded.

In a criminal prosecution, under chapter 57, Sess. Laws 1915, for making false entries in the books of a banking association, where the information charged the defendant, the cashier of the bank, with making certain false entries in the "Daily Balance and General Ledger" of the bank, and where the evidence showed that the defendant managed the bank and was responsible for the condition of its books; and that he personally made false entries in the certificate of deposit book, a book of original entry, from which the bookkeeper in regular course carried them into the Daily Balance and General Ledger, it is *held:*

1. There is no variance between the allegations of the information and the proof.

2. A managing officer of a bank, responsible for the condition of the books and who has knowledge of the manner in which they are kept, may be charged with criminal responsibility for a false entry in the ledger made by the bookkeeper, where he, the managing officer, initiated the false entry in a book of original entry.

3. Where the information charges the defendant with falsifying specific certificate of deposit entries, resulting in the showing of a false total of certificates of deposit outstanding, it is not incumbent upon the state to prove that the falsity of the total was unaffected by other transactions.

4. In a prosecution under chapter 57, Sess. Laws 1915, for making false entries in the books of a banking association, gain to the defendant or prejudice to the banking association is not an ingredient of the offense.

5. Evidence may properly be excluded if, in the state of the record at the time it is offered, it is in its nature cumulative and calls for a conclusion of the witness which the jury can readily draw from the testimony preceding.

6. Where the defendant had corrected the false entries, and where he testified that their falsity was originally due to accident and mistake, and the corrections were made for the sole purpose of rectifying the books and making them correct, no error was committed by the trial court in sustaining objections to questions inquiring as to whether the defendant had realized any gain to himself, or whether the bank had sacrificed anything of value.

Opinion filed November 5, 1920.

Appeal from District Court of Eddy County, *Nuessle,* J.

Affirmed.

N. J. Bothne, P. M. Mattson, and *Edward P. Kelly,* for appellant.

William Langer, Attorney General, and *Albert E. Sheets,* and *James A. Manly,* State's Attorney, for respondent.

Proof of the command or procurement may be direct or indirect, positive or circumstantial, but it is a matter for the jury, and not of legal competency. Terrell, Crimes by Nat'l. Bank Officers & Agents, pp. 41, 42; Billingsley v. United States, 101 C. C. A. 474, 178 Fed. 653; United States v. Fish, 24 Fed. 593.

Where an officer of a bank knows that there is an irregularity in the mode in which the business is being carried on, and blindly verifies a statement without investigating the truth of the same, he may be convicted of making a false entry contained therein although he does not

know of its falsity. United States v. Graves, 53 Fed. 634 reversed on other grounds in 165 U. S. 323, 41 L. ed. 732, 17 Sup. Ct. Rep. 393.

BIRDZELL, J. This is an appeal from a judgment convicting the defendant of the crime of making false statements or entries in the books of a banking corporation. The appellant relies for a reversal upon two main propositions, and it will be unnecessary to do more than state the facts bearing upon these questions. It is first contended that there is a variance between the allegations of the information and the proof, and the second proposition is based upon the exclusion of certain evidence.

The information contains three counts. It alleges the commission of the offense as follows:

"On the 23d of August, in the year of our Lord one thousand nine hundred and seventeen, at the county of Eddy, in the state of North Dakota, one E. R. Davidson, late of the county of Eddy and state aforesaid, did commit the crime of subscribing and making a false statement and entry in the books of a banking association, committed in the manner following, to wit:

"Count 1: That at the said time and place the said defendant was an officer, to wit, the cashier of the Farmers & Merchants Bank, a banking association, organized and doing business under and by virtue of the banking laws of the state of North Dakota; that at said time and place the said defendant, being an officer of the said bank aforesaid, did wilfully, unlawfully, knowingly, and feloniously in the books of the said Farmers & Merchants Bank subscribe and make a false statement and entry to wit, a certain statement and entry contained in the books of the said Farmers & Merchants Bank, kept in the regular course of business by said bank, said entry being contained in a certain record book of said bank, commonly known as the 'Daily Statement and General Ledger,' of the date of August 23, 1917, which said entry purported to contain upon its face a statement of the total amount of certificate of deposit checks outstanding at the close of business on August 23, 1917, said statement and entry being contained under the head of certificates of deposit checks outstanding, showed the total sum thereof to be $342,090.46; whereas, in truth and in fact the said sum of $342,090.46 was not the total amount of certificate of deposit checks

outstanding as a liability of said bank on said date, but excluded from the said sum of $342,090.46 was the sum of $11,995, which said sum consisted of certificate of deposit No. 5465 drawn against the assets of the Farmers & Merchants Bank on the 23d day of August, 1917, in the sum of $7,340.30, payable to James E. Renferew, which said certificate of deposit was falsely entered by the defendant upon the records of the said bank and included in the said statement and entry of $342,090.46, as $340.30; whereas, in truth and in fact the said certificate of deposit No. 5465 was issued to James E. Renferew by the defendant in the actual amount of $7,340.30; and certificate of deposit No. 5425, drawn against the Farmers & Merchants Bank by the defendant on the 1st of August, 1917, payable to W. A. Gordon, which said certificate of deposit was falsely entered by the defendant upon the records of the said bank and included in the said statement and entry of $342,090.46 as $5; whereas, in truth and in fact the said certificate of deposit No. 5425 was issued to W. A. Gordon, drawn upon the Farmers & Merchants Bank by the defendant, in the actual sum of $5,000, which said certificate of deposit No. 5465 and 5425, respectively, contained a total of at least $11,995 not shown in, or contained by, and excluded from the statement and entry of $342,090.46 of said bank, purporting to be the total certificate of deposit checks outstanding for August, 23, 1917; that the said statement and entry in the amount of $342,090.46 was by the defendant falsely made to appear as the total amount of certificate of deposit checks of said bank outstanding on said date; that the said sum of $342,090.46 was not on the 23d day of August, 1917, the total amount of certificates of deposit checks outstanding as a liability of the Farmers & Merchants Bank, but that said sum of $342,090.46 was, on the 23d day of August, 1917, at least $11,995 more than the statement and entry of $342,090.46, contained in the general ledger, purporting to be the total amount of outstanding certificate of deposit checks for said date."

Counts 2 and 3 contain similar allegations with respect to the certificate of deposit transactions of Renferew and Gordon, treating them separately; that is, count 2 alleges as an independent offense the entries described in count 1 with respect to the Renferew transaction, and count 3 contains similar allegations with respect to the Gordon transaction. The defendant did not demur to the information. Hence, no

question can now be raised as to its charging more than one offense. Comp. Laws 1913, §§ 10,737 and 10,745. Counsel for the appellant concedes that the information is good, and upon this appeal relies only upon certain assignments of error appearing below.

The appellant argues that, inasmuch as the defendant is charged with making a false statement and entry in the books of the Farmers & Merchants Bank, and the entry is described as being contained in a certain record book commonly known as the "Daily Balance and General Ledger," which entry purported to contain a statement of the total amount of certificates of deposit outstanding at the close of business on August 23, 1917, and being entered under the head of "Certificates of Deposit Checks Outstanding," showing the total sum to be $342,090.-46, he cannot be convicted in the absence of proof showing that the defendant made such false entries. The evidence shows that the defendant did not personally make the entries described in the Daily Balance and General Ledger, but it further shows that he made entries in the book of original entry, from which, in due course of business, the entries in the Daily Balance and General Ledger of the bank were made. To illustrate: The evidence shows that on August 1, 1917, the defendant issued certificate of deposit No. 5425 to W. A. Gordon for $5,000; that he entered upon the certificate of deposit book the record of this certificate, stating the amount to be $5; and on the 23d day of August, 1917, he issued certificate No. 5465 to James Renferew for the sum of $7,340.30, entering it in the certificate of deposit book as $340.30. From the entry in the certificate of deposit book the items were carried into the daily cash balance book and from there posted in the Daily Balance and General Ledger, where the items enter into the total of certificates of deposit as they had been issued from time to time. The evidence shows that the defendant personally made the entries in the certificate of deposit book, and that the entries in the other books were made by the bookkeeper. It is said that this is a variance.

The statute under which the defendant was prosecuted reads as follows. Sess. Laws 1915, chap. 57:

"Every officer, agent or clerk of any association organized under this chapter, who wilfully and knowingly subscribes or makes any false statements or entries in the books of such association, or knowingly subscribes or exhibits any false paper with intent to deceive any person

authorized to examine as to the conditions of such association, or wilfully subscribes or makes false reports, shall be punished by imprisonment in the state penitentiary not less than one nor exceeding ten years," etc.

The appellant admits that if the information had charged him with having made a false entry in the original certificate of deposit book, the proof would support the allegation and there would be no variance. But he contends that the allegations of the information cannot be supported by evidence showing false entries in books of original entry which ultimately find their way into the "Daily Balance and General Ledger." In our opinion the offense described in the statute is committed whenever a person wilfully and knowingly makes a false entry in any of the books of a banking association; and, within the purview of the statute, one making an original false entry "makes a false entry" in every book which is made up in regular course from the entry or entries in the book of original entry. The pleader can charge the offense to have been committed with respect to any book in which the false entry is carried, but he must, of course, be prepared to prove that the defendant either personally made the entry, specifically directed it to be made, or knowingly directed it through his general control of the manner in which the books were kept. It is admitted in this case that throughout the entire period covered by the transactions in question, and in fact for a long time prior thereto, the defendant was the cashier of the bank, and, as such, in charge of the books in a supervisory capacity; that he was responsible for the general management of the bank and the condition of its books. It is well established that where one sustaining this relation to a bank makes the initial false entry, he is criminally responsible for the acts of other employees in carrying the entry forward into the other books of the bank. Terrell, Crimes by Nat. Bank Officers & Agents, pp. 41, 42; Morse v. United States, 98 C. C. A. 321, 174 Fed. 539, 20 Ann. Cas. 938, and note at page 947; Billingsley v. United States, 101 C. C. A. 465, 178 Fed. 662. Under the principles established by these authorities it is clear that there was no variance in the case at bar.

The further contention is advanced that the state, having alleged the false entry in the daily statement and general ledger as of specific dates affecting the total sum of the certificates of deposit outstanding on

these dates, assumed the burden of establishing that the falsity of the total sum so carried forward was not affected by any prior entry, and that in order to sustain this burden it should have been required to establish the correctness of the total save as it is affected by the false entries charged. It is said that otherwise the defendant might be convicted on account of false entries made so far back that the Statute of Limitations had run against the offense. There is no merit in this contention. The information and the proof so connect the false total with the specific false entries as to leave no doubt of the manner in which the total was affected by the false certificate of deposit entries. It was not incumbent upon the state to establish that there had not at some prior time been counterbalancing false entries. The defendant is not charged alone with carrying forward a false total. He is charged with carrying a false total in connection with certain specific false entries.

The next proposition advanced is that the court erred in sustaining objections to the following questions:

Q. Mr. Davidson, referring back to the two exhibits, state's exhibits 1 and 23, upon which a mistaken entry appears to have been made in each case by you, I will ask you if, in either of these transactions, you realized or acquired any profit or interest to yourself?

Q. By either of the transactions or both of them, do you know of any loss or anything which the bank with whom you were employed, the Farmers & Merchants Bank, sacrificed any property or anything of value by reason of these mistaken entries?

Neither gain to the defendant nor loss or prejudice to the bank or to the public is made an ingredient of the offense defined in the statute. It is made an offense to wilfully and knowingly make a false entry. So the answer of the defendant to the above questions would not have disproved any ingredient of the crime. But it is urged that he should have been thus permitted to testify to the absence of motive. While we are mindful that the law has established a broad range of inquiry for the purpose of establishing motive in criminal cases, we are satisfied, upon the record before us, that no prejudicial error was committed in sustaining objections to the above questions. The record discloses that the defendant went upon the witness stand and testified in great detail concerning the manner in which the false entries were made. He stated that they were false from pure accident and mistake. He was permitted

to go into every circumstance connected with the immediate issuance of the certificates and the making of the entries that might reasonably be supposed to have a bearing upon the question as to whether it was done by mistake and accident in the manner testified to by him. In his testimony he not only accounted for the way in which the entries happened to be falsely made, but he also told the manner in which he corrected the entries later on. He also stated that his purpose in making the subsequent entries was to balance and rectify the books, and that this was his purpose in making the corrections. His testimony in fact is so replete with the statement that he never intended to make a false entry, that any false entries were made by mistake, and that he later on rectified the mistakes so as to make the books correct, that direct testimony which would only negative private gain to himself and prejudice to the bank would be purely cumulative. It would also be in the nature of a mere conclusion from the facts as testified to by him. If the jury believed the defendant's version, they must have believed that he never made any profit through these mistakes, and that the bank never suffered.

On the whole record we are satisfied that the defendant had a fair trial and that the issues were properly submitted to the jury. Finding no error, the judgment is affirmed.

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

GRACE, J. (dissenting). This appeal is from a judgment convicting the defendant of the alleged crime of making false statements or entries of the books of a banking corporation. As we view the case, there is in law no proper or legal information, and hence there could be no judgment, nor did the court have authority or power to pass sentence, and this is our opinion, for two reasons: First, the information does not, in law, charge any offense; second, it attempts to charge three seperate and distinct crimes.

In order to understand fully the fatal defects of the information, it should be set forth in full. Excluding title, it is as follows:

"To the District Court in and for Said County.

"James A. Manly, State's attorney in and for the said county of Eddy and state of North Dakota, in the name and by the authority of

the state of North Dakota, informs this court that heretofore, to wit, on the 23d day of August, in the year of our Lord one thousand nine hundred and seventeen, at the county of Eddy in the state of North Dakota, one E. R. Davidson, late of the county of Eddy and state aforesaid, did commit the crime of subscribing and making a false statement and entry in the books of a banking association, committed in the manner following, to wit:

"Count 1: That at the said time and place the said defendant was an officer, to wit, the cashier of the Farmers & Merchants Bank, a banking association organized and doing business under and by virtue of the banking laws of the state of North Dakota; that at the said time and place the said defendant, being an officer of the said bank aforesaid, did wilfully, unlawfully, knowingly, and feloniously, in the books of the said Farmers and Merchants Bank, subscribe and make a false statement and entry, to wit, a certain statement and entry contained in the books of the said Farmers & Merchants Bank, kept in the regular course of business by said bank, said entry being contained in a certain record books of said bank, commonly known as the 'Daily Statement and General Ledger,' of the date of August 23, 1917, which said entry purported to contain upon its face a statement of the total amount of certificate of deposit checks outstanding at the close of business on August 23, 1917, said statement and entry being contained under the head of Certificate of Deposit Checks Outstanding, showed the total sum thereof to be $342,090.46; whereas, in truth and in fact the said sum of $342,090.46 was not the total amount of certificate of deposit checks outstanding as a liability of said bank on said date, but excluded from the said sum of $342,090.46 was the sum of $11,995, which said sum consisted of certificate of deposit No. 5465, drawn against the assets of the Farmers & Merchants Bank on the 23d of August, 1917, in the sum of $7,340.30, payable to James E. Renferew, which said certificate of deposit was falsely entered by the defendant upon the records of the said bank and included in the said statement and entry of $342,090.46, as $340.30; whereas, in truth and in fact the said certificate of deposit No. 5465 was issued to James E. Renferew by the defendant in the actual amount of $7,340.30; and certificate of deposit No. 5425, drawn against the Farmers & Merchants Bank by the defendant on the 1st of August, 1917, payable to W. A. Gordon, which said

certificate of deposit was falsely entered by the defendant upon the records of the said bank and included in the said statement and entry of $342,090.46 as $5; whereas, in truth and in fact the said certificate of deposit No. 5425 was issued to W. A. Gordon, drawn upon the Farmers and Merchants Bank by the defendant, in the actual sum of $5,000, which said certificates of deposit, No. 5465 and No. 5425, respectively, contained a total of at least $11,995 not shown in, or contained by, and excluded from, the statement and entry of $342,090.46 of said bank, purporting to be the total certificate of deposit checks outstanding for August 23, 1917; that the said statement and entry in the amount of $342,090.46 was, by the defendant, falsely made to appear as the total amount of certificate of deposit checks of said bank outstanding on said date; that the said sum of $342,090.46 was not on the 23d of August, 1917, and has not been since the 1st of August, 1917, the total amount of certificate of deposit checks outstanding as a liability of the Farmers & Merchants Bank, but that said sum of $342,090.46 was on the 23d of August, 1917, at least $11,995 more than the statement and entry of $342,090.46 contained in the General Ledger, purporting to be the total amount of outstanding certificate of deposit checks for said date.

"Count 2: That at the said time and place the said defendant was an officer, to wit, the cashier of the Farmers & Merchants Bank, a banking association organized and doing business under and by virtue of the banking laws of the state of North Dakota; that at the said time and place the said defendant, being an officer of the said bank aforesaid, did wilfully, unlawfully, knowingly, and feloniously, in the books of the said Farmers & Merchants Bank, subscribe and make a false statement and entry, to wit, a certain statement and entry contained in the books of the said Farmers and Merchants Bank, kept in the regular course of business of said bank, said entry being contained in a certain record book of said bank commonly known as the 'Daily Statement and General Ledger,' of the date of August 23, 1917, which said entry purported to contain upon its face a statement of the total amount of certificate of deposit checks outstanding at the close of business on August 23, 1917, which statement and entry being contained under the head of 'Certificate of Deposit Checks Outstanding,' showed the total sum thereof to be $342,090.46; whereas, in truth and in fact, the said sum of $342,090.46

was not the total amount of certificate of deposit checks outstanding as a liability of said bank on the said date, but excluded from the said sum of $342,090.46 was the sum of $7,000, which said sum consisted of and was included in certificate of deposit No. 5465, drawn against the Farmers & Merchants Bank by the defendant on the 23d of August, 1917, payable to James E. Renferew, which said certificate of deposit was falsely entered by the defendant upon the records of said bank, and included in the said statement and entry of $342,090.46 as $340.30; whereas, in truth and in fact, certificate of deposit No. 5465, drawn upon the Farmers & Merchants Bank, was issued to James E. Renferew by the defendant in the actual amount of $7,340.30, which said certificate of deposit No. 5465 contained the sum of $7,000 not shown in, or contained by, and excluded from, the sum of $342,090.46, purporting to be the statement and entry showing the total amount of certificate of deposit checks outstanding for August 23, 1917; that the said statement and entry in the amount of $342,090.46 was, by the defendant, falsely made to appear as the total amount of certificate of deposit checks of said bank outstanding on said date; that the said sum of $342,090.46 was not on the 23d of August, 1917, the total amount of certificate of deposit checks outstanding as a liability of the Farmers & Merchants Bank, but that said sum of $342,090.46 was on the 23d of August, 1917, at least $7,000 more than the statement and entry of $342,090.46, contained in the General Ledger, purporting to be the total amount of outstanding certificate of deposit checks for said date.

"Count 3: That at the said time and place the said defendant was an officer, to wit, the cashier of the Farmers & Merchants Bank, a banking association organized and doing business under and by virtue of the banking laws of the state of North Dakota; that at the said time and place the said defendant, being an officer of the said bank aforesaid, did wilfully, unlawfully, knowingly, and feloniously, in the books of the said Farmers & Merchants Bank, subscribe and make a false statement and entry, to wit, a certain statement and entry contained in the books of the said Farmers & Merchants Bank, kept in the regular course of business by said bank, said entry being contained in a certain record book of said bank, commonly known as the 'Daily Statement and General Ledger,' of the date of August 23, 1917, which said entry purported to contain upon its face a statement of the total amount of

certificate of deposit checks outstanding at the close of business on August 23, 1917, said statement and entry being contained under the head of 'Certificate of Deposit Checks Outstanding,' showed the total sum thereof to be $342,090.46; whereas, in truth and in fact, the said sum of $342,090.46 was not the total amount of certificate of deposit checks outstanding, as a liability of said bank on said date, but excluded from the said sum of $342,090.46 was the sum of $4,995, which said sum consisted of certificate of deposit No. 5425, drawn against the assets of the Farmers & Merchants Bank on the 1st of August, 1917, in the sum of $5,000, payable to W. A. Gordon, which said certificate of deposit was falsely entered by the defendant upon the records of the said bank and included in the said statement and entry of $342,090.46 as $5; whereas, in truth and in fact, the said certificate of deposit No. 5425 was drawn upon the Farmers & Merchants Bank and issued to W. A. Gordon by the defendant in the actual sum of $5,000, which said certificate of deposit No. 5425 contained $4,995 not shown in, or contained by, and excluded from, the statement and entry of $342,090.46, purporting to be the total amount of certificate of deposit checks outstanding for August 23, 1917; that the said statement and entry in the amount of $342,090.46 was by the defendant falsely made to appear as the total amount of certificate of deposit checks of said bank outstanding on said date; that the said sum of $342,090.46 was not on the 23d of August, 1917, and has not been since the 1st of August, 1917, the total amount of certificate of deposit checks outstanding as a liability of the Farmers & Merchants Bank, but that said sum of $342,090.46 was on the 23d of August, 1917, at least $4,995 more than the statement and entry of $342,090.46 contained in the Daily Statement and General Ledger, purporting to be the total amount of outstanding certificate of deposit checks for said date.

"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.

"Dated this 11th day of February, 1920.

"James A. Manly,

"State's Attorney in and for Eddy County, North Dakota."

Section 10,688, Comp. Laws 1913, provides that "the information or the indictment must charge but one offense, but the same offense may be set forth in different forms or degrees, under different counts; and

when the offense may be committed by the use of different means, the means may be alleged in the alternative in the same count."

The merest inspection of the foregoing information will disclose that it charges three separate and distinct offenses, and, for this reason, the information is wholly bad and will not support a judgment. State v. Smith, 2 N. D. 515, 52 N. W. 320.

The mode of pleading adopted in charging the commission of the various crimes set forth in the information is similar to that which obtains in the Federal court, where such proceeding is in use, authorized by the Federal statute. Such mode of pleading, however, can have no application in our state court, for the information here must be in accordance with the provisions of § 10,688, supra, and must charge but one offense. It cannot be disputed but that the information under consideration charges three distinct crimes. It is impossible, in such condition, for defendant to know, from the verdict of the jury, of which of the three he was convicted. It is certain, however, that he was charged with, and tried for, the commission of three separate and distinct offenses.

The information is wholly bad, for the reason that it charges no crime. It was evidently intended, by it, to charge an offense under chapter 57, Session Laws of 1915, which provides: "Every officer, agent, or clerk, of any association, organized under this chapter, who wilfully and knowingly subscribes or makes any false statements or entries in the books of such association, or knowingly subscribes or exhibits any false papers with intent to deceive any person authorized to examine as to the condition of such association, or wilfully subscribes or makes false reports, shall be punished by imprisonment in the state penitentiary, not less than one nor exceeding ten years, or in the county jail not exceeding one year, or by a fine not exceeding $10,000, or by both such fine and imprisonment."

It is not alleged in the information, in charging either of the three separate offenses, that any false entries were made in the books of the corporation there mentioned, with intent to deceive any person authorized to examine as to the condition of such association. It is clear that, if such an entry were made, but with no intent to deceive anyone, it would be no crime. If it were otherwise, one making a false entry, though innocently, might be just as liable to prosecution and punish-

ment as one who intentionally makes the false entry. This must be true, if the statute means anything.

We have another view in reference to chapter 57. That chapter is an amendment of § 5174, Comp. Laws 1913. The latter act was quite similar to chapter 57, only that it provided that false entry or entries in the books of such association, by an officer or agent, etc., with the intent to deceive any person authorized to examine as to the condition of such association, etc., was guilty of forgery, as defined in the Penal Code. That section did not say forgery in what degree, and there are four different degrees set forth in the Penal Code. This being true, the penalty for the offense was uncertain, and it was for this reason that chapter 57 was enacted; that is, in order to make the penalty specific. But what is the nature of the crime charged by chapter 57? It is of the same nature as that charged by § 5174, before its amendment, or it is of the same nature as that now contained in § 9899, Comp. Laws 1913, which deals with false entry in public books, which, if made under the circumstances set forth in the statute, constitutes forgery.

We are firmly of the opinion that the crime charged by chapter 57 is forgery. It does not matter that the name of the crime is not mentioned; the elements of the crime are those of forgery.

A false entry in a book of the association, or a false entry in a public book, in the manner prescribed by statute, is a forgery, and we think must be done with the intent to defraud; and if that fraud is not pleaded or proven, there is no offense; in other words, there is no forgery.

The statute above says, "With the intent to deceive;" that is, perhaps, almost as broad as would be the expression, "with intent to defraud." If a statute were enacted which set forth the acts which constitute larceny, but did not say that such acts did constitute larceny, but fixed a definite penalty for the offense, the crime would be that of larceny, whether it was denominated that or not; and we think the same reasoning applies to the above statute.

The act of making a false entry upon the books mentioned in the manner prescribed by statute, though the statute does not denominate it forgery, it is forgery, nevertheless, when fully accomplished, and in that case there must be an intent to commit fraud or an intent to deceive. Such an allegation is wholly absent from this information,

and hence it is absolutely fatally defective, and will not support a judgment of conviction.

ROBINSON, J., concurs.

ROBINSON, J. (dissenting). I dissent on the ground that the proof wholly fails to sustain the information. In each count of the information the charge against the defendant is the making of a false entry in a book of the bank known as the "Daily Statement and Ledger," of date August 23, 1917. The statement relates to certificates of deposit outstanding at the close of the business day on August 23, 1917, showing the sum total of deposits $342,090.46. Now it is conceded that the defendant never did make any such entry, but the information avers, and we may allow the proof to show, that he did make two false entries, the first on August 1, 1917, and the second on August 23, 1917, and that by reason of such false entries there was a deficit in the sum total as computed by the clerks and by them entered in the Daily Statement and General Ledger. Now if the defendant did knowingly make two original false entries, he was guilty of two crimes which began and ended with the making of the entries. The bank clerks could not make him guilty of a daily crime or multiply his crimes by making daily errors in the Statement and General Ledger; nor could the clerks by their entry in the ledger consolidate two or more crimes into one crime. For each false entry the defendant was subject to a separate prosecution, and he had a right to a separate trial. Neither the state nor the bank clerks had any right or power to consolidate, change, or vary the original offenses.

It is true that what a person does by another he does by himself, and that a false entry when made by the direction of an officer of a bank is an entry by the officer just as much as if it were made with his own pen. Such are the holdings of the cases cited in the majority opinion. But in this case there can be no just claim that the alleged false entries in the ledger were made by the direction of the defendant or with intent to deceive or injure any person, or that such entries did cause injury to any person. Hence, the judgment should be reversed.

CHARLES M. PUGH et al., as Board of County Commissioners of Dunn County, et al., Respondents, v. C. J. HEMPFTLING, as County Auditor of said County, Appellant.

(179 N. W. 706.)

Counties — mandamus — in proceedings to remove county seat it is for commissioners, and not court, to pass on petition; mandamus not issued to compel county commissioners to reverse their decision against sufficiency of petition for removal of county seat.

In proceedings for the removal of a county seat, it is for the county commissioners, and not the court, to pass on the sufficiency of the petition for removal. When the county commissioners decide against the sufficiency of a petition, the court may not, by mandamus or otherwise, compel them to undo or reverse their decision. It may not appoint a special commission to act in place of the county commissioners.

Opinion filed November 5, 1920.

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

Affirmed.

T. H. H. Thoreson and *C. F. Kelsch,* for appellant.

W. F. Burnett, C. H. Starke, and *T. F. Murtha,* for respondents.

ROBINSON, J. This is an appeal by the county auditor of Dunn county from an order made by the court on October 13, 1920, restraining him from publishing and posting notices of election upon the question of the removal of the county seat from the city of Manning to Dunn Center, and from printing and distributing the necessary ballots for submitting the question to the voters.

On June 30, 1920, there was a void election held for the removal of the county seat. Appellant seems to consider that it was a valid election, and he avers that the court erred by not holding that the submission of the question of the removal of the county seat at the primary election was simply a contest to eliminate all but two contending towns, and that as the towns of Manning and Dunn Center received the highest number of votes, those two towns should be placed on the ballot at the next general election, pursuant to chap. 102, Laws 1917.

But on appeal by the county commissioners of Dunn county, the court has just held that at the primary election there was no valid submission of the county-seat question, because it was not submitted in accordance with an order or resolution of the county commissioners, and because the commissioners had decided against the removal petitions. And as the primary election was null and void, it serves no purpose in legal effect. It is a mere nullity, all of which more fully appears by our decision of this day in case of Bailey v. Pugh, 45 N. D. 130, 179 N. W. 705.

Affirmed, without costs, and case remanded forthwith.

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

BRONSON, J. I concur in the result.

GEO. P. HOMNES, Respondent, v. R. H. LYNCH, as County Auditor of the County of Divide and State of North Dakota, Appellant.

(179 N. W. 719.)

Mandamus — to compel county auditor to place petitioner's name on general ballot as a candidate held proper.

The trial court awarded a writ of mandamus directing the defendant to print petitioner's name upon the general election ballot as a candidate for the office of state's attorney of Divide county in this state. On appeal to this court, the judgment is affirmed for reasons stated in the opinion.

Opinion filed November 5, 1920.

Appeal from the District Court of Divide County, *Leighton*, J.

Defendant appeals from a judgment in mandamus.

Affirmed.

John E. Greene and *D. C. Greenleaf*, for appellant.

No appearance for respondent.

PER CURIAM. This is an appeal from a judgment in mandamus. The petitioner was one of the two persons receiving the highest number of votes at the last primary election for the office of state's attorney of Divide county. He failed to file the itemized statement of his campaign expenses within the time prescribed by § 929, Compiled Laws. He did, however, file such statement on October 15th. At the time the statement was filed, the defendant, auditor, stated that he would not print petitioner's name upon the ballot to be voted at the coming general election. The petitioner thereupon applied to the district court for a writ of mandamus to compel the defendant to print petitioner's name upon the ballot. The court ordered the writ to issue. The defendant has appealed from that decision.

We have before us nothing but the pleadings and the papers in the judgment roll proper. Some of the averments of the return to the writ were denied by an answer thereto by the petitioner. So far as the record shows there may have been oral evidence adduced and the averments of the return, disproved. Every presumption is in favor of the judgment appealed from.

The statute (Comp. Laws, § 940) provides: "The name of a candidate chosen at a primary nominating election or otherwise shall not be printed on the official ballot for the ensuing election unless there has been filed by or on behalf of said candidate the statements of accounts and the expenses relating to nominations required by this article; *but delay in making such statement beyond the time prescribed shall not preclude its acceptance or prevent the insertion of the name on the ballot, if there is a reasonable time therefor after the receipt of such statements.*"

We have no means of knowing what proof was submitted to the trial court. That court was required to exercise its discretion and judgment, and say whether, under all the circumstances, there was a reasonable time in which the name of the petitioner might have been inserted on the ballot, so as to make it the duty of the defendant, auditor, to do so. Upon the record before us, we cannot say that the trial court was incorrect in deciding as it did.

Judgment affirmed. No costs will be allowed to either party.

A. C. BROWN, Respondent, v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Appellant.

(180 N. W. 792.)

Appeal and error — evidence that other trains did not signal at crossing held prejudicial in action for killing stock.

This is an appeal from a judgment against the Director General of Railroads and the railway company for $500 and interest, as the value of four horses that were turned out on the prairies in January and February, 1918, and killed on a crossing by one of the defendant's trains. It is *held:*

(1) The admission of evidence to establish that other trains not shown to have been equipped as the train in question did not ring the bell or sound the whistle, upon approaching the crossing, was prejudicial error, requiring a reversal of the judgment.

Opinion filed November 13, 1920.

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

Reversed and new trial granted as to Director General.

Wolfe & Schneller (*John L. Erdall,* of counsel), for appellant.

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 the evidence.

Whether such presumption has been fully met and overcome by the defendant's evidence is, in the first instance, a question of law. Hodgins v. R. Co. 3 N. D. 382; Smith v. R. Co. 3 N. D. 17; Duncan v. R. Co. 17 N. D. 610.

W. S. Lauder, for respondent.

The question of contributory negligence, whether it be of a defendant or the alleged contributory negligence of the plaintiff, is primarily and generally a question of fact for the jury. The question becomes one of law, authorizing the withdrawal therefrom from the jury, only when but one conclusion can be drawn from the undisputed facts. Jackson v. Grand Forks, 24 N. D. 601; Clemens v. Royal Neighbors, 14 N. D.

116; Houghton Imp. Co. v. Vavrowski (N. D.) 125 N. W. 1024; Edwards v. Chicago & R. Co. 21 S. D. 504; Hall v. N. P. R. Co. 16 N. D. 60; Walkin v. Horswill (S. D.) 123 N. W. 668.

"Where the evidence is such that different conclusions might fairly be drawn the verdict of the jury is conclusive." Berry v. Chicago & R. Co. (S. D.) 124 N. W. 859; Bryant & Co. v. Arnold, 19 S. D. 106; Unzelmann v. Shelton, 19 S. D. 389; Comeau v. Hurley (S. D.) 123 N. W. 715.

ROBINSON, J. This is an appeal from a judgment against the Director General of Railroads and the railroad company for $500 and interest, as the value of four poor, senseless horses that were turned out on the prairies in the zero months of January and February, 1918, to live or die, survive or perish. It was on a zero night in February, at a time when all good and valuable horses should have been at home and in bed, that the poor, senseless animals were killed. And, under the circumstances, who will blame the animals or reflect on their intelligence if they deliberately committed suicide by running across the railway in front of a train running at 50 miles an hour? All their troubles and starvation was ended in a moment.

The judgment is against the railway company and the Director General, and the appeal is only by the company, and yet before trial it was stipulated that the Director General should be substituted as defendant in lieu of the company. The verdict is for the plaintiff, but does not specify that it is against either defendant. For that reason alone, it seems the judgment should be reversed.

The complaint is based on negligence. It is for the negligent killing of the horses, and the statute makes the killing prima facie evidence of negligence. In the absence of any proof, except the killing, the law presumes negligence, but when the facts and circumstances are proven, then the presumption no longer prevails. Then the case must be decided on the evidence, and the burden of proof is on the plaintiff. At the time of the killing the train consisted of seven coaches. It was running northwest from Wyndmere on schedule time at about 50 miles an hour. It was a first-class train, and it was well equipped with all modern appliances and safeguards, and with a bell which was rung automatically and continuously when the train was in motion. By statute it is

provided that a bell, at least 30 pounds in weight, or a steam whistle, shall be placed on every locomotive engine, and shall be rung or the whistle blown continuously for eighty rods prior to any road crossing, under a penalty of $50 and all damages for any negligence. Comp. Laws, § 4642. The negligence imputed to the defendant is a failure to ring the bell continuously for 80 rods prior to the road crossing and a failure to keep a continuous watch for animals on the track. On these points the evidence seems to preponderate in favor of the defendant. The engineer swears that he had a good headlight and was careful to keep a lookout for animals on the track. Of course he could not be expected to keep his mind and his eyes at all times fixed on the track, as the monotony might drive him to insanity or insensibility. He testifies that on the train there was an automatic contrivance to keep the bell ringing while the train was in motion and that he did not turn it on and off,—and that part of the testimony is highly credible, as it was much easier to keep a continuous ringing than to turn it on and off every moment. To show that the ringing was not continuous, counsel for plaintiff stated on his argument: "I have ridden tens of thousands of miles on railway trains, and I never rode on a train where the bell was rung all the time. And you, gentlemen of the jury, never did and Mr. Wolfe never did." To that statement objection was promptly made, and it was withdrawn, and the court instructed the jury to disregard it except as it is brought out by the evidence in the case. The jurors were not told to entirely disregard the prejudicial statement, and even had they been so directed, the effect might not have been removed. The mind is not a machine to undo all impressions at the direction of a judge. The statement was probably true, though highly misleading and prejudicial, and it would naturally impress the mind of the jurors because the contrivance for ringing a bell is new and it is not used only on the mile a minute train. To prove that the bell did not ring continuously, two witnesses were called, who, against objection, testified that when working near the track in the daytime they did not hear the bell ringing at all, except once. But the fast train, when on schedule time, was not on the track in the daytime, and of course the other passenger trains did not have a continuous bell ringing. Hence the admission of such testimony was error. However, there is no evidence or presumption that the ringing of the bell would have frightened the horses away from the

track or from going upon the track. The evidence rather shows that, as the train approached, the horses were not on the track, but that the ringing of the bell and the noise of the train frightened them, and they attempted to run across the track. One horse was nearly across when struck; two horses were on the center of the track and one was just coming onto the track. Had the train passed without making any noise, the chances are that the horses would not have been killed or injured.

Of course the value of the horses was a material question. Elmer Brown, a son of the plaintiff, was called and testified to their value and condition. Then, on cross-examination, he was asked:

"Q. Had not the horses been permitted to run at large on the prairie for a greater part of the time during the winter before the killing?"

"Q. When did you see the horses last before the accident?"

"Q. Had you anything to do with the care of the horses?"

The court erred in sustaining an objection to those questions, as their manifest purpose was to show the competency of the witness and the value of the animals. Horses that are turned adrift on the prairie in the months of January and February to live or die, survive or perish, and to keep from freezing, are not like horses that are kept in a warn stable and fed hay and oats. Good, valuable horses are not kept in a cruel and careless manner, adrift on the prairie in January and February.

The majority of this court are of the opinion that prejudicial error occurred in the admission of testimony by witnesses that they did not hear the train bell ringing while working near the track. Although the parties stipulated before the trial that the Director General should be substituted as a defendant in this action, nevertheless, the judgment, as in fact entered pursuant to the verdict, was against both the railway company and the Director General. The appeal was argued on the merits. When, on oral argument, a member of this court suggested that the defendant railway company was really not a party, counsel for both sides immediately disclaimed any desire that the manner in which the verdict was returned, or the appeal taken, should, in any way, affect the consideration and determination of the merits of the appeal. In view of the manner in which the case was handled in both courts, we believe it would be unjust to treat the case as one against the Director General alone, and the appeal as one taken by the railway company from a judg-

ment entered against it through inadvertence. To so treat it would be to ignore the intention of the parties. The judgment and verdict should be construed as entered and as treated by the parties. As actually entered, the judgment is in such condition that its reversal as to one party should ordinarily occasion a reversal as to the other. See § 7841, Comp. Laws 1913; 3 C. J. 1007; 4 C. J. 1184, 1206. It is therefore ordered that the judgment be reversed, and a new trial granted to the Director General, and that the action be dismissed as to the railway company. All costs to abide the final determination of the case.

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

GRACE, J. (dissenting). This action was commenced by the issuance of a summons dated the 25th day of February, 1919, and which was served on the defendant on the 26th. Plaintiff's complaint was served at the same time. It stated a cause of action against the defendant, based upon its careless and negligent operation of its locomotives, engines, and cars, by reason of which, at a certain railroad crossing on defendant's railway line, such engines and such locomotives and cars were run against, upon, and over certain horses, the property of plaintiff, of the alleged value of $650.

The defendant answered, and, among other defenses, interposed a general denial, and also the defense of contributory negligence, and, as a further defense, pleaded that its railway line was, on the 1st day of January, 1918, taken over by the Director General of Railways, pursuant to acts of Congress and proclamations of the President, and that the possession, use, control, and operation of it had been, since then, and then was being, exercised by such Director General.

Exhibits were attached to the answer, showing the proclamation of the President of December 26, 1917, relative to government control of railroads; and also an exhibit which is a copy of the proclamation of the President made on the 29th day of March, 1918, authorizing the Director General of Railroads to exercise powers conferred on the President by Congress; and copies of certain orders of the Director General were attached to the answer as exhibits. This answer was dated March 27, 1919, and was served on the plaintiff March 28, 1919.

On the 23d day of April, 1919, the following stipulation was entered

into, by and between plaintiff and defendant; it was in writing and signed by the plaintiff and defendant, by their respective counsel: "It is hereby stipulated and agreed, by and between the parties to the above-entitled action, and their respective attorneys, that the Director General of Railroads, operating the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, shall be substituted as defendant in place of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company; that when said substitution is made, said action shall proceed to trial, the same to all intents and purposes as though the said Director General had been named as party defendant in the first instance."

The action did not come on for trial until January, 1920, nine months or more after the time of entering into the above stipulation. The result of the signing of the stipulation was to make the case one pending against the Director General, and not against the railroad company, and thereafter the railway company was not a party to the action.

At the time the verdict of the jury was returned, the only defendant in the case was the Director General, and this is true of the order for judgment, and the record so shows. The ordering of judgment against the railroad company, which was no longer a party to the action, was, no doubt, inadvertently done, and the same is true of the entry of judgment. The only judgment that could properly be entered in such case, upon the plaintiff recovering judgment, was one against the Director General, who was the only person then liable. Hence, the judgment could not be joint. The court had no right, jurisdiction, nor authority to enter a judgment against the defendant railway company; for it was not then a party to the action, and at no time during the trial, nor since, was it a party to the action, and its entry thereof was inadvertent. There was no joint liability of the Director General and the railway company, nor a joint and several liability, but only liability on the part of the Director General, the only defendant in the action at the time of the trial.

The judgment having been entered against both, and the defendant railway company having appealed, and the Director General not having appealed, and the railway company not being a party to the action at the time of the trial, or the entry of the judgment, the judgment should be reversed and dismissed as to it, and affirmed as to the Director General.

If there were any reversible error in the record, by reason of receiving incompetent testimony, which might have prejudiced the jury, as this case now stands, that would be immaterial, as the only party whom it could affect has not appealed, and therefore is not in position to assert error; and, as the case is properly dismissed against the railroad company, it cannot be affected by such error, if any were committed.

WILLIAM J. CARROLL, Appellant, v. NEW YORK LIFE INSURANCE COMPANY, Respondent.

(180 N. W. 523.)

Insurance — forfeiture of policy for nonpayment of premiums held waived by insurer.

1. Where a policy of life insurance provides for payment of the annual premium in advance, and the first premium was paid, thus operating to keep the policy in force for a year, and, on the date when the second annual premium became due, part of the premium was paid, and a promissory note taken for the remainder, executed by the insured and the beneficiary, and payable within three months thereafter, said note containing several stipulations and provisions, among which was one to the effect that the note, if not paid when due, would thereafter automatically cease to be a claim against the maker, and that all rights under the policy should be the same as if the cash had not been paid nor the agreement made; and where more than thirty days after the time when note became due, the company, by letter to the beneficiary, indicated its willingness to receive payment, and to take a renewal note for part of one of the notes, it is *held*, in these and other circumstances referred to in the opinion and for reasons stated therein, the company waived forfeiture of the policies.

Insurance — representations of agent that there was no need for paying premium held waiver of forfeiture.

2. Where an agent of the defendant insurance company, in the circumstances, and under the authority from his principal, referred to in the opinion, represented to the beneficiary just before the due date of a promissory note given on the date the premium became due for adjustment of part of the premium, the balance having been paid in cash, that the company was making arrangements, or had made arrangements, so that the government would take care of these policies, and that the company was going to make a record in the war, by showing the people that they were right and that they would take care of all premiums of a man in the service, the insured being in the military service of the United States; and where it appears that the beneficiary relied upon

that statement, it is *held*, the defendant waived any right of forfeiture, for the alleged nonpayment of the balance of the premium, for the premium year referred to in the representation.

Opinion filed November 13, 1920. Rehearing denied December 14, 1920.

Appeal from the District Court of Ward County, *K. E. Leighton*, J. Reversed and remanded.

Palda & Aaker, for appellant.

There was a waiver by their duly appointed and acting agent Kane, which waiver was a valid and binding one as far as the defendant company was concerned. McDonald v. Equitable L. Ins. Co. (Iowa) 169 N. W. 352; Ins. Co. v. Eggelston, 96 U. S. 572, 24 L. ed. 841; Union L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617.

The powers of the agent are prima facie coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. Beebe v. Ins. Co. 25 Conn. 51; Lycoming Ins. Co. v. Schollenberger, 44 Pa. 259; Beal v. Ins. Co. 16 Wis. 241; Davenport v. Ins. Co. 17 Iowa, 276.

The condition in a policy or premium notes of forfeiture of policy for nonpayment of premium may be waived. Hall v. Dakota Ins. Co. (S. D.) 158 N. W. 449.

A forfeiture may be waived, as well by an agreement made for extending a premium note after its maturity as by one made before. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689.

Waiver is ordinarily a question for the jury, and is rarely to be inferred as a matter of law. Beauchamp v. Retail Merchants F. Ins. Co. 38 N. D. 483, 165 N. W. 545.

Newton, Dullam, & Young (*James H. McIntosh*, of counsel), for respondent.

There is nothing mysterious about a contract of insurance; it required the consent of both parties to the same thing as in any other contract. Stevens v. Ins. Co. 87 Iowa, 283; Weidenaar v. New York Life, 94 Pac. 1.

No other or different rule is to be applied to a contract of insurance than is applied to other contracts. Rathbun v. New York Life, 30 Idaho, 34; Quinlan v. Phœnix Mutual, 140 N. Y. 79; Dwight v. Ger-

mania Life, 103 N. Y. 341; Foote v. Ætna Life, 61 N. Y. 571; Liverpool & L. G. I. Co. v. Kearney, 180 U. S. 134.

GRACE, J. This is an action to recover upon an insurance policy in the sum of $3,000, issued and delivered by defendant to plaintiff, on the 7th day of July, 1916. The annual premium was $57.30.

On the 19th day of July, 1918, in France, and while a private in Company I., 16th Infantry, American Expeditionary Forces, William G. Carroll died. The plaintiff is the father of Wm. G. Carroll, and is the sole beneficiary under the policy.

The complaint is in the ordinary form, and, among other things, alleges that, until the time of the death of Wm. G. Carroll, all premiums which accrued were paid when they accrued; and that he performed all the agreements and conditions of the policy.

It is further alleged that during the month of September and prior to the 20th of that month, 1917, the plaintiff was informed and told by Charles Kane, the agent of the defendant company, that the government would take care of the premiums on soldiers' life insurance policies, and that the New York Life Insurance Company had made arrangements to take care of these; that, at various times, between the 1st day of October and the 12th day of December, 1918, plaintiff notified the defendant of the death of Wm. G. Carroll, and demanded of them a form for proof of claim, but that it neglected, failed, and refused to furnish it to the plaintiff; and that on about December 12, 1918, the plaintiff notified the defendant, by registered mail, that the said Wm. G. Carroll died in France, on July 19, 1918.

The defendant interposed an answer, which included a general denial, admitting, however, that it is a life insurance corporation, existing in and by virtue of the laws of the state of New York; and that it issued the policy of insurance in question, and that Carroll died as alleged in the complaint; and admits receiving the notices alleged to have been sent to it by plaintiff.

It further, in substance, alleges that the policy was made in consideration of the payment of the first premium of $57.30, constituting payment for the period terminating on the 23d day of June, 1917, and of the payment of a like sum on the 23d day of June, and every year thereafter during the continuance of the policy, until the death of the in-

sured; and that it was provided in and by the terms of the policy that all premiums were payable on or before their due date, at the home residence of the defendant, in the city of New York, or to an agent upon delivery of a receipt signed by the president, a vice president, a second vice president, a secretary or the treasurer of the company, and countersigned by the agent; and that the payment of a premium should not maintain the policy in force beyond the date when the next premium became due.

That when the June 23, 1917, premium on said policy became due, said plaintiff and said Wm. G. Carroll, under date of, to wit, the said 23d day of June, 1917, made and delivered to this defendant their special written note or extension agreement, commonly called by this defendant a "blue note," by the terms of which they there and then paid the defendant $12.30 in cash, and promised to pay at the First National Bank of Grand Forks, North Dakota, on or before September 23, 1917, without grace, and without demand or notice, $45, with interest at the rate of 5 per cent per annum, and in which it was therein and thereby further agreed that although no part of the premium due on the 23d day of June, 1917, on said policy had been paid, the insurance thereunder should be continued in force until midnight of the said 23d day of September, 1917, and that if said sum so agreed by them to be paid was paid on or before said 23d day of September, 1917, said payment, together with said cash, would then be accepted by said defendant as payment of said premium, and all rights under said policy would thereupon be the same as if said premium had been paid when due; but that if said sum was not paid on or before said 23d day of September, 1917, said note agreement should thereupon automatically cease to be a claim against the makers thereof, and said defendant should retain said cash as part compensation for the rights and privileges thereby granted, and all rights under said policy should be the same as if said cash had not been paid nor said agreement made; that neither said plaintiff nor said insured paid or caused to be paid the sum so agreed by them to be paid, or any part thereof, but defaulted in that behalf, and thereupon at midnight on said 23d day of September, 1917, said note agreement ceased to be a claim against the said makers thereof; that no part of said premium on said policy that became due and payable on said 23d day of June, 1917, ever was paid, and said policy

lapsed for the nonpayment of said premium; that only one premium on said policy, to wit, that premium that became due and payable on the 23d day of June, 1916, ever was paid, which maintained the insurance in force to June 23d, 1917, and no longer; and said policy was not maintained in force beyond the date agreed in said note or extension agreement, to wit, midnight of the said 23d day of September, 1917, and there was no insurance under said policy after said September 23, 1917.

A copy of said note or extension agreement is hereto attached marked exhibit "A" and made a part hereof.

The material facts in the case are as follows: On June 4, 1917, the insured enlisted in the military service of the United States, and on October 16, 1917, departed for France as a member of the 16th Infantry, and on the 19th day of July, 1918, died, as the result of wounds received in battle. Wm. G. Carroll, on June 23, 1916, became insured in the New York Life Insurance Company, in the sum of $5,000, one policy for $2,000, and one for $3,000. Separate actions were brought on each policy, and the actions are consolidated and tried as one, the issues being the same.

This action is upon the $3,000 policy, the premium for the first year was paid, and the policies were effective until June 23, 1917. On June 23, 1917, the second premium became due. On that date, $12.30 of the premium due on the $3,000 was paid, and a note for $45, due on or before September 23, 1917, was executed and delivered for the balance, and signed by the insured and also by the beneficiary, W. J. Carroll. This note is called by the insurance company, a "blue note."

On the same date, $8.20 was paid on the premium of the $2,000 policy, and a "blue note" for $30 due on or before September 23, 1917, was given for the balance. A copy of the note given in connection with the premium remaining unpaid on the $3,000 policy of insurance is as follows:

Pol. No. 4,954,618, June 23, 1917.

On or before September 23, 1917, after date, without grace, and without demand or notice, I promise to pay to the New York Life Insurance Company *Forty-five and no/100* dollars at First Nat. Grand Forks, N. Dak., value received, with interest at the rate of 5 per cent

per annum. This note is accepted by said company at the request of the maker, together with *twelve and 30/100* dollars in cash on the following express agreement: That although no part of the premium due on the 23d day of June, 1917, under policy No. *4,954,618* issued by said company on the life of William G. Carroll has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker, and said company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made, except only that the time within which the owner may make a choice of benefits after lapse, as provided in said policy, is hereby extended for three months after the due date of this note, but no longer; that said company has duly given every notice required by its rules or by the laws of any state in respect to said premium, and in further compensation for the rights and privileges hereby granted the maker hereof has agreed to waive, and does hereby waive, every other notice in respect to said premium or this note, it being well understood by said maker that said company would not have accepted this agreement if any notice of any kind were required as a condition to the full enforcement of all its terms.

$45.00 56/int.

Name: W. J. Carroll. Name: William G. Carroll.
Address: Minot, N. D. Address: Minot, N. D."

The policy contains this stipulation: "All premiums are payable on or before the date due, at the home office of the company or to an agent of the company upon delivery of a receipt signed by the president, vice president, a second vice president, a secretary, or the treasurer of the company, and countersigned by said agent. The premium is always considered as payable annually in advance, but by agreement in writing and not otherwise, and may be made payable in semi-annual

or quarterly payments." The premium here was payable annually in advance. The premium became due June 23, 1917. On that date a part of the whole premium then due was paid in cash, and a note given for the balance. That note was not only signed by the insured, but it was signed by W. J. Carroll, a person of admitted financial responsibility, and, we think, operated as an adjustment of the premium due on the 23d day of June, 1917, to such an extent as to prevent a forfeiture of the policies, when considered in connection with the following letter, written by the defendant, by its cashier Wm. J. Carroll, after the time when, under its contention, the policy lapsed because of the failure to pay the note on September 23d, and a copy of which was sent to its agent Kane. The letter reads:

Oct. 27, 1917.

Copy sent to Kane.

Mr. Wm. J. Carroll,
Minot, N. Dak.
Dear Sir:
Re: Pol. 4,954,618.

I have your letter of October 24th, regarding the above policies. According to our records, the note of $30 became due September 23d, on Pol. #4,954,617, and a note of $45 due September 23d, on Pol. #4,954,618; and inasmuch as these notes were not taken care of at that date, the policies are at the present time lapsed on the books of the company. It is a simple matter for your son to apply for reinstatement.

Please forward the attached application for reinstatement to him, and have him answer each and every question, sign where indicated, his signature witnessed, and return with attached military and naval blanks, also signed by him.

I note that you state you will pay the $30 note, and in this connection forward a remittance of $30.50, representing the note, together with interest. In connection with the note of $45, we could not extend the full amount for sixty days, but you could forward a deposit of $5.75, and have your son sign the attached note of $40, due December 23d.

I trust the above meets with your approval, and that you will for-

ward these papers to your son and have them executed and delivered at an early date, in order that the matter of reinstatement may be referred to the home office for attention.

Yours truly,

ML:LW Acting Cashier.

As we view the matter, this letter unquestionably recognizes that the two notes, given for the balance unpaid of the premium, which became due on June 23, 1917, were valid and subsisting obligations, after as well as before September 23, 1917; that these notes, together with the cash received, above mentioned, had the effect to maintain the policies in force until June 23, 1918, and prevent forfeiture thereof.

As we construe the letter, it means defendant was willing to receive payment of the $30 note, by receiving $30.50, the amount of the note and interest, and $5.75 as payment on the $45 note, and to take a new note for the balance, in the sum of $40, the 75 cents undoubtedly being for the accrued interest on that note.

The notes were not, by the defendant, regarded as of no further effect nor validity, after the 23d day of September, 1917, but, on the contrary, were regarded as valid obligations of the insured and the plaintiff beneficiary, for which the defendant could, and was willing to, receive payment in full, of one note and interest, and a part payment of the other, with a renewal note for the balance, in adjustment of the balance of the premium due on June 23, 1917. This would be in accord with the provisions of the policy, requiring the premium to be paid in advance, on the 23d day of June, 1916, and on the 23d day of June in each and every year thereafter.

We think the defendant's conduct as above set forth operated as a waiver of any forfeiture of the policies under consideration in this case.

"Circumstances proving that the party treated the contract as subsisting and not forfeited, a course of dealing consistent only with that hypothesis, and acts and declarations whereby the other party was induced to believe that the condition was dispensed with or forfeiture waived, it will be sufficient to preclude the setting up of the breaches of the condition as a defense to the contract of the party bound thereby." Viele v. Germania Ins. Co. 26 Iowa, 9, 96 Am. Dec. 83.

"Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads the party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon a forfeiture, though it might be claimed under the express letter of the contract." New York L. Ins. Co. v. Eggleston, 96 U. S. 572, 24 L. ed. 841; McDonald v. Equitable L. Ins. Soc. 185 Iowa, 1008, 169 N. W. 352.

On about the 20th of September, 1917, one Kane, the agent of defendant, had a conversation with the plaintiff, when a discussion was had in regard to the payment of the notes. The plaintiff testified that Kane told him not to worry about it, because the company was making arrangements, or had made arrangements, so that the government would take care of those policies, and that the company was going to make a record in this war by showing to the people that they were right, that they did not want to take advantage of anybody,—that is, something along that line; and that they would take care of all premiums of a man in the service, and that plaintiff relied upon that statement; and that this was before the notes became due; and that he did not worry about the payment of them, and that he might have paid them later if they had not put him where he was not worrying at all about them; that he believed that the company was carrying it, and that the government would take care of it, on Mr. Kane's statement; that the company did not return either of the notes, and never sent them for collection, nor returned the $20.50 he had paid.

Plaintiff further testified that he had made no demand for the return of the notes, and the company had not attempted to enforce payment.

The first premium had been remitted by Kane. Presumably he had collected it from the plaintiff and the insured. A copy of the letter of October 27th, above set forth, was sent to Kane, which would show, or tend to show, he had, in connection with the acting cashier, some authority in and about the collection of the premium for the second year. He may not have been a general agent, but, as was stated in the case

of McDonald v. Equitable L. Ins. Soc. supra, "life insurance agents are rarely, if ever, general, in the sense that they execute and deliver policies as is often done in the business of fire insurance; but they often have and exercise general control or power with respect to the particular branch of the business committed to their hands, and to that extent at least they are general agents. The fact that the agent represents a foreign company, and is the only visible or only convenient medium of approach to such corporation, has been recognized by the courts as a fact to be considered in such cases." Citing Union Mut. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; Viele v. Germania Ins. Co. 26 Iowa, 9, 96 Am. Dec. 83, and note, to Johnson v. Ætna Ins. Co. 107 Am. St. Rep. 122.

The court further stated in the opinion that "the authority of agents, so far as the public with whom they deal is concerned, is controlled not so much by the terms of their employment, or even by the terms of the policies which they procure for applicants, as by the things which the principal permits them to do, and by the nature and extent of the business for which they are employed and permitted to carry on. But as we have before said, so far as the agent Blum is concerned, if he transcended his powers in promising an extension of time of payment, a few days, and thereby induced the insured to send him a check, and the cashier, acting for the company and knowing that fact, received and retained the money, it would be a ratification of the unauthorized act, and the forfeiture would thereby be waived unless that effect is found to be obviated either by prompt notice to the insured or by a subsequent valid settlement and discharge of this claim as hereinbefore indicated." Citing Hodsdon v. Guardian L. Ins. Co. 97 Mass. 144, 93 Am. Dec. 73.

It would seem that the agent Kane, having had something to do with remitting prior premiums, and having, by the letter of the defendant of October 27th, been considered as having some connection with the collection of the second premium, being the agent who wrote the insurance, or through whom the insurance was procured, that such were sufficient badges of authority from the principal to warrant the plaintiff in believing that he had authority and right to exercise power with respect to the collection of the unpaid premium for the second year.

It is clear the plaintiff was financially able to pay the notes at any time. They were never sent for collection, and no demand for payment was made, and, in view of such representations by the agent Kane, we think the defendant waived any right of forfeiture, if any it had, by reason thereof.

On the 23d day of June, 1917, when the second premium became due and payable, defendant could have declined to receive anything less than the full amount of the premium in cash, and if it had done this, and had refused to receive the partial payment of the premium, and had not taken notes for the balance thereof, and its agent had not made any representations as above stated, which were relied upon by the plaintiff, and which it must be assumed caused the plaintiff not to pay the note, he being admittedly financially able to do so, then perhaps the policies of insurance would have been forfeited, unless maintained in force by article 4 of the Federal Law of March 8, 1918, entitled "An Act to Extend Protection to the Civil Rights of Members of the Military and Naval Establishments of the United States, engaged in the present war."

The purpose of that act was to provide a method of keeping in force certain kinds of life insurance of those engaged in the military service, and to prevent the forfeiture thereof, during their term of military service, and for one year after the termination thereof.

Congress being aware that those engaged in military service would have little time or opportunity, and perhaps lack financial ability, to look after such matters in such crucial times, generously provided this method whereby such premiums would be paid or taken care of by the government.

Certainly, if ever an act of Congress should receive a liberal construction, this should; for those for whose benefit it was enacted were offering to sacrifice their lives upon the altar of their country; and this insured and many thousands of others in the military service of the United States nobly did make the supreme sacrifice, and offered their lives in defense of our government and the principles upon which it is founded, and in defense of every legitimate business and business institution existing under the authority of the government, and receiving its protection, and this includes insurance companies.

Certainly, then, the act should not be technically construed. The

construction should be broad and liberal, and if thereby the policy of insurance can be held in force and effective, that construction should be given rather than a technical one, holding a forfeiture thereof.

Section 401 provides: "That the benefits of this article shall apply to any person in military service who is the holder of a policy in life insurance, *when such holder shall apply for such benefits on a form prepared in accordance with the regulations* which shall be prescribed by the Secretary of the Treasury. Such form shall set forth, particularly, that the application therein made is a consent to such modification of the terms of the original contract of insurance, as are made necessary by the provisions of this article, and, by receiving and filing the same, the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Bureau of War Risk Insurance.

"The Bureau of War Risk Insurance shall issue, through suitable military and naval channels, a notice explaining the provisions of this article, and shall furnish forms to be distributed to those desiring to make applications for its benefits."

Section 402: "That the benefits of this act shall be available to any person in military service, in respect of contracts of insurance in force under their terms, up to but not exceeding the face value of $5,000, irrespective of the number of policies held by such person, whether in one or more companies, when such contracts were made, and a premium was paid thereon before September 1, 1917; but in no event shall the provisions of this article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this article is made, or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than 50 per centum of the cash surrender value of the policy."

Section 405: "That no policy *which has not lapsed for nonpayment of premium before the commencement of the period of military service of the insured,* and which has been brought within the benefits of this article, shall lapse or be forfeited for the nonpayment of premium, during the period of such service, or during one year after the expiration

of such period: Provided that in no case shall this prohibition extend for more than one year after the termination of the war."

The benefits of this act were available to the insured. He was in military service. He had $5,000 insurance, and no more. It was in one company and the premium was paid before September 1, 1917; and under § 405, there was no lapse of the policy for the nonpayment of the premium before the commencement of the period of military service of the insured, for he left for France on October 16, 1917, and was in the military service on and since June 4, 1917.

It is a general principle of law that every person is presumed to know the law, but that presumption does not obtain in the law that we are now considering; for reference to the language in § 401, which is underscored, will show that that section requires that the Bureau of War Risk Insurance *shall* issue, through suitable military and naval channels, a notice explaining the provisions of this article, and *shall* furnish forms to be distributed to those desiring to make application for its benefits.

Now it is clear that no one could desire to make application for the benefits until knowledge of the benefits were obtained; neither could one apply for the benefits until the forms were furnished; and it can hardly be said that one qualified to make application should be denied the benefits of the law enacted for his benefit, until it affirmatively appears that such notice, as directed by the law, was given through the military and naval channels, as the law requires, and that such notice, as so given, was such that one entitled to apply for benefits must have known of the law; and, further, before one entitled to apply for the benefits can be denied the protection of the law, it is mandatory under that law that a form or forms be distributed to him, so that he could make the application, first having notice and thus an opportunity to acquire knowledge of the benefits and provisions of the law applicable to him.

The government had arranged, through the operation of this law, which went into effect March 8, 1918, to take care of the premiums, where the premiums were not due and unpaid for more than one year when the application for the benefits of the law was made. There would not be, until after June 23, 1918, more than a year's premium due upon the policies in question. Up to that time, the insured could

have made the application, but he could not have done so unless he knew of the law, and it is not to be presumed that he knew of the law, unless it affirmatively appears the notice required by law was given; and he could not make the application until he received the blanks provided by law, and he never received those blanks, or, at least, there is no evidence that he did, and there is no proof that the notice required by law was given.

In these conditions, it is held there was no forfeiture of the policy; that it remained in full force and effect; that the premium due in 1918 was a proper charge against the government, under this law, and that there was no default in the payment of the premium which operated to cause a forfeiture of the policies.

It is further held that the court erred in directing a verdict for the defendant, and in holding there was no competent evidence of waiver of forfeiture. The judgment appealed from is reversed, and the case is remanded for a new trial.

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

BRONSON, J. I concur in a reversal and remand for a new trial upon the grounds stated in the syllabus.

ROBINSON, J. I dissent.

BIRDZELL, J. (concurring specially). Unless it could be said as a matter of law that there was no evidence of waiver, the action of the trial court in directing a verdict must be reversed. I regard the case as exceedingly close. In view of all the evidence, however, which is amply set forth and discussed in the principal opinion herein, I am of the opinion that the question of waiver is one to be decided by the jury under proper instructions from the court. This question largely depends upon the authority of Kane and upon the statements made by him. In view of the evidence I do not think it can be said as a matter of law that Kane had no authority to make the representations. I therefore concur in the opinion of Mr. Justice Grace to the extent of its holding on these points, and in the reversal and remanding of the case for a new trial.

CHRISTIANSON, Ch. J. (dissenting). If the statements which the evidence adduced by the plaintiff shows that defendant's agent Kane made, were chargeable to, and in contemplation of law the statements of, the defendant, then I believe there was a waiver on the part of the defendant company, and the policies involved in this litigation remained in force. The serious question—and one which has caused me considerable difficulty—is whether Kane had authority to bind the defendant company. After a careful consideration of the evidence I have reached the conclusion that there is no evidence from which it can reasonably be inferred that Kane had such authority.

ROBINSON, J., concurs.

FARMERS ELEVATOR COMPANY of Williston, North Dakota, a Corporation, Appellant, v. E. H. WEIL, Respondent.

(180 N. W. 23.)

Evidence — fraud — testimony of bankers that signatures indorsed on backs of grain checks were not in defendant's handwriting held admissible.

In an action to recover moneys alleged to have been fraudulently obtained through the issuance of grain checks, where the plaintiff in its complaint has alleged that the defendant forged signatures of payees' names in such checks, and where further in its proof it has sought to establish that the defendant did sign and forge in his own handwriting the names of payees on the backs of such checks, testimony of bankers to the effect that such signatures so indorsed on such check were not in the handwriting of the defendant, and that some of them were in the handwriting of plaintiff's manager, was both competent and material.

Opinion filed November 26, 1920.

Action in District Court, Williams County, *Fisk*, J.

From a judgment of dismissal and an order denying a new trial, the plaintiff has appealed.

Affirmed.

John E. Greene, for appellant.

Whatever is immaterial to the issue may at least be regarded as collateral matter, and the rule is well established by the decisions of this court that to permit impeachment on collateral matter is error. Becker v. Kane, 8 N. D. 615, 80 N. W. 805; State v. Haynes, 7 N. D. 70, 72 N. W. 923; State v. MaGahey, 3 N. D. 293, 55 N. W. 753; McMillan v. Atchison, 3 N. D. 183, 54 N. W. 1030; Schnase v. Goets, 18 N. D. 594, 120 N. W. 553.

Craven & Converse and *U. L. Burdick,* for respondent.

One who has seen another write may testify, and it is not necessary that the witness should be an expert. Jones, Ev. §§ 546, 549, Value of Testimony.

If a witness has become familiar with the handwriting of a person, he may testify as to the genuineness of the alleged handwriting of that person although it appears to be simulated and disguised. 5 Enc. Ev. 524, Discretion of Court; 5 Enc. Ev. 643, Conflict Between Expert and Other Testimony.

Where opinion evidence is otherwise admissible, the fact that other witnesses have testified who purport to state facts within their knowledge does not effect the admissibility of such opinion. 5 Enc. Ev. 659.

There are three ways of proving the signature to an instrument: The first is by the persons who were present and saw it signed; the second is by persons who have gradually become acquainted with the signature and know it just the same as one man knows another; the third is by experts who may give their opinion by comparing the signature in question with signatures confessedly genuine, and not made for the purpose of comparison. Stutsman County Bank v. Jones, 36 N. D. 531; People v. Molineux, 168 N. Y. 264, 62 L.R.A. 193, 61 N. W. 286.

Witnesses having knowledge of parties' handwriting are competent to testify as to its genuineness. Travis v. Brown, 43 Pa. 9, 82 Am. Dec. 540.

Bronson, J. This is an action to recover moneys alleged to have been fraudulently obtained upon the issuance of grain checks, pursuant to a conspiracy existing between the defendant and the manager of plaintiff's elevator. From a judgment entered upon a verdict of the jury, dismissing the action, and from an order denying a new trial,

the plaintiff has appealed. The facts, necessary to be stated, are as follows:

From April to December, 1914, inclusive, one Graslie was the manager, assistant secretary, and the grain buyer for the plaintiff's elevator at Williston. The defendant was a merchant engaged in the clothing business at Williston. The plaintiff, among other things, alleged that this Graslie during the time above stated, for the purpose of cheating and defrauding the plaintiff, drew a number of checks for the purchase of grain payable at a bank in Williston, and to fictitious payees; that such checks were not issued for purposes of any grain purchased; that they were drawn by Graslie with the full knowledge and connivance of the defendant; that the defendant received the same, forged and indorsed the names of the payees therein, negotiated and collected the proceeds thereof out of the funds of this plaintiff. That the purpose and design was to cheat and defraud the plaintiff, and to appropriate to his own use the money so received. It appears in the evidence that some twenty-one grain checks, aggregating $1,605.50, were drawn by this Graslie as agent of the plaintiff, payable at a bank in Williston, with various parties named therein as payees. Each of such checks stated the grain, its weight, dockage, and the price paid therefor. These checks were received and negotiated by the defendant. His signature appears on the back of each of the checks, either in his handwriting or by a rubber-stamp signature. In addition, there is an indorsement of the name of the payee upon each of such checks.

This Graslie, in a deposition taken at Minneapolis, testified that, after he became manager, he had a talk with the defendant to the effect that he should issue or pay to him checks, and that he would be a fool if he did not make some money out of the handling of grain. That, pursuant to this proposition suggested by the defendant, he issued the checks mentioned, giving them, sometimes to the defendant at the elevator, and sometimes at his store. He further testified that he had the sole and exclusive management of the business, and issued the checks. Concerning many of these checks, he further specifically testified that the defendant signed and indorsed the names of each payee therein in his presence and when the payee therein was not present. Concerning some of the checks he testified that he knew no such man as the payee therein designated. Further, that he received himself

money on these checks and the defendant received the balance. He further gave testimony to the effect that the issuance of some of these checks did not represent genuine wheat or grain transactions. This witness did not know what amounts he himself received; he did not know whether he indorsed or signed names of payee upon such checks; he was certain, however, that he delivered the checks involved to the defendant. The defendant, through his testimony, denied that he indorsed the names of any of the payees named in the checks. He did not recall any of the payees as known to him at the time he cashed the same or took them in trade. Three witnesses engaged in the banking business testified for the defendant. Their testimony in general is to the effect that they were acquainted with the handwriting of the defendant for many years, and that, in their opinion, the indorsed signatures of the payees of such checks were not in the handwriting of the defendant, and, in some instances, that they were in the handwriting of this Graslie. Upon this appeal, the contention made by the plaintiff is that the trial court erred in receiving this testimony of such witnesses concerning the handwriting of such checks, for the reason that the only vital question concerned was whether the defendant accepted the checks in question and collected the money thereon in furtherance of the fraudulent scheme alleged by the plaintiff; that the question whether or not this Graslie or the defendant indorsed such checks by their writing the names of the payees thereon was wholly immaterial, and the admission of such testimony was therefore prejudicial. That further, under the circumstances, such testimony amounted merely to an expression of the opinion of such bankers that the defendant Weil was telling the truth.

We are clearly of the opinion that the trial court did not err in receiving the testimony of such bankers. Where the plaintiff has alleged a fraudulent scheme for obtaining money which involved, by a direct allegation made, a forgery of the names of the fictitious payees by the defendant, and where further in its proof it has sought to establish such forgery as a fact, pursuant to such fraudulent scheme as alleged, it was clearly proper for the defendant to establish by competent evidence not only through himself, but also through others, that he did not indorse or sign the names of such payee in such checks himself.

As evidence tending to establish such fraudulent conspiracy, and

in proof of its consummation, the plaintiff did seek to prove that the defendant forged in his own handwriting signatures to the checks. Clearly the defendant had the right to negative such evidence by proof that such signatures were not in his handwriting, or by proof that they were in the handwriting of Graslie, whose testimony, at least in part, was to the contrary. For such purposes, the evidence of the bankers was admissible. See 22 Cyc. 624; Stutsman County Bank v. Jones, 36 N. D. 531, 541, 162 N. W. 402. The issues in this action were fairly submitted to, and determined by, the jury. The judgment is affirmed, with costs to the respondent.

AGNES JOHNSON, Appellant, v. LEWIS B. JOHNSON, Respondent.

(180 N. W. 794.)

Divorce — evidence held insufficient to show wilful neglect and extreme cruelty.

In an action for divorce, where the plaintiff alleged as grounds for divorce wilful neglect and extreme cruelty, the evidence is examined and it is *held* that the grounds alleged are not established.

Opinion filed November 26, 1920. Rehearing denied January 3, 1921.

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

Affirmed.

W. S. Lauder, for appellant.

A wife is no longer regarded as her husband's chattel. The husband is no longer regarded as the superior and the wife as the inferior as in the days of Blackstone. 2 Sharswood's Bl. Com. p. 142; Rott v. Goehring, 33 N. D. 413.

Extreme cruelty is the infliction by one party of a marriage of grievous bodily injury or grievous mental suffering upon the other. Comp. Laws 1913, § 4382.

Mental suffering is ground for a divorce in the absence of any bodily injury. Mahnken v. Mahnken, 9 N. D. 118.

Any unjustifiable conduct upon the part of either the husband or

wife which so grievously wounds the mental feelings of the other or so utterly destroys the peace of mind of the other as to utterly destroy the legitimate ends and objects of matrimony constitutes extreme cruelty although no physical violence may be inflicted or even threatened. Carpenter v. Carpenter, 2 Pac. 122; Gibbs v. Gibbs, 18 Kan. 419; Whitmore v. Whitmore, 49 Mich. 417; Wheeler v. Wheeler, 53 Iowa, 511; Smith v. Smith, 6 Or. 100; Beyer v. Beyer, 40 Wis. 254.

Wolfe & Schneller, for respondent.

The judgment of the trial court upon the facts must have weight and influence in this court, especially when based upon the testimony of witnesses who appeared in person before that court. Christensen v. Farmers Warehouse Asso. 5 N. D. 438; Merchants Bank v. Collard, 33 N. D. 556; Wilke v. Sassen (Iowa) 99 N. W. 124; Birdzall v. Birdzall (Mich.) 77 N. W. 1114; Langmann v. Guernsey (Neb.) 145 N. W. 270.

BIRDZELL, J. This is an action for divorce. The plaintiff, Agnes Johnson, was married to the defendant on June 22, 1918. She was a little past sixteen years of age and the defendant was twenty-five. He entered the military service during the month following his marriage, and remained in the service for some five months or until the middle of December. On November 28, 1918, approximately five months after the marriage, a child was born. During confinement the plaintiff was cared for by her mother, who lived in a small, one-story, two-room house in Havana, in this state, the defendant at the time being in military service at Camp Dodge, Iowa. Upon receiving his discharge from the Army, the defendant returned to Havana about the 22d of December, 1918, living with his wife and her mother in the small, two-room house until about the 13th of January, 1919, when he left for Minneapolis. He returned the 21st of January, and the complaint in this action was verified the 25th of the same month.

The complaint alleges two grounds for divorce: Wilful neglect and extreme cruelty. After trial in the district court, judgment was entered dismissing the complaint. The plaintiff appeals and demands a trial *de novo.*

Wilful neglect is defined in the statute, § 4384, Comp. Laws 1913, to be: ". . . the neglect of the husband to provide for his wife the

common necessaries of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation."

While an attempt was made upon the trial to substantiate the allegations of wilful neglect, only minor attention is paid to them in the appellant's brief. After a careful examination of the record, we are of the opinion that this charge is not supported by the evidence. While it does not appear that the defendant made generous provision for his wife, it does appear that he entered the Army a short time after the marriage; that as a soldier he made an allotment for her benefit under regulations prescribed by the Federal government, and that a similar amount was added by the government. These payments, however, were not actually received by the wife until the fall of 1918. In addition to these payments, the defendant sent her a small amount of cash, $11. He apparently had no money at the time he was married, for his wife's mother, who was a working woman, lent him the money to pay the expenses of the marriage. He had an interest in his father's estate of approximately $100,000, amounting, perhaps to less than $10,000, which at that time had not been distributed. He was out of the Army but a short time before this suit was begun, and during that time he had paid some of the expenses incident to the maintenance of his wife and child. The evidence does not warrant a finding of wilful neglect.

The appellant places principal emphasis upon the charge of extreme cruelty. It is not contended that there were any acts of physical violence, but rather that the conduct of the defendant was such as to cause the plaintiff to undergo grievous mental suffering. The conduct relied upon as establishing this form of cruelty may be considered under two heads: First, his friendly relations with other women; and second, acts evidencing a depraved moral nature. His relations with other women were not established. The charge was based principally upon some letters which he had received while in the military service, and which were found by his wife in his trunk upon his return from the Army. It is satisfactorily established in the record that these letters, which were written from Eagle Grove, Iowa, were not intended for the defendant but for another person of the same name who had enlisted from Eagle Grove. The letters are perfectly innocent in themselves, and do not evidence any wrongful relations between the writers

and the recipient or the person for whom they were intended. The defendant claims that this matter was explained to his wife before the suit was begun. There are also some pictures of the defendant taken in the company of ladies. These are likewise innocent pictures, and it is also shown that they were taken at a time before the defendant had even met his wife.

The principal argument in support of this charge is drawn from evidence that the defendant exhibited to his wife lewd pictures, lascivious compositions, and paraphernalia evidencing a depraved moral nature, and that these acts or some of them took place at a time when, owing to the delicate condition of her health, she was subjected to extreme mental suffering on account thereof. It is not necessary in this opinion to describe the character of the matter so exhibited by the defendant. These acts deserve the condemnation which counsel for the appellant has given them, but they do not necessarily amount to extreme cruelty. However much they are inclined to shock the moral sensibilities of persons of refinement, it is obvious that their effect in the particular case depends upon the manner in which they are received. The testimony of the plaintiff herself, aside from her direct statements, does not disclose that she was extremely shocked by these vile exhibitions. A widowed cousin of the defendant, who lived near the parties in Havana, testified to matters concerning the exhibition of these lascivious compositions and lewd pictures in a manner that shows them to have been received by the plaintiff either with satisfaction, indifference, or tacit approval. She stated that on one occasion the plaintiff and defendant came to her house in the evening, and the plaintiff asked the defendant if he "had brought that dirty poem along," and he said "No;" that he went and got a number of them, and that he and Mrs. Johnson together picked out the "best" (the dirtiest?) one and the plaintiff read it; that his wife insisted that he should read it and that they all laughed. There is nothing in the testimony of the plaintiff which evidences extreme shock at these matters. On the other hand, we would not be justified, from her testimony, in saying that she chose to live on the same moral plane as her husband. There is no reason to believe that this girl of tender years had so far abandoned her natural modesty and inherent feminine virtue as to initiate such

indecent subjects of domestic intercourse; but it does not follow that they were necessarily so abhorrent to her as to cause grievous mental suffering. This depends so largely upon the sensibility of her moral nature, which could only be known to others as reflected by her presence and demeanor, that we who have only the cold record of the testimony are at a disadvantage. The trial judge, who had a superior opportunity to observe the parties and who held that obscenity of the character complained of might constitute extreme cruelty, did not feel warranted in finding that the plaintiff was shocked to the point of grievous mental suffering by the attitude and conduct of the defendant in relation to the matters that he exhibited to his wife. In the light of this record, we do not feel justified in overturning the findings of the trial court.

It was also shown that *after this action was brought* the defendant wrote a letter in which he offered to furnish a home for his wife and in which he forbade her to bring her mother along. The feeling exhibited in that letter toward the mother was anything but what it should have been, and would doubtless cause heartache to an affectionate child, particularly one in the unfortunate situation of this plaintiff. But we are not warranted in saying that the writing of this letter would constitute extreme cruelty.

Appellant's counsel has ably presented the facts which he contends altogether support the charge of extreme cruelty, but we do not find in this record sufficient evidence that the defendant's conduct amounted to legal cause for divorce. The judgment appealed from is affirmed.

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

GRACE, J. I dissent.

ROBINSON, J. (dissenting). From the opinion as written in this case by Mr. Justice Birdzell, I do emphatically dissent. The plaintiff has a mother who brought her into the world and who has been ever kind and good to her, and, in a letter to the plaintiff, defendant went out of his way to gratuitously insult and abuse the mother, as well as her daughter. He wrote thus:

Now, in so far as your mother is concerned, let me explicitly inform

you that under no circumstances will I have anything to do with her. I do not want her around me in any way or at any time. I am perfectly willing to provide for you a home, but it will have to be your home and my home. Under no circumstances will I allow you to bring your mother into same, nor yet will I be in any way responsible for her support or maintenance."

The letter is really brutal, and it is in keeping with the general conduct of the defendant toward his wife. It shows that he had no regard or respect for either the mother or her daughter. The letter made it impossible for the plaintiff to live with defendant as his wife unless as his mere dog, and without any feeling of self-esteem or self-respect. No judge would hold that his own daughter should live as the wife of a man guilty of writing her a letter so insulting and degrading. The only proper response to such a letter was an action for divorce.

F. W. ABRAHAM, Respondent, v. A. S. DURWARD, Appellant.

(180 N. W. 783.)

Frauds, statute of — statute held not to render contract void, but merely voidable.

1. Section 4, chapter 202, Laws 1917 (Statute of Frauds embodied in Uniform Sales Act), which provides that "a contract to sell or a sale of any goods . . . of the value of $500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods . . . so contracted to be sold or sold, and actually receive the same, . . . or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf," does not render a contract falling within the statute absolutely illegal or void, but renders it merely voidable at the election of one or either of the parties thereto.

Frauds, statute of — failure to invoke statute in appropriate manner constitutes waiver of rights thereunder.

2. A party sought to be charged upon a contract within such statute must invoke its protection in some appropriate manner, or he will be deemed to have waived his rights under it.

Frauds, statute of — statute not available as defense where not especially pleaded and where complaint alleged contract generally.

3. Where the complaint alleges the contract generally, without stating wheth-

er it was in writing or not, the Statute of Frauds is not available as a defense unless specially pleaded.

Opinion filed December 6, 1920.

Appeal from the District Court of Barnes County, *Englert*, J.

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

Affirmed.

W. J. Lorsbough and *Pollock & Pollock*, for appellant.

The telegram is neither a contract nor sufficient memorandum of one. Hastings v. Webber, 56 Am. Rep. 671.

"The stipulated price of such sale is an essential part of the contract, and must be stated in the note or memorandum thereof required by statute." Hanson v. March (Minn.) 40 N. W. 817; Watt v. Wisconsin Cranberry Co. 18 N. W. 898.

"A memorandum, when a contract is not in writing, must embrace all its substantial terms." Palmer v. Marquette & P. Rolling Mill Co. 32 Mich. 274.

There can be no acceptance while the purchaser has the right to object to either quality or quantity. 24 Ga. 215.

Sale void under the Statute of Frauds unless there was not only a delivery by the vendor, but an acceptance on the part of the purchaser. Simmons Hardware Co. v. Mullen (Minn.) 22 N. W. 294.

The law seems to be well settled that the objection that an alleged contract which is void under the Statute of Frauds may be availed of by general denial. Riif v. Riibe (Neb.) 94 N. W. 517; Livingston v. Smith, 14 How. 490; Allen v. Richard, 83 Mo. 55; Wiswell v. Tifft, 5 Kan. 263; Bliss, Code Pl. 2d ed. § 355.

W. J. Courtney, for respondent.

Where the Statute of Frauds was neither alleged in the answer nor mentioned at the trial, obviously it cannot be relied upon as a defense for the first time in this court. Groff v. Cook, 34 N. D. 126.

Christianson, Ch. J. This action is brought to recover the purchase price of a carload of potatoes alleged to have been shipped by the plaintiff to one D. E. Hollinshead, of Thomson, Illinois, under an agreement with the defendant. In his complaint the plaintiff alleges:

"That the defendant on or about the 20th day of September, 1918, arranged with this plaintiff to ship to this defendant or to defendant's order, a carload of potatoes, and agreed to pay for them at the rate of 80 cents per bushel when the potatoes were loaded on the car at Pillsbury, North Dakota. That the agreement was made between the plaintiff and the defendant that the defendant was to pay 80 cents per bushel when the potatoes were loaded and ready to ship from Pillsbury, North Dakota and this price was to be paid for field run of potatoes, just as the potatoes were taken from the field.

"That on the 30th day of September, 1918, the defendant sent to his agent M. L. Peterson, at Pillsbury, North Dakota, the following telegram [omitting printed portions]: 'Thomson, Ill., 9th,–30 1918. To M. L. Peterson, Pillsbury Bank, Pillsbury, N. Dak. Have W. Abraham ship car of potatoes to D. E. Hollinshead, Thomson, Ill. immediately. Light (load) car to insure against frost. Draw on Sherman Bank, and answer collect. [Signed] A. S. Durward.'

"That the man Peterson notified this plaintiff of the order in the telegram, and asked the plaintiff if he would ship a car of potatoes immediately to the defendant's order, and at the same time showed the telegram to this plaintiff, and assured him that he would get his money within a very few days, and that he would draw on the Sherman Bank for the amount of the car as soon as it was loaded, at the agreed rate of 80 cents per bushel.

"That the plaintiff, relying on the agreement made, ordered a car, got one immediately, and shipped to D. E. Hollinshead, Thomson, Illinois, as directed by the telegram, and M. L. Peterson, the agent of the defendant who received the telegram, 900 bushels of potatoes from the field, as ordered by the defendant, and shipped them in a refrigerator car, and shipped them as directed by the defendant; that this plaintiff complied fully with all the orders of the defendant and shipped the potatoes, in conformity with defendant's orders."

The complaint further alleges that a sight draft was drawn upon a bank of Thomson, Illinois, as directed by the defendant, and payment thereof refused; and that defendant is justly indebted to the plaintiff in the sum of $720, the amount agreed to be paid for the potatoes, and that no part of the sum has been paid.

In his answer the defendant denied that he "on or about September

20, 1918, or at any other time, made any contract, arrangement, or bargain or agreement with the plaintiff or with any other person for the plaintiff, for the purchase of potatoes in car upon the track at Pillsbury or elsewhere."

He further denied that M. L. Peterson was his agent or in any manner authorized to represent him. He further denied that he wrote, signed, or authorized to be sent or transmitted the telegram set forth in the complaint. He also denied, generally, the allegations of the complaint.

The case was tried to a jury and resulted in a verdict in favor of the plaintiff for the sum demanded in the complaint. The defendant moved for a new trial. The motion was denied, and defendant has appealed from the judgment and from the order denying a new trial.

The evidence adduced by the plaintiff tended to establish the allegations of his complaint. The plaintiff testified: "The last days of September Mr. Durward came over there and I was digging potatoes. He asked me if I wouldn't ship him—if I wouldn't sell him any potatoes, ship a carload of potatoes, and I says, 'No, I wouldn't ship any. I wouldn't have nothing to do with shipping,' and he says, Well, he would go up town and see Peterson [a banker], that he would do the business for him. He says he always did his business, and he went up town and he came back after a while and then . . . Mr. Durward said he had made arrangements and could give me 80 cents f. o. b. Pillsbury; that he could use a carload of potatoes, and he sent a telegram that he wanted them." Plaintiff further testified that, upon the delivery to him of the telegram set out in the complaint, he loaded a car containing over 900 bushels of potatoes; that Peterson (the banker) figured out the amount coming to the plaintiff, and prepared a sight draft and a bill of lading, which papers were left with Peterson for attention.

Peterson testified that he received the telegram set out in the complaint, and delivered it to the plaintiff; that, later, he received a long-distance telephone message from Illinois, inquiring whether plaintiff had shipped the potatoes or how soon he could ship them; that after plaintiff had loaded the car he brought the weight slips or tickets to Peterson; that he (Peterson) computed the number of bushels and the amount coming to the plaintiff for the potatoes, and prepared a bill of

lading for the car, and attached to it a sight draft for the amount coming to the plaintiff, and sent the papers to the bank at Thomson, Illinois, for collection, in accordance with the directions of the telegram; that payment of such draft was refused.

One Tillmony testified that in the fall of 1918 he was a tenant on one of defendant's farms; that one morning the defendant (who was staying with Tillmony) went over to plaintiff's place; that defendant said: "Well, I can buy potatoes from Mr. Abraham, and I will buy them when I can get ready on the other end for them." That when he came back defendant said: "I bought the potatoes, and when I trade them down at the other end, as soon as I get home and trade them then I send him word to ship them."

Hollinshead testified (in a deposition taken by the plaintiff October 31, 1919):

In the fall of 1918, I [Hollinshead] heard the defendant make some remarks in regard to potatoes and the price in Dakota where he had been, and I told him that I could use a car of potatoes of that kind at the price. He said he would give me the party's name and address, and I could get them, he giving the assurance as to the quality of the potatoes and the name of the man that owned them.

Q. What, if anything, was said with reference to using his [defendant's] name on the telegram?

A. Don't remember just exactly. *He told me, in order to make them understand that everything was all right, that I could send the telegram in his name* to insure getting the potatoes quickly.

Q. Then, as I understand it, you went to the telegraph office and sent the telegram we have introduced in evidence and signed his name to it?

A. Yes.

Hollinshead further testified that he called Peterson on the telephone and had a conversation with him over the long-distance telephone of the import testified to by Peterson, and that in such telephone conversation he (Hollinshead) stated that it was the defendant who was talking. He further testified that the telegram offered in evidence is like the one he wrote, with the exception that the word "light" was written, and should be "load."

In a subsequent deposition (taken by the defendant on December 29, 1919) Hollinshead attempts to qualify, to some degree, the testimony formerly given as to the authorization given by the defendant to sign his (defendant's) name to the telegram. He says: "Defendant did not tell me to order them in his name." He also says: "He [defendant] authorized me to refer to him, and, in order to shorten matters, I signed his name to the telegram mentioned above. . . . He said that he was well acquainted with the parties and I might refer to him in ordering them, in order to make them understand that everything was all right."

The defendant admitted that he had some conversation with the plaintiff about potatoes; but denied that the conversation was as related by the plaintiff. He also denied that he had the conversation with, or made the statements testified to by, Tillmony. He admitted that he had a conversation with Hollinshead, and that he told him that he could buy some potatoes from the plaintiff; also, that he told Hollinshead "he could telegraph to Peterson and Peterson would see Abraham;" and that Hollinshead said "he would refer them to me so they—so that he would get results, use my name as reference so he would get results." He denied that he authorized Hollinshead to order the potatoes in his (defendant's) name.

While defendant has specified many errors on this appeal, in his argument he has confined himself to the question whether plaintiff has established a valid contract. In his brief, defendant says:

"The position of the defendant and appellant is that the contract alleged in paragraph 3 and denied by the defendant has not been established by competent proof, and that even if so established, it is not an enforceable contract under chapter 202, Session Laws of 1917, and that:

"The telegram referred to and set out in paragraph 4 of the complaint, the sending or authorization of which is denied by the defendant, even if sent, did not constitute a contract or a sufficient memorandum of one, it being deficient in that it did not name the kind of grade of goods or the price to be paid therefor.

"That such telegram cannot be connected with prior oral conversations by parol evidence, for the purpose of supplying these deficiencies and making an enforceable contract.

"That the evidence does not show such a *delivery and acceptance* of the goods alleged to have been sold as would take the case out of the Statute of Frauds.

"That the defense of the Statute of Frauds is available in this case under the general and specific denials of the answer and the objections to the evidence made by the defendant during the course of the trial."

The entire argument of appellant is devoted to a discussion of the Statute of Frauds, the contention being that there was neither a written memorandum of the contract of sale, nor an acceptance and receipt of the goods by the buyer, sufficient to satisfy the requirements of the statute. It is further contended that the defendant properly invoked the Statute of Frauds as a defense. We shall consider the latter contention first, for if the defendant did not invoke the statute it will be unnecessary to determine whether by invoking it he might have defeated a recovery.

The statute involved is one of the provisions of the Uniform Sales Act. Laws 1917, § 4, chap. 202. So far as is pertinent to this controversy, it reads: "A contract to sell or a sale of any goods . . . of the value of $500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods . . . so contracted to be sold or sold, and actually receive the same . . . or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." Sess. Laws 1917, chap. 202, § 4. It will be noted that this statute differs somewhat from the Statute of Frauds formerly in existence in this state. That statute (Comp. Laws 1913, § 5961) provided that "no sale of personal property or agreement to buy it . . . *is valid,*" unless the requirements of the statute are fulfilled. Whatever differences of opinion there may be among the authorities as to the effect of a statute worded like § 5961, supra, there seems to be little or no difference of opinion that a statute worded like chapter 202, Laws 1917, does not make a verbal contract falling within the statute illegal or void, but makes it merely voidable at the election of one or either of the parties thereto. See 29 Am. & Eng. Enc. Law, p. 814, and authorities cited in note 4. The defense of the Statute of Frauds is personal. It can be invoked only by the parties to the agreement or their representatives or privies. Strangers to the agreement have no right to invoke it for themselves,

or for the benefit of others. 29 Am. & Eng. Enc. Law p. 807. The Statute of Frauds (worded like the one under consideration) presupposes an existing lawful contract, and affects only the remedies upon it. Browne, Stat. Fr. 5th ed. § 136.

Browne (Browne, Stat. Fr. 5th ed. § 135) says: "As the Statute of Frauds affects only the remedy upon the contract, giving the party sought to be charged upon it a defense to an action for that purpose, if the requirements of the statute be not fulfilled, it is obvious that he may waive such protection; or rather that, except as he undertakes to avail himself of such protection, the contract is perfectly good against him." This principle has been recognized and enforced by this court. Erickson v. Wiper, 33 N. D. 193, 203, 204, 157 N. W. 592; Groff v. Cook, 34 N. D. 126, 157 N. W. 973.

The complaint in this case alleged the contract generally, without stating whether it was in writing or not. The complaint was sufficient, for it is now "settled by the great weight of authority that, where a contract within the Statute of Frauds is declared on, the court will presume that it was in writing, and no averment to that effect is necessary." 9 Enc. Pl. & Pr. p. 700; Browne, Stat. Fr. 5th ed. § 505. The answer was a general denial, coupled with specific denials of certain of the allegations of the complaint. In other words, the answer was, in effect, that the averments of the complaint were all untrue. Nothing was said in the answer to indicate that the defendant claimed that the contract was unenforceable because it failed to comply with the requirements of the Statute of Frauds. The first intimation plaintiff had that any such claim was, or would be, made, was after the trial had commenced. The defendant sought to raise the statute solely by objections to the introduction of evidence. He first made a general objection to the introduction of any evidence, and later made objections to the questions asked the different witnesses. No application was made for leave to amend the answer so as to plead the statute. While there are authorities to the contrary, we believe the better rule is that where the complaint alleges a contract generally, without stating whether or not it was in writing, a party who desires to avail himself of the Statute of Frauds (worded like chap. 202, Laws 1917) as a defense, must specially plead it; and unless, and until, he does so plead it, his objections to evidence, predicated on the Statute of Frauds, are unavail-

ing. If a party sought to be charged upon a contract voidable under the statute intends to rely upon that fact and avoid the contract, it is but just that he should so notify the adverse party, to the end that the litigation may end. If he does not rely upon the statute in his pleading, it is but just that he should be deemed to have waived his right to avoid the contract.

The Encyclopedia of Pleading and Practice (9 Enc. Pl. & Pr. pp. 705–707) says: "While there is no little conflict of opinion regarding the proper mode of taking advantage of the Statute of Frauds, it may be laid down as a sound and generally accepted rule, with certain exceptions in some jurisdictions, to be noticed hereafter, that, unless it appears otherwise that the contract declared on is obnoxious to the statute, the party seeking its protection must specially insist on it in his pleadings. The reason for this rule is obvious. A parol agreement is neither illegal nor void under the law. The statute of frauds requiring the contract to be in writing is simply a weapon of defense which the party entitled may or may not use for his protection. If he does not specially, by plea or answer, set it up and rely upon it as a defense, he cannot afterwards avail himself of its benefits." See also Sutherland, Code Pl. § 533, 20 Cyc. 314; Gottlieb v. Gins, 166 N. Y. Supp. 1041; Crane v. Powell, 139 N. Y. 379, 34 N. E. 911; Alaska Salmon Co. v. Standard Box Co. 158 Cal. 567, 112 Pac. 454; Groff v. Cook, 34 N. D. 126, 130, 157 N. W. 973; Erickson v. Wiper, 33 N. D. 193, 203, 157 N. W. 592.

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

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

GRACE, J. (specially concurring). We think the evidence is sufficient to show that Peterson was the agent of the defendant and, as such, calculated the value of the potatoes, and included that amount in a sight draft and bill of lading, which were left with him for attention.

The foregoing, together with the telegram, were sufficient to take the case without the Statute of Frauds.

I do not agree with all the discussion contained in the majority opinion, with reference to the Statute of Frauds, but it is unnecessary

to state wherein I do not agree. It is sufficient to say that the purpose of the Statute of Frauds is to prevent fraud and perjury. The reason for the statute is based upon public policy. Its provisions largely relate to the validity of the contract.

FRANK PIECHOTTA, Respondent, v. FRED O. FRIED, Appellant.

(181 N. W. 602.)

Evidence — witnesses — cross-examination of defendant as to arrests for prior similar offenses improper.

1. In a civil action to recover damages for assault and battery, cross-examination of the defendant with reference to arrests for prior offenses of a similar nature is improper.

Assault and battery — evidence as to binding over of defendant to district court inadmissible in civil action for damages.

2. Where the defendant had been arrested on a criminal charge of assault, and upon preliminary hearing before a police magistrate had not testified in his own behalf and had been bound over to the district court, the action of the magistrate in binding him over is inadmissible in a civil action to recover damages for the same assault.

Appeal and error — cross-examination of party as to prior offenses held prejudicial error.

3. Where, during cross-examination of a party, counsel persists in pursuing an improper line of examination for purposes of affecting credibility, the questions asked relating to the witness's commission of prior petty offenses, and the rulings thereon, being accompanied by intimations of possible admissibility for certain purposes, it is *held* that the asking of the questions and the pursuit of the line of examination was prejudicial error.

Opinion filed December 6, 1920. Petition for rehearing filed January 22, 1921.

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

Reversed and remanded.

George W. Thorp and *Harry Rittgers*, for appellant.

"Damages may be uncertain, either as to their existence, or their nature, or in respect to the cause from which they proceed." 17 C. J. 754, § 87.

"Where it is not shown with reasonable certainty that the harm or loss resulted from the act complained of, there can be no recovery of compensatory damages therefor." 17 C. J. 755, § 89; West Chicago, etc. Co. v. Foster (Ill.) 51 N. E. 690; Kethledge v. City (Mich.) 146 N. W. 164.

"Another principle of proximate cause which seems to be well established is that an accident or injury cannot be attributed to a cause unless, without the operation, it would not have happened." Ring v. Cohoes, 77 N. Y. 83; Taylor v. Yonkers, 105 N. Y. 202, 11 N. E. 642; Ayres v. Hammondsport, 130 N. Y. 665, 29 N. E. 265; Grant v. R. Co. 133 N. Y. 657, 31 N. E. 220.

There is no evidence in the case at bar of the earning capacity of plaintiff or that his earning capacity, if he had any, was impaired. York v. Co. (N. D.) 170 N. W. 312; Wagoner v. Boudell (N. D.) 164 N. W. 147; Mark v. Frick (Minn.) 147 N. W. 279.

A cross-examination is proper though it calls for facts not testified to on direct examination but relating to the same subject-matter and bearing upon the main facts toward which the examination in chief was directed, facts which give to the direct testimony the effect of false testimony. Hogan v. Klabo, 13 N. D. 319; 40 Cyc. 2482, 2483.

"The right of cross-examination should not be abridged, especially where the witness is the opposite party and is testifying to make out his case." 40 Cyc. 2476, 2477.

S. E. Ellsworth, for respondent.

"It must be apparent at first blush that the damages are glaringly excessive. Likewise, if the verdict is manifestly inadequate to compensate plaintiff for the damage sustained, it will be rectified or set aside for insufficiency." 3 Cyc. 1109; Brown v. Evans, 17 Fed. 917; Winston v. Terrace (Wash.) 138 Pac. 673.

In the following cases both of which were actions in damages for assault and battery, courts have held an award of $2,000, the sum awarded as compensatory damage in this case, to be not excessive. Wohlenburg v. Melchart (Neb.) 53 N. W. 982; Barr v. Post (Neb.) 77 N. W. 123.

BIRDZELL, J. This is an action to recover damages for assault and

battery. The jury returned a verdict in favor of the plaintiff for $2,000 compensatory damages and $2,000 exemplary damages, and judgment was entered for $4,000 and costs. The appeal is from the order of the trial court denying the defendant's motion for a new trial.

Some time during the year 1919 the defendant obtained, by trade with the Bank of Clementsville, some notes which had been given by the plaintiff amounting to about $1,200, and which were secured by a chattel mortgage. There were also some other transactions between the parties whereby the plaintiff had become indebted to the defendant in a larger sum. In the early spring of 1920, the indebtedness being past due, the parties discussed their financial matters somewhat, and Fried, the defendant, endeavored to persuade the plaintiff to execute a chattel mortgage as security therefor. After some prior negotiations regarding this mortgage, Fried and one Dresser, his employee, went out to the plaintiff's home, a short distance from Spiritwood, North Dakota, on May 1, 1920, for the purpose of effecting a settlement. Fried claims that, before going on this mission, threats of intended violence toward him on the part of the plaintiff, Piechotta, had been communicated to him, and that being fearful that there would be some attempt to carry out these threats, he took with him a part of a revolver, which he obtained from his hardware store in Spiritwood. The piece of revolver consisted of an apparently complete automatic pistol, lacking a sliding piece at the top which contained the hammer and operated as a shell extractor. Its efficiency, according to Fried's claim, would be limited to frightening the plaintiff in case of an attempted assault by the latter. Fried and Dresser arrived at the plaintiff's place about 1 or 2 o'clock in the afternoon, and, after some discussion of the proposed settlement of their business transactions, the altercation which gave rise to this action took place. It is not necessary to detail the conflicting evidence concerning what happened at the time.

The jury has apparently adopted the plaintiff's version, in which he was corroborated by his wife, to the effect that the defendant was the aggressor; that he committed the first assault by drawing the gun from his pocket and thrusting it at the plaintiff with the muzzle from 2 to 4 inches from his face; that the plaintiff took hold of the defendant's hand in such a manner as to remove the gun from this threatening position, and otherwise sought to prevent injury to himself by holding the

plaintiff from him. Notwithstanding his efforts, however, he emerged from the conflict with his face cut or scratched and bleeding, his eyes swollen, and at least one eyelid lacerated. The evidence is conflicting as to whether Dresser separated the belligerents or whether he interceded to the extent of holding the plaintiff's hands behind him while the defendant administered additional punishment. After the altercation the plaintiff and his wife drove to Jamestown (plaintiff driving the car part of the way), where the plaintiff had his wounds dressed, caused the defendant to be arrested, and attended the preliminary hearing, which was partially completed that day, before Police Magistrate Murphy.

There are twenty-eight specifications of errors of law occurring during the trial. In view of the conclusion at which the court has arrived concerning certain of these specifications, it is not necessary to consider the remainder, as it does not appear that similar questions may arise upon a retrial of the case. The appellant complains of certain rulings of the court upon the admission and exclusion of testimony, and contends that they prevented a fair trial. In order to present the rulings in such form a just estimate as to their probable effect may be made, it is necessary to set forth extracts from the transcript. The following is part of the cross-examination of the defendant:

Q. Well, Mr. Fried, during the past few years, is it not true you have been drinking or have been in the habit of drinking heavily, taking intoxicants frequently?

Mr. Thorp: That is objected to as an improper method of impeachment or cross-examination.

The Court: Objection sustained.

Q. Isn't it true that on numerous occasions here in Jamestown, at Spiritwood and elsewhere, you have been guilty of disorderly conduct and assaults upon the person of other people?

Mr. Thorp: That is objected to for the reason that it has no connection with the case at issue, it is conjectural and scurrulous, not a proper method of impeachment, stating no specific acts.

The Court: Objection sustained.

Mr. Thorp: We except to the question itself as prejudicial.

Q. I will ask you, Mr. Fried, if you are acquainted with a man by the name of George Lund, who was formerly at Spiritwood?

A. Why, I knew of him, yes.

Q. Isn't it true that you were arrested upon a warrant issued from the justice court of this county for an assault upon the person of George Lund?

Mr. Thorp: That is objected to as a collateral matter—not the best evidence, scurrilous, incompetent, irrelevant, and immaterial and an improper subject of cross-examination.

The Court: Objection sustained.

Mr. Thorp: We except to the question.

Q. Is it not true that you were taken before the justice of the peace of this county, and found guilty of assault upon George Lund and fined for the offense?

Mr. Thorp: That is objected to as not the best evidence, calling for hearsay—having no tendency to impeach this witness upon the ground that he has been convicted of an infamous crime; a misdemeanor, if one had been commmitted, is not an infamous crime; is a collateral issue and incompetent, irrelevant, and immaterial in a civil case anyway.

The Court: Objection sustained.

Q. Mr. Fried, I will ask you if on the 31st of March or about that time of the present year—may have been a little before the time of the assault you are charged with here, you were not arrested here in Jamestown, upon a warrant issued by Justice Murphy for a breach of the peace?

Mr. Thorp: In the light of the ruling of the court on similar questions, on this occasion and at this time, it appearing that the questions were asked for no other reason than to prejudice this jury, we first except to the question as prejudicial itself and make the same objection to the question as was made to the first question.

Mr. Thorp: We object to the argument of any purported facts before this jury, as prejudicial.

The Court: I hardly think it is material in this case, as a specific act is being charged here.

Objection sustained.

Mr. Ellsworth: Now what would your holding be, that he could be asked as to the particulars of the specific assault, within the heart. He claims that he was incapacitated by physical deformity.

Mr. Thorp: That is not what he said; he was incapacitated in making the assault. The purpose, under the rules of evidence in introducing the physical condition of the parties, is for the reason that the jury can take into consideration, the physical incapacity of the parties, in connection with the other parties in the case. He wasn't asked anything about whether he could fight or couldn't fight, so that the jury could see these two men in connection with the facts that are in evidence in this lawsuit.

The Court: I think that evidence is admissible in this case under the allegation of forcibly committing the assault. The question of the physical condition, I will admit under that theory. Of course, it has directly to do with the question of force and has also to do with the question of oppressiveness,—oppression is charged in the complaint. I do not know that there is anything to rule on at this time.

Mr. Ellsworth: In order to bring the question fairly before the court I will ask another question.

Q. I will ask you to state whether or not on or about the 31st of March of this year you were not intoxicated at the café known as the Chop Suey here in Jamestown, and at that time, guilty of disorderly conduct, consisting, among other things, of an indecent assault upon a young lady employed there as a waiter, for which you were afterwards arrested and brought before a magistrate of this city.

Mr. Thorp: That is objected to as incompetent, irrelevant, and immaterial; with reference to the arrest, it is not the best evidence, if there was any arrest. It is a collateral issue having no connection with the case herein involved, not being an infamous crime, by a regularly entered judgment of a court of competent jurisdiction, and a collateral issue, having no tendency to impeach this witness as to his veracity.

The Court: If testimony was offered to show that this defendant was incapacitated to exercise force, it wouldn't be competent to inquire if he had used force in committing assaults on other people.

Mr. Thorp: It is objected to upon the further ground that an arrest and conviction for a breach of the peace is not admissible as impeachment of the credibility of the witness or for any other purpose in this lawsuit.

The Court: I will sustain the objection. I wouldn't receive any

evidence upon that theory in this case—if received at all it would be received on the theory that the evidence was offered in the first place to show that this man was incapacitated to commit an assault, and these other evidences of an assault having been committed might throw some light upon the question of receiving it.

Mr. Ellsworth: We offer the evidence for that purpose, your Honor.

Mr. Thorp: We renew our objection for all of the reasons stated.

The Court: I will overrule the objection and allow the evidence on the theory already stated by myself.

Mr. Thorp: This was an indecent assault.

The Court: This is an indecent assault—Read the question, Mr. Reporter.

[Question read:]

The Court: I will sustain the objection upon the ground that it does not bear upon his physical ability.

[Mr. Ellsworth continues cross-examination.]

Q. Were you not, Mr. Fried, afterwards arrested and brought before the magistrate who issued the warrant in that case, and convicted of disorderly conduct and a breach of the peace on the day aforesaid?

Mr. Thorp: That is objected to on the ground that in the first place this was a violation of a city ordinance, if it ever happened, and in the next place it shows on its face that it was only a misdemeanor, and in the next place it is not the best evidence for any purpose, and is a collateral matter, and had no bearing on the credibility of this witness, and it is immaterial.

The Court: I think it is immaterial, and I will sustain the objection.

. . . . . .

Q. The same day this assault was committed, were you not arrested here upon a warrant issued by magistrate of this city, for the offense of carrying concealed weapons?

Mr. Thorp: The question itself is prejudicial, but I will state to the counsel that the complaint was made by the plaintiff in this case himself, and the arrest of the person for a preliminary hearing is in no sense the impeachment of the witness, and is immaterial. We will admit it, he was arrested for this same assault by the plaintiff.

Mr. Ellsworth: You will admit that?

Mr. Thorp: Yes.

Mr. Ellsworth: Will you further admit that he is bound over to the district court by the magistrate on that charge?

Mr. Thorp: If you will stipulate all the facts, I will.

[Mr. Ellsworth continues cross-examination.]

Q. After being arrested on that charge and having a hearing before Magistrate Murphy here in Jamestown, were you not bound over to the district court, to answer to the charge of carrying concealed weapons on that day?

Mr. Thorp: That is objected to as incompetent, irrelevant, and immaterial, having no tendency to impeach this witness—that an order of the police magistrate, if any was made, not being a conviction, but being a hearsay.

The Court: This is the same cause of action brought here. Objection overruled.

A. I think I was—I didn't testify though.

Q. You heard Mr. Dresser testify that day, didn't you?

Mr. Thorp: That is objected to as immaterial, prejudicial.

The Court: Objection overruled.

A. Yes, I heard him testify.

The line of cross-examination disclosed by the portions of the transcript above quoted must be justified, if at all, upon one or both of the following grounds: That it is directed to matters affecting the credibility of the defendant as a witness; or that it tends to prove that the defendant committed the assault in the case at bar. We are firmly of the opinion that this line of cross-examination is not proper for either of these purposes. The rule that a witness may be cross-examined with reference to his prior conviction of crimes had its origin in the statutes removing disqualification by reason of such convictions. With the disqualification removed, persons who were convicted of infamous crimes could testify in court, but it was deemed proper to show by cross-examination or by the production of the record that they had at a former time been convicted of crime. In this way matters which were originally thought sufficiently grave to altogether preclude the giving of testimony were allowed to be shown for the effect on the credibility of the witness. Neither simple assault, breach of the peace, nor other offense implied by the questions asked in the case at bar, comes within

the common-law designation of infamous crime, such as would have disqualified a witness. Neither do such offenses have sufficient connection with the quality of veracity to make the line of inquiry appropriate for impeachment. Such questions have a strong tendency to affect the jury prejudicially against the defendant, and are of little, if any, value as affording a standard for measuring the reliability of his testimony. Such a question should not have been asked in the first instance, and, after an adverse ruling, the line of examination should not have been pursued to the extent of inquiring concerning other offenses of similar character. This only added to the probability of prejudice.

Some of the questions are also open to the objection that they do not inquire as to whether the defendant had been convicted, but are limited by asking whether or not he had been arrested or whether he had been held to answer to district court upon preliminary hearing. This form of question is generally recognized as improper. State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; State v. Nyhus, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71; 5 Jones, Ev. § 838. While the respondent contends that it was proper to show the action of the magistrate in holding the defendant upon the preliminary hearing as some proof by way of admission (as the defendant did not testify) or otherwise of the commission by him of the assault, we are unable to so regard it. After a defendant has been convicted in district court, the record of his conviction is not admissible in a civil action for damages arising out of the same assault to prove the fact of the assault. 3 Cyc. 1098; Caverno v. Jones, 61 N. H. 623. Much less would the action of a magistrate at a preliminary hearing be admissible.

While it is true that the district court sustained objections to questions, except as they related to the criminal charge growing out of the assault in question, the rulings were accompanied by intimations of doubt as to the relevancy of the evidence for certain purposes, and the objectionable line of cross-examination was pursued to an extent that is unjustified as an effort to obtain a definite ruling of the court. It is apparent to us that the probable effect was prejudicial to the defendant. It is difficult indeed to see why certain questions were asked, unless for their prejudicial effect. For instance, it appears that after

the court had ruled that evidence of other assaults might be admitted on the questions of force and oppressiveness, and had concluded by stating that there was nothing to rule on at the time, plaintiff's counsel immediately framed a question in which he asked the defendant if he had not, at a time stated, been intoxicated and guilty of disorderly conduct, consisting, among other things, of an indecent assault upon a young lady employed as a waitress. This is the first mention of indecent assault. Such an assault clearly has no bearing upon the "question of force" in the commission of the assault upon the plaintiff. Up to this point, plaintiff's counsel had been treading upon thin ice, and we are at a loss to see why he would thus attempt to secure an extension of the already doubtful, if not erroneous, ruling by suggesting a more odious assault, unless it was desired that the improper matter be thus indirectly brought to the notice of the jury.

Being of the opinion that the probable effect of the line of questions referred to was prejudicial to the defendant and prevented a fair trial, the order appealed from is reversed and the case is remanded for a new trial.

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

GRACE, J. I concur in the result.

On Petition for Rehearing Filed January 22, 1921.

BIRDZELL, J. Counsel for respondent has filed a carefully considered petition for rehearing, in which he has collated the cases decided in this jurisdiction bearing upon the scope of the cross-examination of witnesses. These cases are brought to the attention of the court by way of supporting the contention, forcibly advanced, that the liberal rule of cross-examination previously adhered to is departed from in the decision of this case. See Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Kent (State v. Pancoast), 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; State v. Apley, 25 N. D. 298, 48 L.R.A.(N.S.) 269, 141 N. W. 740, and cases therein cited. See also Engstrom v. Nelson, 41 N. D. 530, 171 N. W. 90. This court does not wish to be understood as in any way qualifying the previous holdings referred to. We think it sufficiently appears from the portions of the transcript quoted

in the original opinion that the trial court at the outset, in the exercise of discretion, ruled in such a way as to exclude evidence having a tendency merely to degrade the defendant and to show him to have been guilty of some petty misdemeanors. This evidence, if admitted, would have had so little bearing upon the witness's credibility that this court could not say that its exclusion was prejudicial error; but, on the other hand, it would rather appear that the trial court had properly exercised its discretion in thus controlling the cross-examination. Following these first questions, plaintiff's counsel asked defendant if he had not been *arrested* on a warrant issued by a justice for an assault upon the person of George Lund. This question was clearly improper for the reasons stated in the previous opinion; namely, that it did not inquire whether or not the defendant had committed the assault or been convicted of it. Then this was followed by the question as to whether or not he had not been found guilty and fined for this same assault. Again the court exercised its discretion as in the first rulings, and sustained the objection to the question. Then respondent's counsel asked another question of exactly the same character; that is, as to whether or not the defendant had not been *arrested* upon a warrant issued by Justice Murphy for a breach of the peace. After the objection to this question was sustained counsel suggested the possible admissibility to prove capacity for committing the assault, since the defendant had claimed that he was incapacitated by physical deformity. Then, after the court had intimated that he would admit evidence of other assaults on the question of physical condition or capacity to use force, and also on the question of oppressiveness, respondent's counsel framed a question apparently embodying an instance not covered by any of the previous questions, and the court ultimately excluded that, and we think properly so, upon the record made up to that time.

For the reasons stated in the principal opinion and reiterated here, we think the rulings on the cross-examination concerning the other offenses were proper. We do not hold, however, that a witness may not be fully cross-examined as to his prior conviction of crime, or as to his or her prior disreputable conduct generally, such as living in an open state of adultery or being a prostitute, a professional gambler, or engaged in operating a saloon without a license, as has been held in the cases referred to by counsel. The rule in this jurisdiction is the liberal,

discretionary rule. See cases supra and Wigmore, Ev. §§ 980, et seq.

In this case punitive damages amounting to $2,000 were awarded by the jury, and the case is such that punitive damages may be recovered. This makes it all the more important to exclude from the consideration of the jury matters having a strong tendency to induce a conviction in their mind that the defendant merits punishment on account of his conduct upon other occasions. All evidence that would tend strongly in this direction, and be of only slight value at best as bearing upon credibility, should, therefore, be excluded. We are of the opinion that the record in this case shows that an amount of prejudicial matter, beyond what was necessary to secure a clear ruling by the court, was indirectly presented to the jury, and we think the surest corrective measure is a new trial.

The petition for rehearing is denied.

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

HENRY ANDERSON, Appellant, v. THORVAL P. OVERBY, as Administrator with Will Annexed of the Estate of Andrew Anderson, Respondent.

(180 N. W. 708.)

Deeds — evidence sustaining finding that deed was not delivered.

In an action to determine adverse claims to certain land, plaintiff claimed title under a certain warranty deed from one Andrew Anderson, his father. Nine years after the date of the deed, and a few months after his father's death, plaintiff recorded the deed. The defendant, administrator of the father's estate with the will annexed, contended that no grant ever was made by the deed. It is conceded that it was signed and acknowledged. The sole issue in the case was whether or not it was delivered. The answer denied the delivery of it. There was evidence by and on behalf of plaintiff, tending to show delivery, and evidence on behalf of defendant, tending to show there was no delivery. The trial court made its finding of fact, to the effect that there was no delivery.

Held, that such finding is sustained by the evidence, and hence the judgment should be and is affirmed.

Opinion filed December 8, 1920.

Appeal from judgment of District Court of Griggs County, North Dakota, for trial *de novo, Englert,* J.

Judgment affirmed.

E. G. Larson and *Engerud, Divet, Holt, & Frame,* for appellant.

"A grant duly executed is presumed to have been delivered at its date." Comp. Laws, § 5496; Leonard v. Fleming, 13 N. D. 629; Tunison v. Chamblin, 88 Ill. 387; Lines v. Wilby (Ill.) 97 N. W. 846; Magee v. Allison (Iowa) 63 N. W. 822; Richmond v. Morford (Wash.) 30 Pac. 242, 31 Pac. 513; Rohr v. Alexander (Kan.) 46 Pac. 699.

Failure of the adverse party to object at the time the testimony is offered, on the statutory ground, waives the statutory bar. 40 Cyc. §§ 2349, 2351; 12 Enc. Ev. p. 1042.

Combs & Ritchie, for respondent.

Where the deed remains in the possession of the grantor, the presumption arises that it was not his intent to deliver it, and that it never was delivered. Cassidy v. Holland, 27 S. D. 287, 130 N. W. 771.

Parol evidence of a transaction of which the execution and delivery of a deed is part, is admissible in so far as it does not vary the written terms of the deed of conflict with the Statute of Frauds. Bjornson v. Rostad, 137 N. W. 567, Ann. Cas. 1915A, 1115.

GRACE, J. This action is one to determine adverse claims to a certain tract of land. The complaint is in the ordinary form. The plaintiff alleges that since the year of 1907 he was, and now is, the owner in fee and entitled to the possession of the tract of land in question; that one Andrew Anderson, late of Griggs County, North Dakota, died testate in that county, about the month of March, 1916; and that thereafter, pursuant to due proceedings in the county court of Griggs county, his last will and testament was proven, allowed, and admitted to probate, about the 25th of July, 1916; that the county court issued to Thorval P. Overby, the defendant, letters of administration, with the will annexed, upon the estate of the deceased, and that the defendant since has been, and now is, administrator, and wrongfully asserts claims to the property here involved as part of the deceased estate, and has asserted and exercised dominion and control over it, receiving and retain-

ing the rents and profits for the years 1916, 1917, and 1918, which are claimed to be of the value of $5,000.

The answer alleges that Andrew Anderson was the owner and in possession of said real estate from November 28, 1913, to June 3, 1916, when he died testate; that the executor named in the will refused to qualify, and thereupon the county court of Griggs county appointed the defendant as administrator, with will annexed, of the estate of Andrew Anderson, deceased; that, on the 18th day of March, 1916, Andrew Anderson, being the owner in possession of the land, leased it to Elmer Anderson and William Anderson for the years 1916, 1917, and 1918, who had possession and farmed the land during those years; that the terms of the lease were such that they were to receive one half the crops raised on the land during those years; that during those years, the administrator retained the share of the crops, which, under the terms of the lease, became the property of Andrew Anderson, and after his demise the property of his estate.

The answer, in substance, avers that the plaintiff never had possession of and never claimed to own the premises nor the crops, until about August 17, 1918. The answer further avers, "that on or about the 19th day of June, 1907, Andrew Anderson, now deceased, executed a certain instrument of conveyance, wherein and whereby he purported to convey said land to Henry Anderson, the plaintiff in this case; but this defendant avers that said instrument was never in fact or in law delivered to, or accepted by, the plaintiff during the lifetime of the said grantor or afterwards; and in this connection, the defendant alleges that, after the execution of said purported conveyance aforesaid, said Andrew Anderson remained and continued in possession of said land until on or about the 3d day of June, 1916, when he died; that he mortgaged the whole of said lands during said period to secure the payment of debts then owing by him, and that on one occasion he deeded a small parcel of said lands to Homnes School District No. 9, Griggs county, North Dakota, which said deed was executed on or about the 14th day of October, 1911, and that it was not the intent and purpose of the said Andrew Anderson to deed said land to the plaintiff, nor has the plaintiff ever paid any consideration for such deed, but that, after the death of Andrew Anderson, the plaintiff, by subterfuge, obtained possession of the deed, and on the 10th day of November, 1916, caused

the same to be recorded in the office of register of deeds of Griggs county; and that he and his wife pretended to execute and deliver a mortgage to the First National Bank of Binford, covering said tract of land, to secure the payment of $2,000, but that the defendant is informed and believes that said mortgage was not given to secure a valid and subsisting debt or for any other lawful purpose, but for the purpose of complicating the title to the land, and to assist plaintiff in carrying out the plan to deprive the estate of Andrew Anderson of the land."

The answer further alleges that, at the time of the execution of the purported conveyance, there was a first mortgage to secure the payment of $3,000 on the land, and that on November 2, 1913, Andrew Anderson paid the mortgage, and remortgaged the land for the sum of $4,300, all of which plaintiff knew and to which he made no objection, and that said mortgage is still a valid and subsisting lien upon the land, and unpaid; and that Andrew Anderson paid the taxes on the land each and every year until the time of his death.

The material facts in the case are substantially as follows: Andrew Anderson was, on the 19th day of June, 1907, and for many years prior thereto, owner in fee of the southwest quarter of section 23, Twp. 147, range 58, Griggs county.

On the date last above mentioned, he and his wife were living on the west half of section 23, same township and range, which includes the land involved in this litigation. On that date, he and his wife made, executed, and acknowledged a deed, covering the southwest quarter, in which the plaintiff was named as grantee.

Andrew Anderson, from the time the deed was made, continued to live upon the land, and exercised dominion over it, until the 3d day of June, 1916, when he died.

On March 18, 1916, he leased the land for a period of three years to Elmer and William Anderson, his sons, and the brothers of plaintiff. The lease was witnessed by the plaintiff. Prior to his death, Andrew Anderson made and published his last will and testament, and by its terms he gave to each of four of his children, including the plaintiff, a legacy of $500 in cash, to be paid from his estate, and the remainder of his estate, consisting of a half section of land, which included the land here, he gave to his children, this plaintiff and William and Elmer, his sons, Lena C. Olson, Amanda Scramstad, and Til-

lie E. Anderson, his daughters, being his only heirs, his wife having died in the year 1915.

The plaintiff was present when the will was made and published, and heard read the contents of it, and did not suggest or claim that he owned the quarter section of land here involved, or that his father had no right to will it away. He signed the petition for probate of the will. In the petition it was declared that Andrew Anderson, the father, was the owner of a half section of land, which included the land here involved.

We think there is no dispute in the facts so far stated. The plaintiff never, after the execution and acknowledgment of the deed, attempted, or claimed, to exercise dominion over the land, nor did he ever pay any taxes thereon, until after his father's death and until after he recorded the deed.

After the deed was recorded, the plaintiff and wife purported to mortgage it for $2,000, to the First National Bank of Binford. The mortgage was recorded on the 26th day of November, 1917.

A dispute in the facts squarely arises upon the question of whether or not, after the time of the execution and acknowledgment of the deed, it was delivered by Andrew Anderson to the plaintiff. The plaintiff claims it was delivered, and that, ever since then, about nine years, and until the 10th day of November, 1916, when it was delivered for record, that he had it in possession. The defendant maintains that, after the deed was executed and acknowledged, Andrew Anderson kept the deed in his possession, among his own papers, in his house, on the half section of land; that it was kept in a bureau drawer in his bedroom, in his home, and that shortly before his death plaintiff, who had access to the drawer of the bureau, which was not kept locked, wrongfully took possession of the deed, without the knowledge or consent of Andrew Anderson, and contrary to his will and desire.

After the execution and acknowledgment of the deed in question, Andrew Anderson mortgaged the half section of land for $4,300 to Northwestern National Life Insurance Company, which remains still unpaid.

The trial court made findings of fact, conclusions of law, and order for judgment in favor of defendant, and judgment was entered accordingly.

With the notice of appeal, the plaintiff served a demand for trial *de novo* in this court, on all issues. The appellant contends that the trial court's finding that the deed was not delivered to the grantee is unsupported by the evidence, and is directly contrary to all the competent evidence in the case. A decision of this point will dispose of the case.

The principle of law advanced and relied upon by the plaintiff is that the deed, having been produced by him at the trial, established prima facie that it was delivered on the date it bears.

Appellant cites a great deal of authority upon this point, among which is found § 5496, Comp. Laws 1913, which is: "A grant duly executed is presumed to have been delivered at its date." Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308, is among the authority cited, as upholding that principle and the statute.

The reading of that decision convinces us it is not in point as authority in the present case. There, the question at issue was entirely different than here. There, the plaintiff claimed the right to possession and ownership through a warranty deed from one George W. Toms and wife, dated November 4, 1892, acknowledged November 8th thereafter, and recorded January 17, 1893.

The defendants there claimed ownership by virtue of a sheriff's deed dated August 2, 1894, based upon attachment proceedings in an action against Toms, under which a levy was made upon the land on December 10, 1892. The judgment in that action was entered against the defendant on March 10, 1893.

It appears that the plaintiff's grantor was a nonresident of the state, and service was claimed to have been made by publication of the summons. He died before the last publication thereof, and judgment was rendered against the defendant on the date above mentioned, and was a judgment *in rem* only. There was no substitution of the personal representatives of grantor after his death. The court did not determine whether the judgment was valid, or the sale thereunder operated to devest grantor's interest in the land, if any he had, when the attachment was levied, but disposed of the case on the merits on another ground.

There, the defendants alleged the execution and delivery of the deed. In view of that allegation the court held that they were concluded from asserting, at the trial, that there was no proof of delivery. In the pres-

ent case, the question of whether or not the deed was delivered is the only material issue. In that case, the only question at issue was the time of the delivery of the deed, defendants pleading delivery and thereby admitting the same. There, there was no evidence of the time of delivery other than the recitals in the deed, and those were held controlling in that regard.

Delivery there having been shown, the presumption was that the time of the delivery was the date of the instrument conveying the land. Section 5495, Comp. Laws 1913: "A grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor." Section 5497: "A grant cannot be delivered to the grantee conditionally. Delivery to him or to his agent as such is necessarily absolute; and the instrument takes effect thereupon, discharged of any condition on which delivery was made."

It is clear from a consideration of these statutes, that there is no grant transferring and vesting an interest, unless there is a delivery thereof, and if there is a grant, it is absolute and thereupon takes effect, discharged of any conditions attached to the delivery. If the evidence is sufficient to support the findings of fact of the trial court, which is to the effect that there was no delivery of the deed, thus warranting the conclusion of law and order of judgment in that regard, it would necessitate our holding that the judgment should be affirmed.

The evidence, we think, shows, and we think it is conceded, that the deed was executed and acknowledged, but its delivery is most strenuously denied by the defendants. To the evidence then must we turn to determine if the trial court was in error in its findings of fact and conclusions of law. Part of the evidence is direct, and part circumstantial.

The testimony of plaintiff is direct, and to the effect that he had the deed in his possession since the date of its execution. In substance, he testified on cross-examination, that his father handed him the deed in Cooperstown, telling him he could record it when he pleased; that his father there told him he intended to take a homestead in North Dakota, and did do so a short time after he gave the deed; that he saw the land and examined the entry in the Dickinson land office, and that the occasion for his doing so was that his father, after taking the homestead, suggested to him that he get the land by contesting the father's entry.

Under the United States Homestead Act, no person who is the proprietor of more than 160 acres, in any state or territory, shall acquire any right under the homestead laws.

The direct testimony of plaintiff was not objected to under § 7871, Comp. Laws 1913, which, in the circumstances stated therein, bars testimony of transactions with the deceased. As the writer views that section, it is not necessary to make such objection. We regard the statute as prohibitive in character, and that it is the duty of the court thereunder to prohibit the witness from testifying, if such witness is one within the class prohibited, under the terms of the statute, from giving testimony as to transactions with the deceased.

The plaintiff is such a witness. This, however, is not the view of the majority of the members of this court. Under their view, which must prevail, the direct testimony of the plaintiff, relating to transactions with the deceased, not being objected to, is admissible and is considered as competent evidence.

The testimony which was brought out from plaintiff, upon cross-examination, was of no effect under the statute, and should have been prohibited. If the plaintiff had been called as the witness of the opposite party, and then testimony of the same character elicited, as that under his cross-examination, that testimony would be admissible under the statute.

Mrs. Scramstad testified that her father made a homestead entry in 1907. Udgard's testimony shows that Andrew Anderson came into Udgard's bank and acknowledged the deed, and, at the time, used the following language: "Said he made the deed for the purpose of enabling him to take a homestead. He was then going to the western part of the state and file on a homestead, and he gave this deed for that purpose."

Udgard testified that he understood that if the old man did not take the homestead he annulled the deed. He also testified that, in the spring of Mr. Anderson's death (1916), on the road between his and the Anderson farm, Henry Anderson showed him the deed, and that at that time, Henry had the deed. Udgard said to him, "You wouldn't take advantage of that; that was given you just for the purpose your father said." Well," he said, " if they proved too mean, he would."

The facts and circumstances which support the assertion of nondelivery of the deed are quite numerous, and the more important of which may be stated as follows:

After the execution and acknowledgment of the deed, during the lifetime of his father, the plaintiff made no claim of title to the land, the father, during all that time, exercising complete dominion over it, retaining possession of it,—all of which the plaintiff knew, and to which he in no manner objected. At no time did the plaintiff suggest to the father that he claimed any right or interest in the land, by reason of the execution and acknowledgment of the deed. Plaintiff was present when the father leased the land to the two brothers above mentioned, and was cognizant of the terms of the lease, witnessed it and made not the least objection, and made no claim of title of the land, nor to the rentals or proceeds thereof. He signed the petition for probate of his father's will, which, among other things, contained a recital that the estate consisted of certain property, among which was a half section of land, which included the land involved herein.

Plaintiff was present when the father made the will, heard the discussion of its terms, and he was beneficiary under it, and by it the testator devised all of his property, including the land in question. It was nine years after the deed was executed and acknowledged before it was delivered for record.

After the death of the father, plaintiff lived on the premises occupied by the father at the time of his death. The lower floor of the house consisted of a bedroom, kitchen, and pantry. The bedroom was occupied by the father during his life and by his wife before her death in 1915. There was a door opening from the kitchen into the bedroom. The father's dresser was in the bedroom, and so located that it was in plain sight from the door to the kitchen. It had four drawers, two small and two large ones.

Mrs. Scramstad lived about 3 miles from the old home. In September, 1916, the plaintiff came to her home to get her to go to where he lived, to take care of his wife, who was about to be confined. She went and remained four or five days there. While there, she had a talk with the plaintiff with reference to the deed here under consideration. She said, in substance, that he took the paper out of the dresser, and came and showed it to her, about the 20th day of September, 1916; that he then said: " 'See here. I have got something that will fix the whole bunch of you, if I want to.' He took the paper out of the dresser and came and showed me. I saw him take it out of the dresser," and in

answer to question, she said she saw him take it out of the dresser and carry it in his hands to the room where she was; that he was about in the middle of the floor when he came with the paper, and said: " 'Here. See here. I have got something that will fix the whole bunch of you.' I said: 'Can I see it?' And he says, 'Yes,' and handed it to me. I read it and it was the deed."

The testimony shows that, after she read the deed she handed it back to him and told him he had never paid the $4,000, and he said that did not make any difference. After this, he went into the bedroom with the deed, and she did not see what he did with it. She was busy working.

On cross-examination, plaintiff testified in substance that he had showed the deed to Mrs. Scramstad at Binford, about four or five years before the father died; he testified, She was up there cooking for him, and that her husband called to see the deed; that he went upstairs, in his trunk, and got it for him; that Martin Scramstad was sitting downstairs; that there were present the Mrs. (plaintiff's wife) and his sister (Mrs. Scramstad). Mrs. Scramstad states, in substance, in her testimony, that no such conversation ever occurred in her presence. It also appears from the testimony, that the father, after the execution and acknowledgment of the deed, deeded a portion of the land, 1 acre, for school purposes. Plaintiff knew this and made no objection to it.

Perhaps there is other evidence in support of either side, which might be referred to, but we think the material and important evidence has been here mentioned and considered, at sufficient length, for all purposes of the case. It should be kept in mind that there is a clear distinction between a case where the deed has been delivered, or the delivery thereof admitted, or the delivery thereof pleaded, and thereby admitted, as in the case of Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308; and one where the principal issue is that no delivery was made.

In the former, circumstances such as the grantor retaining the possession of the premises, and exercising complete dominion over it, after the grant, and even the leasing of the same to parties other than the grantee, the grantee having full knowledge thereof, would have a different meaning and application than in the latter, where there is an absolute denial of delivery, and where the question of delivery is the real issue.

In the former, the showing of such circumstances, etc., is not incon-

sistent with the fact that the grant passed the title, whereas, in the latter, it would be. In the latter, such circumstances are very material to show that the title never passed out of the grantor; that the grant, though executed and acknowledged, did not operate to pass title; that, notwithstanding those facts, title was retained in the grantor.

In the former, in absence of fraud or collusion, the title did pass from the grantor to the grantee, and conditions attached to the delivery are of no avail, for the delivery is absolute, and the instrument takes effect, discharged of any conditions on which delivery was made. See § 5497, Comp. Laws 1913.

In every case of this character, where the issue is that no delivery was made, the question of whether delivery was made is exclusively one of fact. The testimony adduced in support of defendant's contention, including the circumstantial evidence, tends strongly to show that no title passed by the grant. The circumstances above mentioned are inconsistent with an assumption that the deed was delivered. They strongly tend to show that no delivery ever was made.

The testimony of Mrs. Scramstad shows that when the deed was shown to her it was procured from her father's dresser in the same bedroom he occupied while living; and there is direct evidence to show that, after the execution of the deed, the grantor took it with him.

Udgard testified as follows:

Q. It seems to you that the grantor kept the deed in his possession when he went out of the room?

A. That is the way it seems to me.

Q. That is you best recollection?

A. He brought it to me and then took it with him.

Q. He took it with him, himself?

A. Yes, sir.

The trial court's finding is to the effect that there was no delivery of the deed. He saw the witnesses and heard them give their testimony. We think the finding of the trial court, and its findings as a whole have ample support in the evidence.

The judgment appealed from is affirmed. Respondent is entitled to his costs and disbursements on appeal.

ROBINSON, J., concurs.

BRONSON, J. (specially concurring). I concur in the affirmance of the judgment. The plaintiff challenges the finding of the trial court that the deed was not delivered. Upon the record this was largely an issue of fact. The trial court, in my opinion, did not err in so finding. See McManus v. Commow, 10 N. D. 340, 344, 87 N. W. 8; Druey v. Baldwin, 41 N. D. 473, 172 N. W. 665, 182 N. W. 700.

CHRISTIANSON, Ch. J. (concurring specially). This case comes here for trial *de novo*. Hence, the members of this court are required to weigh the evidence and determine what judgment should be rendered upon the facts established by the evidence, and the rules of law properly applicable. Both parties seem to concede, and the opinion of a majority of this court is predicated upon the theory, that the pivotal question in this case is whether the deed in controversy was delivered to the plaintiff by his father, Andrew Anderson. Of course, there is, and can be, no question but that the deed was in fact executed. The undisputed evidence shows that it was; and the deed itself was recorded in the office of the register of deeds of Griggs county, and the plaintiff produced it upon the trial of this action. There is no secret as to the circumstances surrounding the execution of the deed. Andrew Anderson owned a half section of land upon which there was an existing mortgage in the sum of $3,000. He decided that he would go to the western part of this state and enter land under the Federal homestead laws. Under such laws he could not make a homestead entry if he owned more than 160 acres of land. And so he decided to convey one quarter to his eldest son, the plaintiff in this action. Thereupon, Andrew Anderson and the plaintiff went to the office of Tufte, an attorney at Cooperstown, and Andrew Anderson directed Tufte to prepare a deed conveying the land in controversy to the plaintiff. It appears that Tufte was not a notary public, and, therefore, they went to one Udgard, a notary public (who also was cashier in a bank), in the same city, and Andrew Anderson acknowledged the execution of the deed before Udgard. To both Tufte and Udgard, Andrew Anderson stated specifically the reasons why he desired to convey the land to his son. Udgard testified: "He [Andrew Anderson] said he made this deed for his convenience for the pur-

pose of enabling him to take a homestead. He was going to the western part of the state to take a homestead, and if he did not, why I understood that he annulled it." Tufte testified: "My impression is that the old man told me that he was going to deed that land to his son. I think he said he was going to file on some land." The plaintiff testified, without objection, that his father delivered the deed to him shortly after its execution. Apparently, Andrew Anderson decided to abandon his homestead, for the evidence is undisputed that he never went near the land after he made his entry; and under the law he was, of course, required to take up his residence thereon within six months after making entry. If the deed had never been delivered and was in the possession of Andrew Anderson, why did he continue to preserve the deed? Why did he keep and guard it for more than eight years after he had decided to abandon his homestead entry? From his standpoint the deed was of no use, and should have been destroyed. Not so with the plaintiff, however. It is true he was probably in doubt as to what, if any, rights he had by virtue thereof. But nevertheless it appears, both from the testimony of Udgard and Mrs. Scramstad, that plaintiff did believe the deed would be of some value to him in case trouble arose among the heirs. Hence, there was some reason for plaintiff's preserving the deed which his father had given to him; but there was absolutely no reason why the father should have preserved this deed throughout the years, if he had it in his possession. The contention of the defendant that the plaintiff took the deed from a drawer in a certain bureau where the father kept it is based upon the testimony of Mrs. Scramstad that the plaintiff took it from such drawer in September, 1916; but that occurrence was more than three months after the father had died, and in the meantime the plaintiff had been, and was then, making that place his home. Is there any reason why the son, after the father's death, might not have decided to put his valuable papers in the same bureau drawer where the father, while alive, used to keep his?

But the evidence shows clearly that the plaintiff had the deed in his possession before the father died. Udgard testified that the plaintiff exhibited the deed to him several weeks before the father's death; and Larson, one of plaintiff's attorneys, testified that plaintiff exhibited the deed to him before the father's death. Hence, the case of the plaintiff does not rest alone upon his testimony to the effect that the father de-

livered the deed to him, and upon the presumption arising from his possession thereof at the time it was offered for record, and subsequent thereto.

Plaintiff's possession of the deed raised a strong presumption that it was delivered to him at the time it was executed. Comp. Laws 1913, § 5496. It is also presumed that a person is innocent of crime or wrong; that private transactions have been fair and regular; and that the law has been followed. Comp. Laws 1913, subds. 1, 19 and 33, § 7936.

These presumptions are all in harmony with the theory that the deed was delivered to the plaintiff. For if the deed was not delivered then Andrew Anderson did not carry out his intentions as expressed when he executed the deed; he went out to the Dickinson land office, and committed a crime in stating under oath, as part of his application to make homestead entry, that he did not own more than 160 acres of land; the plaintiff committed larceny in obtaining possession of the deed; and the father, Andrew Anderson, after having abandoned all idea of delivering the deed to his son, nevertheless kept the deed for nine long years. It seems to me that when the evidence is construed in the light of applicable presumptions, it shows that the deed was delivered to the plaintiff at or about its date.

But while I am of the opinion that the evidence shows a delivery of the deed to the plaintiff, I am inclined to the view that he is precluded from claiming under it. The evidence shows that the father, during his lifetime, exercised full dominion over the premises in controversy, and in every respect treated them as his own. He mortgaged them (together with an adjoining quarter) for $4,300. He sold and conveyed part of them. About three months before his death he leased the premises for three years to his two youngest sons, and the plaintiff signed as one of the subscribing witnesses to the lease. The plaintiff procured the scrivener who prepared the will; and after execution it was delivered to the plaintiff. About ten days after the father's death the plaintiff took the will to the county judge's office, and instituted proceedings to have the will admitted to probate. The plaintiff signed and verified the petition for probate of the will. In such petition it was averred that the estate of said decedent consisted of one half section of land in Romness township, in Griggs county, which did not exceed in value the sum of $12,000; of goods, chattels, and personal property of the value

of about $3,000; and that the probable amount of debts due and unpaid left by the deceased was $4,400. The inventory and appraisement in the probate proceedings shows that the land was appraised at $10,000, and is encumbered in the sum of $4,300; and that all the personal property of the deceased was of the value of $3,532.63.

In the will a bequest of $500 was made to each of four children, including the plaintiff. The will further provided that all the remainder of the estate should be divided equally among all of testator's six children. The plaintiff admitted that he had received and accepted the $500 bequeathed him in the will. It seems clear that the decedent at the time he made and published his last will and testament was under the impression that the quarter in controversy was his property, and was being disposed of by, and would be distributed in accordance with the terms of, the will. In fact this is virtually conceded by plaintiff's counsel, for in their brief in this court they say: "It may well be conceded, and in fact we are satisfied, that the fact is that after Anderson, Sr., concluded to abandon his homestead entry, there was a tacit understanding on the part of both him and Henry that the latter would not make any claim under the deed, or it may have been that both believed that the deed was no longer of any effect when the old man abandoned his homestead entry." The testimony of the scrivener also shows that at the time the will was drawn in March, 1916, the testator, in discussing its terms, referred to the land in question as his property and as property disposed of by the will. The plaintiff seems to have put the same construction on the will when he petitioned to have it admitted to probate. In these circumstances, it seems to me that the plaintiff is precluded from claiming that he is the owner of the land in controversy. For it is a well-settled rule in equity that a person will not be permitted to hold both under and against a will. Herbert v. Wren, 7 Cranch, 374, 378, 3 L. ed. 374, 377. In other words, he may not (with a full knowledge of the situation) take any beneficial interest under a will, and at the same time set up any right or claim of his own, *de hors* the will and adverse to it,—even though such claim otherwise is legal and well founded,—which defeats, or in any way prevents the full effect and operation of every part of the will. Bigelow, Estoppel, 6th ed. pp. 733, 734; Jarman, Wills, 6th ed. pp. 532 et seq.; Story, Eq. Jur. 14th ed. § 1454; Pom. Eq. Jur. 3d ed. §§ 462 et seq.; 40 Cyc. 1959 et seq.;

Hyde v. Baldwin, 17 Pick. 303, 308; Fry v. Morrison, 159 Ill. 244, 42 N. E. 774; Drake v. Wild, 70 Vt. 52, 39 Atl. 248; Utermehle v. Norment, 197 U. S. 40, 49 L. ed. 655, 25 Sup. Ct. Rep. 291, 3 Ann. Cas. 520.

BIRDZELL, J., concurs.

BEULAH COAL MINING COMPANY, a Corporation, Appellant, v. KARL HEIHN, JR., and Rosina Heihn, Respondents.

(180 N. W. 787.)

Mines and minerals — mining rights may be separated from surface.

1. A mining right may be separated from the surface, which may be held by one person and the mining right by another; and the ownership of mines, whether opened or unopened, may exist distinct from the ownership of the surface.

Mines and minerals — method of severing mine and surface of land by conveyance stated.

2. The severance of a mine and the surface of lands may be accomplished by a conveyance of the mines and minerals, or by a conveyance of the land with a reservation or exception as to the mines and minerals.

Mines and minerals — surface and minerals held by separate titles in severalty after severance.

3. After severance, the surface and minerals are held by separate and distinct titles in severalty, and each is a freehold estate of inheritance.

Mines and minerals — exception in deed held not void for uncertainty and to reserve to grantor of surface title in mineral.

4. In this case the grantor inserted in the granting clause in the deed the following provision: "Excepting and reserving unto the grantor, its successors and assigns, forever, all coal and iron upon or in said land, and also the use of such surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same." It is *held* that, in absence of statutory provisions to the contrary, this provision is not void for

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NOTE.—On effect upon remote grantee, of reservation or exception of mineral rights, see note in 4 L.R.A.(N.S.) 477.

On the question of title to surface and minerals severable, see notes in 24 Am. St. Rep. 554, and 140 Am. St. Rep. 951.

uncertainty or indefiniteness, and that it excepted the coal and iron deposits from the operation of the deed, and that the fee title thereto was retained in the grantor.

Covenants — covenant of seisin broken as soon as deed delivered where grantor not seised of property.

5. Where the grantor is not seised of property which his deed purports to convey, the covenant of seisin is broken as soon as the deed is made and delivered, and an immediate right of action accrues to the grantee for its breach.

Covenants — when substantial or nominal damages may be had for breach of covenant stated.

6. If there is merely a technical breach of the covenant, the grantee is entitled to merely nominal damages; but in cases where the grantor, at the time of the execution and delivery of the deed, is not in fact or in law seised of the premises to which the covenant relates, a cause of action, for substantial damages, accrues immediately upon the delivery of the deed.

Assignments — cause of action for breach of covenant of seisin assignable.

7. Under § 5446, Comp. Laws 1913, a cause of action for the breach of a covenant of seisin is assignable.

Covenants — damages for breach of covenant of seisin is consideration paid with interest.

8. In cases where the conveyance passes nothing to the grantee, the measure of damages for the breach of the covenant of seisin is prima facie the consideration paid by the grantee and interest on such sum.

Assignments — assignee may recover same damages for breach of covenant of seisin in that grantee might have recovered.

9. Where an action for breach of a covenant of seisin is brought by an assignee of the grantee, and it is shown that the assignee paid to his assignor the same consideration which the assignor paid to his grantor, the assignee is entitled to recover the same damages that the grantee might have recovered if he had maintained the action.

Opinion filed December 9, 1920.

From a judgment of the District Court of Mercer County, *Hanley*, J., plaintiff appeals.

Reversed.

Newton, Dullam, & Young, for appellant.

A reservation is a clause in a deed whereby the grantor reserves some new thing to himself issuing out of the things granted and not *in esse*

before. 4 Kent, Com. 468; Marshall v. Trumball, 28 Conn. 183, 73 Am. Dec. 667; Winston v. Johnson, 42 Minn. 401, 45 N. W. 958; Devlin, Deeds, § 979.

The language used, whether technically an exception or reservation, sufficiently severed the mineral rights from the title to the surface. Moore v. Griffin (Kan.) 4 L.R.A.(N.S.) 477, 83 Pac. 395; Gould v. Howe, 131 Ill. 490, 23 N. E. 602.

The separation of estates may be accomplished by an exception in the deed conveying the lands by which the grantor carves out and retains the right to the minerals in the land. The right retained by the exception is the ownership of the minerals. Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 18 L.R.A. 702, 34 Am. St. Rep. 645, 25 Atl. 597; Koen v. Bartlet, 41 W. Va. 559, 31 L.R.A. 128, 56 Am. St. Rep. 884, 23 S. E. 664.

Edward S. Allen and *Theodore Koffel,* for respondents.

The reservation in the deed was insufficient to reserve in grantor the coal rights therein mentioned. Bowne v. Wolcott, 1 N. D. 415; Bowne v. Wolcott, 1 N. D. 497, 17 L.R.A.(N.S.) 1186; Dahl v. Stakke, 12 N. D. 334; Mercer Co. St. Bank v. Hayes, 34 N. D. 640.

This appellant is a remote grantee. It cannot maintain this action. Bull v. Beiseker, 16 N. D. 296.

Christianson, Ch. J. This is an action to recover damages for breach of covenants of seisin, right to convey, quiet enjoyment, and warranty. The case was tried to a jury, and resulted in a directed verdict in favor of the defendants, and plaintiff has appealed from the judgment entered upon the verdict.

The question presented on this appeal is whether the trial court erred in directing a verdict in defendants' favor. A determination of that question requires an examination of the evidence.

The undisputed evidence shows that on August 31, 1910, the Northwestern Improvement Company, the then owner of certain lands in section 7, township 144, range 87, in Mercer county, in this state, conveyed the same to Karl Heihn, Sr., by a warranty deed, the granting clause of which contained the following reservation: "Excepting and reserving unto the grantor, its successors and assigns, forever, all coal and iron upon or in said land, and also the use of such surface as may be necessary for exploring for and mining or otherwise extracting and

carrying away the same." On June 8, 1914, Karl Heihn, Sr., conveyed the same lands by a warranty deed, containing no reservation or exception whatever, to the defendant Karl Heihn, Jr. On February 5, 1918, the defendants Karl Heihn, Jr., and Rosina Heihn, his wife, conveyed, by a deed containing the usual covenants of seisin, right to convey, quiet enjoyment, and warranty, to the Beulah Coal & Mining Company, "its successors and assigns, forever, all those veins and parcels of lands lying and being in the county of Mercer, and state of North Dakota, and described as follows, to wit: All those seams, strata, deposits, and mines of coal lying and being within and under" the same lands originally conveyed by the Northwestern Improvement Company to Karl Heihn, Sr.

The deed also contained a covenant that said Karl Heihn, Jr., and Rosina Heihn, his wife, did "grant, bargain, sell, and convey unto the party of the second part (Beulah Coal & Mining Company), its successors and assigns, the right to enter into and under said lands, and to take and employ all usual, necessary, proper, or convenient means for working, mining, excavating, making merchantable, and removing the said deposits of coal, and the coal from under adjacent, coterminous, and neighboring lands, without entering upon the surface of the lands hereinbefore described, and to make, build, construct, and maintain in, through, and under the said lands all structures, machinery, roads, ways, excavations, airshafts, drains, drainways, openings, and conveniences necessary for the mining and removal of said deposits of coal from said land, and from adjacent, coterminous, and neighboring lands, and should any depression, subsidence, damage, or injury whatsoever be caused or occasioned to the surface of said lands by reason of the mining operations thereunder, the grantee, its successors and assigns, shall make compensation to the grantors, their heirs, executors, administrators, and assigns therefor, in the amount of the damage or injury so caused or occasioned, not exceeding, however, the sum of fifty dollars ($50) an acre, the grantors having reserved to themselves the title to the surface of said lands."

This suit involves, and is predicated upon a breach of the covenants contained in, the following paragraph of the deed:

"And the said Karl Heihn, Jr., and Rosina Heihn, his wife, parties of the first part, for themselves, their heirs, executors, administra-

tors, and assigns, do covenant with the party of the second part, its successors and assigns, that they are well seised in fee of the land and premises aforesaid, and have good right to sell and convey the same in manner and form aforesaid, and that the same are free from all encumbrances whatsoever, and the above bargained and granted land and premises in the quiet and peaceable possession of said party of the second part, its successors 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."

On July 31, 1918, the Beulah Coal & Mining Company conveyed all its interest, right, and title in and to said property to the plaintiff (Beulah Coal Mining Company) by deed of conveyance. At the same time the former company executed and delivered to the latter company a written assignment of all claims, demands, and causes of action which it had against the defendants by reason of a breach of any of the covenants contained in the deed executed and delivered by the defendants to the Beulah Coal & Mining Company. The evidence shows that the Beulah Coal & Mining Company, at the time it purchased the coal interests from the defendants, paid a consideration of $10 per acre therefor. The Beulah Coal Mining Company was organized to take over the properties and business of the Beulah Coal & Mining Company; and all the properties of that company were transferred to it for the same consideration which that company paid therefor.

During the course of the trial, plaintiff offered to reconvey to the defendants the property involved in this suit, upon the repayment to it of the consideration which the defendants received therefor when they conveyed it to the Beulah Coal & Mining Company.

The question is, Do these facts establish a prima facie case in favor of the defendant for substantial damages? For appellant disclaims any desire to have the judgment disturbed if it is entitled to merely nominal damages.

Defendant contends:

1. That the reservation or exception in the deed is void; and that, hence, defendants had a good title to the property they conveyed, and there was no breach of the covenants of the deed.

2. That even though the reservation was valid, and defendants in fact had no title to the property they conveyed, nevertheless there is

no evidence showing that plaintiff or its assignor has sustained any damages. These propositions will be considered in the order stated.

(1) Under the first contention it is argued:

(a) That the clause, in the deed given by the Northwestern Improvement Company to Karl Heihn, Sr., which purported to except all coal and iron deposits and reserve title thereto in the grantor, was ineffectual, and did not prevent the title to such deposits from vesting in the grantee named in the deed, for the reason that the nature, length, width, and thickness of the mineral deposits sought to be reserved were not stated as required by § 5518, Comp. Laws 1913.

(b) That even though § 5518, supra, be deemed inapplicable to the deed in question, the clause is, under general rules of law applicable to such clauses, void for uncertainty and indefiniteness.

The deed in question was executed and delivered August 31, 1910, and recorded in the office of the register of deeds of Mercer county, on November 21, 1910. The statute invoked by defendants was not in existence at that time. That statute was approved, and became effective, March 17, 1911. See chapter 304, Laws 1911. That statute did not purport to be retroactive, but operated prospectively only. Hence, it clearly has no application to the deed in controversy, and in no manner affected the validity of the clause in that deed which is the primary cause of this controversy.

Minerals in place are land, and may be conveyed as other lands are conveyed. "A mining right may be separated from the surface, which may be held by one person and the mining right by another, and the ownership of mines, whether opened or unopened, may exist distinct from the ownership of the surface. There may be as many different owners as there are strata; thus, one person may own the surface, another may be entitled, by conveyance, to the iron, another to the limestone, and still another to the stratum of coal. After severance, the surface and minerals are held by separate and distinct titles in severalty, and each is a freehold estate of inheritance. . . . Since under modern law, livery of seisin—as the distinguishing feature between corporeal and incorporeal hereditaments—has been supplanted by deed and registration, there is nothing incongruous in considering a grant of the substratum a grant of land as much as is a conveyance of the surface itself, and so it is the general rule that whether the granted

right therein be deemed a corporeal or an incorporeal hereditament, it should be conveyed or granted as land itself." 18 R. C. L. pp. 1174, 1175. "The severance of a mine and the surface of lands may be accomplished by a conveyance of the mines and minerals, or by a conveyance of the land with a reservation or exception as to the mines and minerals. There is no substantial difference between these two methods in the result accomplished; for a reservation will be construed as an exception where that is the plain intent, and the grantor will retain in himself a fee simple estate in the portion reserved. And so the fact that subsequent to the severance of the minerals from the surface estate a conveyance of the land is made in which no reservations or exceptions of the minerals are set forth does not extinguish the rights of the mineral owner nor vest any of the mineral rights in the grantee of such a conveyance." 18 R. C. L. pp. 1175, 1176. Contracts excepting ores and minerals from grants of land, with a reservation of the right to enter upon the portion thereof granted, are in accordance with long-established usage, and have been invariably held by the courts to be valid; and not to be contrary to, but in harmony with, public policy. 18 R. C. L. p. 1176. The practice of excepting ores and minerals from grants of land has been adopted not only by individuals, but by the government. Thus the United States has for some time made it a practice to except from the grant, by appropriate recitals in the patent, coal deposits in lands classified as coal lands in this state. The clause inserted in such patent reads thus: "Reserving, also, to the United States all coal in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine, and remove coal from the same upon compliance with the conditions of and subject to the limitations of the Act of June 22, 1910." 36 Stat. at L. 583, chap. 318, Comp. Stat. § 4666, 6 Fed. Stat. Anno. 2d ed. p. 608. Of course, under such patents the coal deposits, if any, are severed from the surface. The patentee becomes the owner of the surface of the land, while the United States remains the owner in fee of the coal deposits beneath it; and such coal deposits are "subject to disposal by the United States in accordance with the provisions of the coal land laws in force at the time of such disposal." Act June 22, 1910, § 3, 36 Stat. at L. 583.

The phraseology of the clause in controversy in this case clearly indicates that it was the intention of the grantor to sever the coal deposits

from the surface, and to retain in the grantor the ownership in fee of all coal and iron deposits which might exist in the land. There is nothing uncertain as to what is excepted from the operation of the grant,—it is the iron and coal deposits contained in the soil. An exception quite similar to the one involved in this case was construed by this court in Northwestern Improv. Co. v. Oliver County, 38 N. D. 57, 164 N. W. 315, and it was held that by virtue of such exception the grantor remained the owner of an interest in the land; that such interest was subject to taxation as property belonging to the grantor; and that the grantor might properly maintain a statutory action to determine adverse claims to the interest or estate so retained.

We have this situation, therefore, in this case: the defendants sold, and by their deed purported to convey, to the Beulah Coal & Mining Company, certain property which they did not own, and in which they had no interest. Hence, the covenant of seisin was broken immediately upon the delivery of the deed. For "it is well established by the great weight of authority that a covenant of seisin runs in the present in reference to the date of the deed, in contradistinction to a covenant of warranty, or for quiet enjoyment, which runs in the prospective, and that, in the event of its not being true when made, there is a breach of it *eo instanti,* as soon as the deed is made and delivered, and an immediate right of action accrues to the vendee for its breach, and the rights of the parties must be determined by the condition of the title at the date of the covenant." 7 R. C. L. p. 1156.

(2) The defendants admit that, if the reservation or exception in the deed was valid, there was a breach of the covenant of seisin; but they assert that such breach was technical only, and that unless and until the grantee is evicted, it and its assigns are limited in recovery to nominal damages merely. The rule contended for by defendants has the support of respectable authority; but we do not believe it the correct one in cases where the grantor, at the time of the covenant, was not in fact or in law seised of the premises to which the covenant relates. In such cases we believe it to be the better doctrine that a cause of action, for substantial damages, accrues as soon as the deed containing the covenant is delivered. Nothing to the contrary was said in Bowne v. Wolcott, 1 N. D. 415, 48 N. W. 336. In that case the grantor was the owner of the full equitable and beneficial title to the land, but the

naked legal title was held by the United States. The grantee, therefore, received the full equitable and beneficial title, and in the ordinary course of events the United States would transfer to him the naked legal title which it held in trust for him. In these circumstances the court held that the grantee was entitled to recover nominal damages only. The court, however, recognized that a distinction existed between that case and a case wherein the grantor had no interest to convey.

In its decision in that case this court said: "The defendant, at the time he executed the conveyance in this case, was the owner of the full equitable and beneficial title to the land, but the naked legal title was held by the United States. We hold that the covenants in the deed can be satisfied by nothing less than the conveyance of the absolute title, both legal and equitable. Lord Ellenborough, in Howell v. Richards, 11 East, 633, 103 Eng. Reprint, 1150, said: "The covenant of title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey. The legal title being in the government, defendant did not convey to the plaintiff complete equitable, legal, and alienable title to the land, and hence the covenant of seisin was broken.

"The more difficult question in this case, however, pertains to the correct rule of damages for such breach. It has been repeatedly announced, both in the textbooks and in the decided cases, that the measure of damages for the breach of the covenants of seisin was the consideration paid, with interest. In numberless cases this statement stands unqualified. But an examination of the cases will show that in each instance a paramount title had been asserted, or *that the grantee took nothing by the conveyance, for the reason that the grantor had no interest to convey.* . . . In this case, however, there is no allegation that no interest passed by the deed. On the other hand the complaint is pregnant with the thought that some estate did pass to the grantee, and the findings show that the full equitable title—everything but the mere legal title—passed to the grantee, that possession passed, and that such possession has remained undisturbed, and no hostile title has ever been in any way asserted. The record thus made would negative the idea that the grantee took nothing. It is perfectly clear that he took a very valuable interest. No reconveyance is tendered."

In the instant case the mineral estate had been severed from the surface estate. Such severance created two estates, which were, and are, "as distinct as if they constituted two different parcels of land." 18 R. C. L. p. 1184; Delaware & H. Canal Co. v. Hughes, 183 Pa. 66, 63 Am. St. Rep. 743, 38 Atl. 568, note in 140 Am. St. Rep. 956. The defendants owned only the surface estate. They had no more interest or estate in, or right to convey, the mineral estate than they had intent in, or right to convey, an adjoining tract of land owned and occupied by someone else. Hence, nothing passed by the conveyance of the defendants, and a cause of action for substantial damages accrued to the grantee as soon as the defendants executed and delivered the deed. Devlin, Real Estate, 2d ed. §§ 888, 889, 894; Bowne v. Wolcott, 1 N. D. 415, 420, 48 N. W. 336. In such cases,—cases where the conveyance passes nothing to the grantee,—the measure of damages for the breach of the covenant of seisin is prima facie the consideration paid by the grantee and interest on such sum for the time during which the grantee *derived no benefit from the property not exceeding six* years. Devlin, Real Estate, 2d ed. § 894; Comp. Laws 1913, § 7149. And where such action is brought by an assignee of the grantee, and it is shown that the assignee paid the same consideration to his assignor which the assignor paid to the grantor, the assignee is entitled to recover the same damages that the grantee might have recovered if he had maintained an action. 7 R. C. L. pp. 1176, 1177, § 96. See also Bowne v. Wolcott, 1 N. D. 417, 419, 48 N. W. 336.

Defendants assert that the covenant of seisin does not run with the land. That is the holding of this court in Bowne v. Wolcott, 1 N. D. 417, 48 N. W. 336, and we see no reason for overruling that decision. The plaintiff in this case does not, however, predicate its right of action alone upon the conveyance which it received from the Beulah Coal & Mining Company. It also holds a written assignment of the claim or cause of action which the Beulah Coal & Mining Company had against the defendants for the breach of the covenants of the deed; and such assignment is alleged in the complaint. As already indicated, the plaintiff corporation took over all the business and assets of the Beulah Coal & Mining Company, and the transfer of the cause of action against the defendants was not an isolated transaction, but part of, and incidental to, the general transfer of such business and assets. Upon the trial

defendants' counsel conceded that plaintiff was entitled *to recover nominal damages for the breach of the covenant of seisin.* Of course, this concession could only have been made upon the theory that the plaintiff was the owner of the claim sued upon. And we see no reason why the plaintiff might not become the assignee of the claim upon which this action is predicated. For our statute provides: "A thing in action, arising out of the violation of a right of property or out of an obligation, may be transferred by the owner." Comp. Laws 1913, § 5446. "A thing in action is a right to recover money or other personal property by a judicial proceeding." Comp. Laws 1913, § 5445. See also Kimball v. Bryant, 25 Minn. 496; Van Doren v. Relfe, 20 Mo. 455; 15 C. J. p. 1300; 5 C. J. p. 850; Pom. Code Rem. 3d ed. § 126.

It follows from what has been said that the trial court erred in *directing a verdict in favor of the defendants.* The judgment appealed from is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

BRONSON, GRACE, and BIRDZELL, JJ., concur.

ROBINSON, J. (dissenting). The complaint is based on mere theory and conjecture concerning the value of mineral rights contained in conveyances of certain land, but the complaint does not contain a covenant that such mineral rights have any value whatever. The principle is the same as if the reservation had been of mineral located a hundred miles below the surface of the earth, only that in the latter case it would appear to a certainty that the reservation was of no value. In this case the reservation may or it may not be of any value. There is neither averment, presumption, or proof of value. Hence the court properly directed a verdict for the defendant.

In August, 1910, the Northwestern Improvement Company conveyed the land in question and other lands to Karl Heihn, Sr., by warranty deed, recorded November, 1910, reserving all coal and iron upon or in the land. In June, 1914, Karl Heihn, Sr., conveyed the land to Karl Heihn, Jr. In February, 1918, Karl Heihn, Jr., and wife conveyed to Beulah Coal & Mining Company all deposits and mines of coal on a part of the land. The deed contained a general warranty of title to the land and of quiet and peaceable possession. The Beulah Coal & Mining

Company reorganized and took a new name, to wit, the Beulah Coal Mining Company, and it conveyed to itself by its new name the mineral rights in the land, though, of course, nothing was paid for the conveyance. Then, for a failure of title and a failure of quiet possession, this suit is brought to recover $1,200 as the price of the mineral rights to 120 acres of land. But there is no proof showing a failure of quiet possession, no proof showing any coal or iron in or upon the land, no proof to show actual damages. True in an ordinary deed of real property the detriment caused by the failure of title or quiet possession is presumed to be the consideration paid. Comp. Laws, § 7141. But this is not a conveyance of land. It is merely a right to go upon certain land to explore it and to take and carry away any coal that may perchance be found. The statute applies to an ordinary conveyance of land which the purchaser has an opportunity to see and to agree upon its value. And so the principle should apply to a transfer of personal property, but not to a mere chance in a lottery or anything which may or may not exist. For aught that appears from the proof and pleading, the deed under which plaintiff claims may not convey any property. There may not be a pound of coal on or in the land, and if there is any coal it may be such that it would not pay to mine it.

In such a case the burden is on the plaintiff to aver and prove actual damages. The action should be dismissed without prejudice.

INDEX

ASSAULT AND BATTERY.

DIVORCE.

1. This is an appeal from an order made by Judge Cooley denying a motion to vacate a judgment of divorce. In 1907, some thirteen years ago, the plaintiff being fifty-nine and the defendant sixty-three, this action was commenced. From the complaint and the answer it appears that each party charged the other with cruelty and desertion. On the trial each party was represented by distinguished counsel. Many witnesses were sworn. The testimony covers 500 pages, and it sustains the judgment. The moving affidavits, which impute bribery to the trial judge, are in no way convincing. And it appears that for twelve years the defendant has accepted the benefits of the judgment; she has been receiving $300 a month. In 1909 an appeal from the judgment was dismissed because the plaintiff had then accepted some of the benefits awarded her. (Tuttle v. Tuttle, 19 N. D. 748). Tuttle v. Tuttle, 79.
2. In 1915 there was duly entered in this case a judgment dissolving the marriage between the plaintiff and the defendant and awarding to the plaintiff a liberal alimony, giving to her the custody of the minor child, and making for its future support a special and generous allowance of $500 a year for twenty years. In 1919 the court made an order forbidding the plaintiff to move from her residence into an apartment house and from permitting the child to go in company with Mrs. Grant, a teacher in the public schools, and a lady of the highest repute. Held, that there is no sufficient reason for the order and it is reversed. Thorp v. Thorp, 113.
3. In an action for divorce, where the plaintiff alleged as grounds for divorce wilful neglect and extreme cruelty, the evidence is examined and it is held that the grounds alleged are not established. Johnson v. Johnson, 606.

DOMICIL.

1. Under ¶ 6 of § 2501, Comp. Laws 1913, the residence of an individual in a given county is lost by voluntary absence from the county for one year or more, regardless of the receipt by such person of poor relief during a part of the period of absence. Kost v. Sheridan County, 75.

ELECTIONS.

1. For reasons stated in the opinion it is held that a woman may be a candidate for nomination as delegate to a national nominating convention. State ex rel. Rudd v. Hall, 294.
2. Candidates whose names appear upon a general election ballot in a column devoted to "individual nominations" may properly object to the printing at the head of the same column of the names of candidates (also nominated by individual petitions) in such a way as to indicate that the latter represent a national political party with which the plaintiffs do not affiliate. State ex rel. Baier v. Hall, 395.

FRAUDULENT CONVEYANCES.

1. In three actions brought by a judgment creditor to subject to the lien of the judgment three parcels of land purchased subsequent to the judgment, each in the name of a different child of the judgment debtor, the evidence showed that the children in whose names the land had been purchased had advanced to their father and mother from time to time moneys in excess of the amounts paid by the father upon the purchase price at the time of purchase; also that the children in whose names the lands were purchased worked away from home, earning money, part of which was turned over to the father, with an understanding that he would repay it at a subsequent time whenever they might desire to invest it. It is held: (1) The evidence fails to show that the lands were purchased in the names of the various grantees in circumstances indicating that they held the title in trust for their father as the beneficial owner. (2) Where a conveyance is attacked by a judgment creditor as fraudulent, the burden of proving the fraud rests upon the one asserting it. (3) The relationship of parent and child existing between parties to an alleged fraudulent conveyance does not remove from the creditor the burden of proving fraud. (4) Relationship of parent and child between the parties to an alleged fraudulent conveyance is a circumstance calling for a close scrutiny of the transaction, but is not itself a badge of fraud; nor does it give rise to a presumption supplanting proof. (5) Suspicious circumstances alone are not equivalent to proof of fraud, and do not warrant a judgment in the face of satisfactory evidence of bona fide debtor and creditor relations between parent and child. (6) An insolvent debtor's preference of his child is not fraudulent as a matter of law. First National Bank v. Mensing, 184.

2. In this case the plaintiff brings suit against his mother and her judgment creditors to quiet his title to certain property in Minot. He appeals from a judgment against him. It appears that by a judicial proceeding the mother, a woman of forty-five years, conveyed all her good productive property to her minor son, who had no means only such as he obtained from the mother or her property, and a small salary, barely enough to defray the expenses of his living. Manifestly the conveyances were made in trust for the mother, and with intent to hinder, delay, and defraud her judgment creditors. By statute, every transfer of property made and every judicial proceeding taken to hinder, delay, or defraud any creditor, is void against all creditors of the debtor. Phillips v. Phillips, 376.

3. In an action for a conversion of an automobile seized by a sheriff upon a warrant of attachment, where the plaintiff claims to have previously purchased the same from the judgment debtor, it is held that the questions of whether such purchase was made in good faith and for value, and whether there was an actual change of possession and delivery of such automobile,