REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

May 8, 1917 to August 20, 1917.

H. A. LIBBY
REPORTER

VOLUME 37

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

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

H. A. LIBBY, Reporter.
J. H. NEWTON, Clerk.

PRESENT JUDGES OF THE DISTRICT COURTS.

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

OFFICERS OF THE BAR ASSOCIATION.

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

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

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

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

COUNTY COURTS.

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

Constitutional Provisions.

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

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

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

Statutory Provisions.

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

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

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

CASES REPORTED IN THIS VOLUME.

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TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

C. W. DAVIS, as Administrator of the Estate of J. W. Johnston, Deceased, v. IDA M. CALDWELL, as Executrix of the Last Will and Testament of W. A. Caldwell, Deceased, and W. C. Caldwell.

(163 N. W. 275.)

Chattel mortgages — execution of — witnesses — filing of — notice — witness described as mortgagee — mistake — beneficial interest — mortgagee fully disclosed by name — mortgage filed — operates as notice.

When the law relating to the execution of chattel mortgages provides that a chattel mortgage in order to be entitled to be filed must be signed by the mortgagor in the presence of two witnesses, who must sign the same as witnesses thereto, or that such chattel mortgage, where it is not so witnessed, shall be acknowledged before some official qualified to take the acknowledgment, such law is complied with notwithstanding the name of one of the witnesses to such chattel mortgage appears through mistake, inadvertence, or clerical error, in the body of the chattel mortgage as mortgagee, where such mortgage shows on its face that such witness had no beneficial interest in such mortgage, and also discloses the name of the mortgagee who has a beneficial interest in such chattel mortgage, and to whom the debt is owing which is secured by the chattel mortgage, and such chattel mortgage when filed operates to give sufficient notice to all subsequent purchasers and encumbrances of the mortgagee's interest in and lien on the property described in such mortgage.

Opinion filed May 8, 1917.

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

Judgment reversed.

J. A. McKee, for appellants.

An agent who acts solely for his principal and by and under the direction of his principal, and without knowledge of any wrong and without any bad intent or motive, is not liable as for conversion of property taken by him in such capacity and under such circumstances. Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363; Leuthold v. Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218; 2 C. J. p. 827, and cases cited in note 82.

A chattel mortgage, to be effectual against third parties, must point out the parties, so that a third person, by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify them. 6 Cyc. 1022, and notes and cases cited therein.

Where ambiguity exists as to the mortgagee, the real test in determining the same is to ascertain the beneficial party or mortgagee—that is, who owns the claim secured. World Mfg. Co. v. Hamilton-Kenwood Cycle Co. 123 Mich. 620, 82 N. W. 528; 6 Cyc. 1022, and note and cases cited; First Nat. Bank v. Ridenour, 46 Kan. 707, 27 Pac. 150.

Where one of the witnesses is by mistake described in the mortgage as mortgagee, and it can be clearly ascertained who is the mortgagee or real party in interest as such, the mortgage will be held good. Watts v. First Nat. Bank, 8 Okla. 645, 58 Pac. 782.

Where a third party takes a chattel mortgage on property, actually knowing of the existence of another or first mortgage on same property, the fact that such first mortgage was not filed, or that it was not even the proper subject of filing, makes no difference, and he takes his mortgage subject to the other unfiled mortgage. Comp. Laws 1913, § 6758; 6 Cyc. 1074, and notes and cases cited.

Even constructive notice in such cases is generally held sufficient. 6 Cyc. 1077, 1079, and notes and cases cited; Allen v. McCalla, 25 Iowa, 464, 96 Am. Dec. 56; Comp. Laws 1913, 6758; Thompson v. Armstrong, 11 N. D. 198, 91 N. W. 39.

A party under such circumstances must bring himself squarely under the statute before he can recover. Thompson v. Armstrong, supra; 6 Cyc. 1079, and notes and cases cited therein.

Davis & Warren, for respondents.

It is well settled that if the acts in fact constitute a conversion, the existence of the agency will not shield the agent from liability. There are no accessories in conversion. Hodgson v. St. Paul Plow Co. 50 L.R.A. 649, note.

So far as the recording acts or filing laws are concerned, it is immaterial as to who the actual mortgagee is. The instrument must speak for itself, and when an individual mortgagee is also one of the witnesses, the mortgage cannot be filed, because it is not properly witnessed, and the filing of an instrument not the proper subject of filing does not convey notice to third persons. Donovan v. St. Anthony & D. Elevator Co. 8 N. D. 585, 46 L.R.A. 721, 73 Am. St. Rep. 779, 80 N. W. 772; Pease v. Magill, 17 N. D. 166, 115 N. W. 260; Havemeyer v. Dahn, 48 Neb. 536, 33 L.R.A. 332, 67 N. W. 489; Freerks v. Nurnberg, 32 N. D. 587, 157 N. W. 119; 3 C. J. 1382, and cases cited in note 24.

GRACE, J. The complaint in the case is one for conversion, and alleges among other things that the defendants unlawfully and wrongfully took possession of, sold, and converted to their own use certain personal property, to wit, one black mare named "Maud," one black horse named "Tom," and one bay horse named "Colonel," of the value of $700, and demands judgment for such sum, with interest.

The complaint further alleges that on the 1st day of April, 1912, Earl M. Alcorn, at La Moure, La Moure county, North Dakota, executed and delivered to the plaintiff his certain chattel mortgage upon certain personal property described as follows: One black mare named "Maud," one black horse named "Tom," and one bay horse named "Colonel;" such chattel mortgage being given to secure three promissory notes,—one note for $550, one note for $87.30, and one note for $232.18. That said mortgage was executed in the presence of two witnesses, and was on the 12th day of April, 1912, at the hour of 2 o'clock P. M. filed in the office of the register of deeds of La Moure county, North Dakota. That said plaintiff is the owner and holder of said notes and mortgage, and that there is due and unpaid thereon $811.26, with interest.

The complaint further states a proper demand.

Defendants for answer enter a general denial, except that they admit the allegations contained in paragraphs 1 and 2 of the complaint. The

defendants further allege that on the 16th day of March, 1911, Earl M. Alcorn, then of Dickey county, North Dakota, executed and delivered to Ida M. Caldwell, as the executrix of the last will and testament of W. A. Caldwell, deceased, a certain chattel mortgage upon the same property mentioned in the complaint, which was given to secure a note for $300 payable to the estate of W. A. Caldwell, which note became due on the 1st day of November, 1911.

Defendants further allege that such mortgage was a first lien upon all such property, and that such lien of the defendants was a prior lien to any lien claimed by the plaintiff. That default occurred in the payment of said note and mortgage, and the said defendant Ida M. Caldwell, as executrix as aforesaid, on or about the 20th day of March, 1913, acting through the defendant W. C. Caldwell, who then and there acted as her authorized agent, lawfully took possession of the property described in the complaint and foreclosed the same by advertisement as required by law, to satisfy the amount due upon such mortgage; that such property was sold to the highest bidder for cash, and full report of such chattel mortgage sale, as by law required, was made to the register of deeds of Dickey county on the 11th day of April, 1913, and that the proceeds of such sale were $316, and no more.

Defendants further alleged that plaintiff in this action had full, complete and actual knowledge of the execution and delivery to the defendant Ida M. Caldwell, as executrix of the estate of W. A. Caldwell, of the mortgage described in defendants' answer, and also had notice of the fact that the debt secured thereby was unpaid, and that plaintiff took his said mortgage with such actual notice.

The facts in the case are as follows: The plaintiff claims title to the property in question under and by virtue of a certain chattel mortgage executed by Earl M. Alcorn on April 1, 1912, to J. W. Johnston, now deceased, which said chattel mortgage was filed in the office of the register of deeds of La Moure county, North Dakota, on April 12, 1912, which mortgage was given to secure notes aggregating $811.26, with interest at 10 per cent, and in which chattel mortgage is described the property involved in this controversy. On the 16th day of March, 1911, and prior to the execution and filing of the mortgage from Alcorn to Johnston, Alcorn, who then resided in Dickey county, North Dakota, executed and delivered to the estate of W. A. Caldwell, mortgagee, a

certain chattel mortgage bearing date the 15th day of March, 1911, which was filed in the office of the register of deeds of Dickey county on the 16th day of March, 1911, which said chattel mortgage was given to secure a note for $300 due on or before November 1st 1911, which said chattel mortgage also covers and describes the same personal property as that involved in the controversy in this action, and which is also the same personal property described in the chattel mortgage executed by Alcorn to Johnston. It appears in such chattel mortgage to the estate of W. A. Caldwell, that the name of W. C. Caldwell was mentioned four different times as mortgagee; and it also appears from the said mortgage that the estate of W. A. Caldwell was named as mortgagee once, and it is stated in said mortgage as follows: "The said mortgagor, being justly indebted to the mortgagee in the sum of $300, which is hereby confessed and acknowledged, according to the terms and conditions of a certain promissory note for said sum, payable to the estate of W. A. Caldwell, mortgagee, as follows: One note for $300 due on or before November 1, 1911, with interest at the rate of 10 per cent per annum after date until paid; has for the purpose of securing the payment of said note and interest, granted, bargained, sold, and mortgaged, and by these presents does grant, bargain, sell, and mortgage unto the said mortgagee all that certain personal property described as follows:"

Then follows a description of the property involved in this controversy.

William Nesbit and W. C. Caldwell were witnesses to such mortgage.

W. C. Caldwell, claiming to be the agent of Ida M. Caldwell, the executrix of the estate of W. A. Caldwell, took possession of such property, and sold the same at chattel mortgage sale for the sum of $316, and made due report of such chattel mortgage sale to the register of deeds of Dickey county on the 11th day of April, 1913.

The appellant makes several assignments of error, but we find it necessary to consider only one assignment, with its subdivisions, which is as follows: "The evidence is insufficient to justify the findings and decision of the court in the above-entitled action, because: (1) the evidence clearly shows that the mortgage 'exhibit E' was duly executed, delivered, and filed, and was duly and legally foreclosed, and that the property alleged by the plaintiff to be converted was taken under the foreclosure of said mortgage upon default in payment of the debt

secured. (2) There is absolutely no evidence or proof that J. W. Johnston, the original plaintiff herein, who was named as mortgagee in the mortgage 'exhibit D,' did not have knowledge of the existence of the mortgage 'exhibit E' at the time he accepted the mortgage 'exhibit D,' or at the time of the execution thereof, and the evidence is therefore not sufficient to sustain the court's findings of fact No. 14."

With the foregoing we may include an error of law by the court, namely, the court's conclusion of law No. 1 to the effect that such chattel mortgage "exhibit E" was not entitled to be filed under the laws of the state of North Dakota, and that the filing thereof did not operate to give constructive notice thereof.

There is but a single question involved in this action, and that is whether or not the chattel mortgage executed by Alcorn to the estate of W. A. Caldwell on the 16th day of March, 1911, was invalid for the reason that in different portions of such chattel mortgage the name of W. C. Caldwell appears as mortgagee, and his name also appears as one of the witnesses. If W. C. Caldwell was a proper witness to such mortgage, such mortgage is a valid mortgage and a first lien upon such property. If he was not a proper person to witness such chattel mortgage, then in all probability, as far as innocent purchasers are concerned, such mortgage was not a valid mortgage, and did not give constructive notice to such subsequent purchasers. The respondent claims that W. C. Caldwell was not a proper witness to such chattel mortgage "exhibit E," and could not witness the same, for the reason that in different parts of such chattel mortgage he was named as mortgagee, and for that reason the said chattel mortgage was not entitled to be filed of record in Dickey county, and therefore was not notice to subsequent purchasers in good faith. The disposition of this question disposes of this case.

To arrive at a proper conclusion in this case it is necessary to know who is a mortgagee as defined by law. In 27 Cyc. 1045 we find the following: "The provisions of a mortgage are not personal to the party named in it as mortgagee, but are for the benefit and security of the real owner of the debt thereby secured."

It would seem, therefore, that the benefits of the chattel mortgage provisions are for the real owner of the debt secured thereby. Thomas on Mortgages, § 427, defines a chattel mortgage thus: "A transfer of

personal property as security for a debt or obligation in such form that upon failure by the mortgagor to comply with the terms of the contract the title to the property will be in the mortgagee."

Jones on Chattel Mortgages, § 1, speaks thus of chattel mortgages: "A conditional sale of chattels as security for the payment of a debt or the performance of some other obligation."

The well-understood and generally accepted meaning of the expression "chattel mortgage" is that it is an instrument executed by one, who is termed the mortgagor, to one, who is termed the mortgagee, whereby the mortgagor gives to the mortgagee a lien upon personal property as security for a debt or the performance of some obligation. The main office of a chattel mortgage is the security of a debt or obligation, and whoever owns the debt which is secured is really and in fact the mortgagee, because it is the debt owing to him which is really secured by the instrument. And if it appears from the body of the instrument in a chattel mortgage to whom the debt which it secures is really owing, such a one is in truth and in fact the real mortgagee, for the reason that he is the one to whom the debt is owing, and it is to secure such debt the chattel mortgage is given, and it must follow that the person to whom the debt is owing is the beneficial mortgagee.

In the case of Lawrenceville Cement Co. v. Parker, 21 N. Y. Civ. Proc. Rep. 263, 15 N. Y. Supp. 577, it was stated: "A mortgage given to the *cashier* of a bank *in his individual name, but to secure a debt due to the bank,* is a valid security in favor of the *bank.*" This doctrine was affirmed in 133 N. Y. 622, 30 N. E. 1150.

The main question in this case is, What debt was intended to be secured? There can be but one answer to that question, and that is, it was the debt to the estate of W. A. Caldwell. If the chattel mortgage in question did not secure a debt to the estate of W. A. Caldwell, it did not secure any debt. In the mortgage itself it recites that it is given to the estate of W. A. Caldwell, mortgagee, to secure a note for $300. The estate of W. A. Caldwell was then the actual beneficial mortgagee. This question was also squarely passed on in First Nat. Bank v. Ridenour, 46 Kan. 711, 27 Pac. 150. W. C. Caldwell appearing therefore to have no beneficial interest in such chattel mortgage, "exhibit E," such chattel mortgage being given to secure a debt due the estate of W. A. Caldwell, in which W. C. Caldwell had no interest, he was a compe-

tent witness to such chattel mortgage; and the fact that his name appears at different times in such chattel mortgage by clerical error, inadvertence, mistake, or otherwise, would in no manner affect his competency as a proper witness to such chattel mortgage. Such being the case, and W. C. Caldwell being a proper witness with Nesbit, the chattel mortgage "exhibit E" was properly filed and was constructive notice to all subsequent purchasers.

The case of Donovan v. St. Anthony & D. Elevator Co. 8 N. D. 585, 46 L.R.A. 721, 73 Am. St. Rep. 779, 80 N. W. 772, is not in point, as it is an entirely different state of facts. In the mortgage involved in that case the mortgagee was the person beneficially interested. He was the one to whom the debt was owing. The mortgage was given to secure a debt due *him* as such *mortgagee,* and is an entirely different and distinct case from the one at bar, for the reason that in the case at bar the debt was owing to the estate of W. A. Caldwell, named also as mortgagee, and W. C. Caldwell has no interest in the debt, and the mortgage was not given to secure any debt due to him. The decision in this case in no manner conflicts with the decision and rule of law laid down in Donovan v. St. Anthony & D. Elevator Co. The rule laid down in the Donovan v. St. Anthony & D. Elevator Co. Case is a proper rule, and we should have followed it if the facts were the same, but the facts are entirely different so far as the mortgagees are concerned.

The case of Pease v. Magill, 17 N. D. 166, 115 N. W. 260, is not in point; for in that case the chattel mortgage was neither acknowledged nor contained two witnesses as required by law.

The judgment of the District Court is in all things reversed, and the case is remanded for further proceedings in harmony with this opinion.

BRIDGET A. HART v. FIRST STATE BANK OF MOTT, a Corporation.

(163 N. W. 530.)

Bill of sale — mortgage — assignment of — consideration — signature — obtaining — deception — fraud.

In this case it appears that, under a bill of sale and a pretended assignment of a mortgage, defendant took and sold two horses on which the plaintiff had a valid mortgage lien for $754. The bill of sale was made without any consideration, and the alleged assignment is a mere nullity. The signature to the assignment was obtained by smoothness and deception, and without any consideration. Hence, in taking and selling the horses the bank was a mere wrongdoer.

Opinion filed May 8, 1917.

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

Defendant appeals.

Affirmed.

B. W. Shaw, for appellant.

Chattel mortgages must be renewed within three years from time of filing or cease to be valid as against purchasers and encumbrancers in good faith. Comp. Laws 1913, § 6762.

To be a purchaser or encumbrancer in good faith, entitled to the protection of the statute, one must have made the purchase or taken the security after the expiration of the period allowed in which to refile. First State Bank v. King, 37 Okla. 744, 47 L.R.A.(N.S.) 668, 133 Pac. 30.

Where the mortgagee authorizes and consents to the sale of the mortgaged property, he thereby waives the lien of the mortgage and cannot thereafter recover the property or its value from the purchaser. New England Mortg. Secur. Co. v. Great Western Elevator Co. 6 N. D. 407, 71 N. W. 130; Peterson v. St. Anthony & D. Elevator Co. 9 N. D. 55, 81 Am. St. Rep. 528, 81 N. W. 59; Carr v. Brawley, 43 L.R.A. (N.S.) 302, and note, 34 Okla. 500, 125 Pac. 1131; Cortelyou v. Jones, 6 Cal. Unrep. 475, 61 Pac. 918.

Conversion takes place at the time of demand and refusal to deliver

the property, and the recoverable damages is the value of the property at time of demand. Towne v. St. Anthony & D. Elevator Co. 8 N. D. 200, 77 N. W. 608; Citizens Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 339, 131 N. W. 266.

Where a motion is made by defendant at the close of the trial for a directed verdict, and the court orders the action dismissed, the parties have had a trial *on the merits.* 23 Cyc. 1215; Kain v. Garnaas, 27 N. D. 297, 145 N. W. 825.

Jacobsen & Murray, for respondent.

The verdict upon trial is not attacked. Therefore, appellant's ground for reversal is limited to the errors committed by the trial court, as set out in his assignments. Swallow v. First State Bank, 35 N. D. 608, 161 N. W. 207; Guild v. More, 32 N. D. 475, 155 N. W. 44.

Where a litigant moves for a directed verdict, he must stand or fall upon the grounds only as set out therefor. Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558; Howie v. Bratrud, 14 S. D. 648, 86 N. W. 747; Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 799; Minder & J. Land Co. v. Brustuen, 31 S. D. 211, 140 N. W. 251; Yeager v. South Dakota C. R. Co. 31 S. D. 304, 140 N. W. 690; Davis v. C. & J. Michel Brewing Co. 31 S. D. 284, 140 N. W. 694.

The motion for a directed verdict must set out in particular wherein the evidence fails to make out a cause of action, and a *general* motion is a nullity. McLain v. Nurnberg, 16 N. D. 145, 112 N. W. 243; Drake v. Great Northern R. Co. 24 S. D. 19, 123 N. W. 82; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Mor. Min. Rep. 26; Cummings v. Ross, 90 Cal. 68, 27 Pac. 62; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Menk v. Home Ins. Co. 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; Updegraff v. Tucker, 24 N. D. 171, 139 N. W. 366; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; Haight v. Tryon, 112 Cal. 4, 60 Pac. 318; Jackson v. Ellertson, 15 N. D. 533, 108 N. W. 241; King v. Lincoln, 26 Mont. 157, 66 Pac. 836.

The assignment of a debt secured by a mortgage carried with it the security. Comp. Stat. 1913, §§ 6733, 6886, 6915.

Delivery of the instrument, either actual or constructive, forms part of the contract of indorsement as well as of the transfer by assignment. 7 Cyc. 814, 815.

In order to constitute one a bona fide purchaser and entitled to protection as such, he must have purchased in good faith, without notice, and for a valuable consideration. Cass v. Gunnison, 58 Mich. 108, 25 N. W. 52; 35 Cyc. 345, note 1.

A wrongful sale of goods whereby a person who has a part interest therein, or a lien thereon, is deprived of the same, is a conversion whether the wrongdoer be an owner of another part, or a lien holder, or a stranger to the property. 38 Cyc. 2028; More v. Burger, 15 N. D. 345, 107 N. W. 200.

The verdict was not challenged in the lower court. It cannot be challenged here. Swallow v. First State Bank, and Guild v. More, supra; Kain v. Garnaas, 27 N. D. 297, 145 N. W. 825.

There is only one way an adjudication of the merits can be had, and that is by a verdict of a jury or by direction of the court, or without direction of the court. The dismissal of the former action amounts merely to a nonsuit. 14 Cyc. 401, 403, 405, 425; 23 Cyc. 1136; Comp. Laws 1913, § 7597, subd. 2.

Robinson, J. In this case the bank appeals from a judgment against it for the conversion of two horses on which the plaintiff had a chattel mortgage. There was no motion for a new trial and no showing that the evidence was insufficient to sustain the verdict. The bank admitted the taking and sale of the horses, and claimed the right to do so under a bill of sale by the owner and an alleged assignment of a mortgage. It appears that on June 22, 1909, J. C. Filler and Cora Filler made to the plaintiff two promissory notes,—one for $354 and one for $400,—and to secure the same they made to the plaintiff a mortgage on the horses in question, with another team of black horses and some crops. The mortgage was duly filed and was given for money loaned, and it has not been paid. The alleged assignment is on a blank printed form, and a paper about the size of a blank promissory note. It is as follows:

For value received, I hereby assign, transfer, and set over unto First State Bank, Mott, North Dakota, that certain chattel mortgage, dated on the 22d day of June A. D. 1909, together with the notes secured thereby, made by J. C. Filler and Cora B. Filler as mortgagor, to Bridget

A. Hart as mortgagee, which has been filed in the office of the register of deeds of the county of Hettinger, State of North Dakota, on the 29th day of June A. D. 1909, being No. 3194 of the chattel mortgages of said county.

In witness whereof, I have hereunto set my hand this 12th day of August, A. D. 1911.

In presence of
J. J. Grest
F. G. Orr

Bridget A. Hart.

The promissory notes secured by the mortgage were not delivered to the bank. The plaintiff testified that she never agreed to make any such assignment and she never knowingly put her signature to it. That in May, 1911, she was in the bank and signed some papers giving the bank a lien for seed wheat. That she talked about the security, the money, and seed lien. She did not read the papers. She thought they would be as they had stated. I talked with Orr, the cashier and manager of the bank, he laid out the papers and showed us where to sign. He said, sign here, and she signed. He called on Mrs. Filler to sign first and then Bridget Hart signed, and then J. C. Filler signed. She says there were quite a good many papers. One was a copy of another. The plaintiff's counsel vainly tried to show the conversations regarding the papers and the whole transaction, and it was objected to and erroneously ruled out. To the question: Was there anything said about the assignment of a mortgage, and objection was made and the objection sustained. And so by the fault of the counsel for defendant the plaintiff was not permitted to show the matter as fully as she might have done.

In regard to the bill of sale the evidence is that it was without any consideration and it was made for the purpose of keeping off creditors. Mr. Orr, the bank manager, was present and heard the testimony impeaching himself, and the assignment and the bill of sale, and he did not attempt to deny any of it. There was no denial. No testimony was offered to show that either the bill of sale or the assignment was made for any consideration, or to show any conversation or negotiation regarding the alleged assignment, or the reason for such an unusual thing as an assignment of a mortgage without the notes.

The whole evidence leads to these clear and positive conclusions:

(1) The bill of sale was made without any consideration, and the bank was not a purchaser in good faith or for value.

(2) The alleged assignment of the mortgage is a mere nullity. The signature was obtained by smoothness and deception of the bank manager.

(3) In taking and selling the horses the bank was a mere wrongdoer, and subject to exemplary damages.

(4) The defendant pleads a former adjudication in a suit which was dismissed, but it is entirely clear the record fails to show any adjudication on the merits of this case.

When the defendant moved for a directed verdict, the court might well have directed a verdict in favor of the plaintiff. The judgment is affirmed.

CHRISTIANSON, J. I concur in result.

JOHN WACKER v. GLOBE FIRE INSURANCE COMPANY, of Huron, South Dakota, a Corporation.

(163 N. W. 263.)

Insurance — contract for — application — action on — not maintainable.

A party cannot recover judgment against an insurance company on a mere application for an insurance contract.

Opinion filed May 8, 1917.

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

Affirmed.

Hyland & Madden for appellant.

It is not necessary that a contract of insurance be in writing. Comp. Laws 1913, § 4913, subd. 4, § 4961; King v. Phœnix Ins. Co. 6 Ann. Cas. 618, and note, 195 Mo. 290, 113 Am. St. Rep. 678, 92 S. W. 892.

By the great weight of authority it is held that a parol contract for insurance is valid unless such contract is expressly prohibited by statute. Firemen's Ins. Co. v. Kuessner, 164 Ill. 275, 45 N. E. 540; Continental Ins. Co. v. Roller, 101 Ill. App. 77.

Such a contract is valid notwithstanding a usage requiring such contracts to be in writing, or even a stipulation in the policy that it must be indorsed by a designated representative of the company. Emery v. Boston M. Ins. Co. 138 Mass. 398; Brown v. Franklin Mut. F. Ins. Co. 165 Mass. 565, 52 Am. St. Rep. 535, 43 N. E. 512; Campbell v. American F. Ins. Co. 73 Wis. 100, 40 N. W. 661; Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co. 19 How. 318, 15 L. ed. 636; Summers v. Mutual L. Ins. Co. 12 Wyo. 369, 66 L.R.A. 812, 109 Am. St. Rep. 992, 75 Pac. 937; American Horse Ins. Co. v. Patterson, 28 Ind. 17; Baldwin v. Chouteau Ins. Co. 56 Mo. 151, 17 Am. Rep. 671; Angell v. Hartford F. Ins. Co. 59 N. Y. 171, 17 Am. Rep. 322.

All such stipulations in insurance policies are not binding, and do not bar recovery where the insured could not be charged with notice of the conditions. Kelly v. Commonwealth Ins. Co. 10 Bosw. 82; Kennebec Co. v. Augusta Ins. & Bkg. Co. 6 Gray, 204; New England F. & M. Ins. Co. v. Robinson, 25 Ind. 536; Audubon v. Excelsior Ins. Co. 27 N. Y. 216.

Fisk, Murphy, & Linde and *Gardner & Churchill,* for respondent.

It is quite true that a contract of insurance may be established by parol. But in this case there has been and is no contract shown or proved to exist between the parties. Brink v. Merchant's & F. United Mut. Ins. Asso. 17 S. D. 235, 95 N. W. 929; Ferguson v. Northern Assur. Co. 26 S. D. 346, 128 N. W. 125; Nordness v. Mutual Cash Guaranty F. Ins. Co. 22 S. D. 1, 114 N. W. 1092; Pickett v. German F. Ins. Co. 39 Kan. 697, 18 Pac. 903; Costello v. Grant County Mut. F. & Lightning Ins. Co. 133 Wis. 361, 113 N. W. 639; Dorman v. Connecticut F. Ins. Co. 41 Okla. 509, 51 L.R.A.(N.S.) 873, 139 Pac. 262; Shawnee Mut. F. Ins. Co. v. McClure, 39 Okla. 535, 49 L.R.A.(N.S.) 1054, 135 Pac. 1150; McCracken v. Travelers Ins. Co. — Okla. —, 156 Pac. 640; John R. Davis Lumber Co. v. Continental Ins. Co. 94 Wis. 472, 69 N. W. 156.

By the terms of the application, the insurance was not to become effective until that application had been approved by the company at

its home office. This is a valid provision, and no liability attaches until compliance therewith is had. Pickett v. German F. Ins. Co. 39 Kan. 697, 18 Pac. 903; Porter v. General Acci. F. & L. Assur. Corp. 30 Cal. App. 198, 157 Pac. 825; Merchants' & Bankers' Fire Underwriters v. Parker, — Tex. Civ. App. —, 190 S. W. 525; Lowe v. St. Paul F. & M. Ins. Co. 80 Neb. 499, 114 N. W. 586; St. Paul F. & M. Ins. Co. v. Kelley, 2 Neb. (Unof.) 720, 89 N. W. 997; Walker v. Farmers' Ins. Co. 51 Iowa, 679, 2 N. W. 583; Atkinson v. Hawkeye Ins. Co. 71 Iowa, 340, 32 N. W. 371; Armstrong v. State Ins. Co. 61 Iowa, 212, 16 N. W. 94; O'Brien v. New Zealand Ins. Co. 108 Cal. 227, 41 Pac. 298; Bowen v. Mutual L. Ins. Co. 20 S. D. 103, 104 N. W. 1040; Comp. Laws 1913, Civ. Code, § 5889; Shawnee Mut. F. Ins. Co. v. McClure, 39 Okla. 535, 49 L.R.A.(N.S.) 1054, 135 Pac. 1150; McCracken v. Travelers' Ins. Co. — Okla. —, 156 Pac. 640.

Robinson, J. Plaintiff appeals from a judgment of the district court in an action to recover from defendant $1,000 on a mere application for an insurance policy, which reads in part thus:

To
Globe Fire Insurance Co.
Of Huron, South Dakota.

I, John Wacker, of Denhoff, P. O. County of Sheridan, state of N. D., hereby make application to the Globe Fire Insurance Company, of Huron, South Dakota, for insurance against loss or damage by fire or lightning for the term of one year commencing on the 11th day of Sept. 1915. [This is followed by a description of a threshing machine outfit] . . . and that this insurance does not take effect until approved and accepted by the company at its office at Huron, South Dakota. . . . That this application may be referred to in the policy to be issued thereon as a part of said policy and as a basis on which said company shall issue the same; and that there is no other insurance on above-described outfit. I hereby agree that the company shall not be bound by any representations of the agent not contained in the application or policy, and I hereby release the company from all liability should any part of the premium be not paid promptly when due.

It appears that on September 14th, appellant's threshing outfit was burned. His application was rejected and his premium tendered back. The insurance application was signed by the plaintiff, but not by the company or any of its agents. It did not constitute a contract of insurance. A contract is an agreement to do or not to do a certain thing. It is essential to the existence of a contract that there should be parties capable of contracting and that they did actually contract. In this case the proof shows only a mere application for an insurance contract. The judgment of the District Court is affirmed.

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

JOHN F. PHILBRICK v. JAMES D. McDONALD.

(163 N. W. 538.)

Void tax deed — void judgment — land — title to.

A void tax deed and a void judgment do not make a perfect title to land.

Opinion filed May 8, 1917.

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

Affirmed.

F. H. Register and *Miller, Zuger, & Tillotson,* for appellant.

A judgment of a court of competent jurisdiction upon the merits of a controversy is conclusive between the parties and those in privity with them, upon every question of fact directly in issue and determined in the action. Brown v. Tillman, 121 Ala. 626, 25 So. 836; Bradish v. Grant, 119 Ill. 606, 9 N. E. 332; Gilmore v. Patterson, 36 Me. 544; Stokes v. Foote, 172 N. Y. 327, 65 N. E. 176.

A judgment by default is just as conclusive as one given upon trial where issue is joined. Crossman v. Davis, 79 Cal. 603, 21 Pac. 963; Barton v. Anderson, 104 Ind. 578, 4 N. E. 420; Johnson v. Jones, 58 Kan. 745, 51 Pac. 224; Howard v. Huron, 6 S. D. 180, 26 L.R.A. 498, 60 N. W. 803.

The doctrine of *res judicata* applies to a default judgment with the same validity and force as to a judgment rendered upon a trial of the issues. Mason v. Patterson, 74 Ill. 191; Venable v. Dutch, 37 Kan. 515, 1 Am. St. Rep. 260, 15 Pac. 520; Doyle v. Hallam, 21 Minn. 515; Greenabaum v. Elliott, 60 Mo. 25; Kloke v. Gardels, 52 Neb. 117, 71 N. W. 955.

Judgments rendered in proceedings strictly *in rem* are *inter omnes* by reason of the power and control of the state over the *res*, and irrevocably determine its status or title against all persons, irrespective of whether they had any other than constructive notice of the litigation, or whether they were parties in fact or not. Lord v. Chadbourne, 42 Me. 429, 66 Am. Dec. 290; Farrell v. St. Paul, 62 Minn. 271, 29 L.R.A. 778, 54 Am. St. Rep. 641, 64 N. W. 809; McClurg v. Terry, 21 N. J. Eq. 225; Miller v. Foster, 76 Tex. 479, 13 S. W. 529; Woodruff v. Taylor, 20 Vt. 65.

Newton, Dullam & Young, for respondents.

A perfect or merchantable title was contracted for. Such a title is one free from flaws, defects, and of such character as will insure to the purchaser perfect right to and quiet possession of the land. It should be free from litigation and palpable defects and doubts. It should be both legal and equitable, and fairly traceable from the records. Warvelle, Vend. & P. § 299; Justice v. Button, 38 L.R.A.(N.S.) 1, and note, 89 Neb. 367, 131 N. W. 736; Howe v. Coates, 97 Minn. 385, 4 L.R.A.(N.S.) 1170, 114 Am. St. Rep. 723, 107 N. W. 397; Devlin, Deeds, § 1477.

Respondent had the right to demand a perfect title of record. Turner v. McDonald, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; Sheehy v. Miles, 93 Cal. 288, 28 Pac. 1046; Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851; Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249; 2 Black, Judgm. p. 717, § 600.

In the action to quiet title, there was defect in parties defendant. 2 Black, Judgm. p. 717, § 600; Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811.

ROBINSON, J. The plaintiff brings this action to recover $500, with interest from July, 1912, as the balance due on a contract for the purchase and sale of an undivided half interest in a quarter section

of land then conveyed to the defendant by quitclaim deed, the plaintiff agreeing to perfect the title. The defense was a failure to perfect the title, and the plaintiff appeals from a judgment sustaining the defense.

The land in question is the undivided half of the N½ of the N½ of sec. 22—138—80, in Burleigh county. The title of plaintiff is based on a tax deed made by the county auditor of Burleigh county on a sale made in December, 1898, for the taxes of 1897, amounting to $11.62. The sale was made under the Laws of 1897, chap. 126, § 76. Each tract or lot must be struck off to the bidders who will pay the total amount of taxes, penalty, and cost charged against it for the smallest or least quantity thereof; and, if any tract remains unsold for want of bidders, the same shall be again offered before the sale closes, and if there be no other bidders the county treasurer shall bid for the same in the name of the county.

The tax deed is void on its face. It recites only one offer of sale to the highest bidder on the 6th day of December, 1898, of the following described tract or parcel of real property, situated in the county of Burleigh and state of North Dakota, to wit: "undivided one half of north one half of north one half of (N½ of N½), which property was returned delinquent for the nonpayment of taxes for the year 1897, amounting to eleven and 62/100 dollars." In the granting clause at the end of the tax deed there is a correct description of the land in question, but under the law the deed should have contained a correct description of the land offered for sale and then a correct description of the land granted by the deed. Every material averment of the deed points to the description which is fatally defective, and the proof shows no assessment of the land for taxation, no levy of any taxes, not tax sale or notice of sale, and no redemption notice.

To base title on this sandy foundation, the plaintiff brought an action in the district court of Burleigh county, entitled as follows:

James McDonald, Plaintiff,

v.

Ferris Jacobs, Jr., and All Other Persons Unknown, Claiming Any Estate or Interest in or Lien upon the Property Described in the Complaint, Defendants.

The complaint is in the statutory form, and it correctly describes

the land. The plaintiff, by his complaint, avers that on July 10, 1911, a judgment and decree of said district court was duly given in favor of said James McDonald against all said defendants, quieting the title of James McDonald to the title based upon said tax deed against all claims of Ferris Jacobs, Jr., and all other defendants mentioned in the action. The alleged judgment was entered under chap. 5, Laws of 1901, as amended by chap. 4, Laws 1905, providing for the service of a summons by publication on unknown and unnamed owners, whether of age or minors. Chapter 4 provides that service of a summons in such action may be had upon all the unknown persons in the manner provided by law for the service by publication upon defendants *whose residence is unknown;* and in such cases the law provides that before publication of the summons a certain affidavit must be filed in the office of the clerk of the court, and the affidavit should be accompanied by a return of the sheriff of the county in which the action is brought, stating that, after diligent inquiry for the purpose of serving the summons, he is unable to make personal service thereof. Comp. Laws 1913, § 7428. In this case there was no such certificate.

The original entry of the land was made by Henry N. Notmeyer, to whom there was issued a receiver's receipt and a government patent for the land in question, and it does not appear that his title has been divested. The record shows claims to the land by Nathan Lamb, Louis Notmeyer, J. A. Brown, John H. Richards; and they might well have been named as parties defendant. In such a statutory proceeding to quiet title to land against minors and persons unknown and unnamed, there must be a strict compliance with these statutes, and the statutes must be legal and valid. As there is no brief upon that question, we do not pass upon it.

The contract of plaintiff calls for a merchantable title, and his title is not merchantable.

Judgment affirmed.

M. S. STRINGER v. J. J. ELSAAS and A. H. Smart, as Sheriff of Nelson County, North Dakota.

(163 N. W. 558.)

Exempt property — levy upon — law — in defiance of — knowledge of exemption — exemplary damages — jury may award.

1. When in defiance or disregard of law a party levies on and sells property known to be exempt, a jury may award exemplary damages.

Attachment — execution — property — levy upon — person or officer — acts of — rights of others — regard for — must have — process of law — abuse of.

2. In levying on property under an attachment or execution, a person is bound to act with due regard for the rights of others and to refrain from abusing the process of the law.

Opinion filed May 8, 1917.

Action in Conversion.

From a judgment and order of the District Court of Nelson County, *Cooley,* J., defendants appeal.

Affirmed.

Frich & Kelly, for appellants.

Where property levied upon is claimed as exempt, and appraisers are selected, their report as to property and value is the best evidence, and oral testimony in reference thereto is incompetent. Comp. Laws 1913, §§ 7734, and 7735; Wood v. Bresnahan, 63 Mich. 614, 30 N. W. 206; Levi v. Groves, 3 Ohio L. J. 569, 7 Ohio Dec. Reprint, 508; 23 Century Dig. Title "Exemptions," § 153.

"The value of the homestead premises, as fixed by the appraisers in setting of a homestead, is conclusive until vacated in a direct proceeding brought for that purpose, and parol evidence is inadmissible to contradict such determination in a subsequent collateral action." 6 Enc. Ev. 529; Barney v. Leeds, 54 N. H. 128; Fletcher v. State Capital Bank, 37 N. H. 369; Globe Phosphate Co. v. Pinson, 52 S. C. 185, 29 S. E. 549; Comp. Laws 1913, §§ 5611–5615; 13 Enc. Ev. 560.

In their attempt to establish the value of the property, they should have shown the market value of similar goods either purchased or to

be purchased for purposes of replacement. Nightingale v. Scannell, 18 Cal. 315; Note to § 3333, Cal. Civ. Code, 2 Kerr's Cyc. Codes (Cal.) pp. 2191 et seq.

In order to bind a person by his acts or words, as a waiver, it must be shown that he acted or spoke with full knowledge of the facts and circumstances attending the creation of the right he is alleged to have waived. 13 Enc. Ev. 1021.

S. G. Skulason and *Ingman Swinland,* for respondent.

When plaintiff has proved that he was the owner of the property, and was within the statutory limit in value, the burden of proving that the property was not exempt was on defendant. 6 Enc. Ev. 557; Wagner v. Olson, 3 N. D. 74, 54 N. W. 286; Paddock v. Balgord, 2 S. D. 100, 48 N. W. 840; Thompson v. Peterson, 122 Minn. 228, 142 N. W. 307.

Exemplary damages are recoverable against one who knowingly sells exempt property, even if there is no actual malice. Galvin v. Tibbs, H. & Co. 17 N. D. 604, 119 N. W. 39; Cronfeldt v. Arrol, 50 Minn. 327, 36 Am. St. Rep. 48, 52 N. W. 857; Brown v. Bridges, 70 Tex. 661, 8 S. W. 502; Lynd v. Picket, 7 Minn. 184, Gil. 128, 82 Am. Dec. 79; Gardner v. Minea, 47 Minn. 295, 50 N. W. 199; Willis v. Noyes, 12 Pick. 324; Matteson v. Munro, 80 Minn. 340, 83 N. W. 153.

The amount is for the jury to determine. Wright v. Waddell, 89 Iowa, 350, 56 N. W. 650; Howard v. Rugland, 35 Minn. 388, 29 N. W. 63; Thompson v. Peterson, 122 Minn. 228, 142 N. W. 307.

A waiver is not presumed unless it is clearly proved. Every reasonable presumption will be made against it, especially when it relates to a constitutional right. 13 Enc. Ev. 559; Murphy v. Sherman, 25 Minn. 196; Pierce v. Boalick, 42 Pa. Super. Ct. 218.

The value of goods in such cases is not determined solely by the appraisement, but may be shown by the testimony of other witnesses who are familiar with the goods and values, and otherwise competent. The appraisement is not conclusive of the value. 6 C. J. p. 240, § 459; Douglass v. Hill, 29 Kan. 527.

The value either at time of asserting exemptions, or at time of trial, may be shown. Also, that it is under the limit. The owner of the goods is a competent witness as to value. So, of householders. The

competency of such witnesses rests largely in the discretion of the court. 13 Enc. Ev. 560, 562, 567; Roden v. Brown, 103 Ala. 324, 15 So. 598; Lynd v. Picket, 7 Minn. 184, Gil. 128, 82 Am. Dec. 79; 6 Ency. Ev. 558; Richter v. Harper, 95 Mich. 221, 54 N. W. 768; Lincoln Supply Co. v. Graves, 73 Neb. 214, 102 N. W. 457; Jensen v. Palatine Ins. Co. 81 Neb. 523, 116 N. W. 286; Langdon v. Wintersteen, 58 Neb. 278, 78 N. W. 501; Patterson v. Chicago, M. & St. P. R. Co. 95 Minn. 57, 103 N. W. 621.

Errors assigned but abandoned in argument need no attention. Minneapolis, St. P. & S. Ste. M. R. Co. v. Firemen's Ins. Co. 62 Minn. 315, 64 N. W. 902; Galvin v. Tibbs, H. & Co. 17 N. D. 602, 119 N. W. 39.

Where it clearly appears that, if errors were committed by the trial court in rulings on evidence, they could not and did not influence the jury, no prejudice can be claimed, and they would not constitute prejudicial error. Lynd v. Picket, 7 Minn. 184, Gil. 128, 82 Am. Dec. 79; Galvin v. Tibbs, H. & Co. 17 N. D. 600, 119 N. W. 39.

If counsel objected to any portion of the charge on account of omissions or error as to law or fact, it was their duty to call the court's attention to the same. Johnson v. MacLeod, 111 Minn. 479, 127 N. W. 497, 1120; Wickham v. Chicago, St. P. M. & O. R. Co. 110 Minn. 74, 124 N. W. 639, 994; Jacobson v. Great Northern R. Co. 120 Minn. 52, 139 N. W. 142.

Robinson, J. The plaintiff sues to recover from defendants for the conversion of personal property alleged to be worth $612.50. The jury returned a verdict in favor of the plaintiff for $550. The defendants appeal from the judgment and from an order denying a motion for a new trial.

It appears that, under a writ of attachment and a judgment against the plaintiff for $355.75, the defendants levied upon and sold all of plaintiff's household property, which was exempt from such levy and sale. The plaintiff was a resident of the state, and he duly claimed his exemptions.

By an appraisal made under the direction of the sheriff, the property was valued at $300. At a forced sale on execution it brought $366.75, and the evidence shows it was fairly worth about $450. Hence, it

seems the jury allowed plaintiff $100 as exemplary damages. The case was fairly tried, and the only real question is in regard to the exemplary damages. By statute it is provided:

Comp. Laws 1913, § 7168: "The detriment caused by the wrongful conversion of personal property is presumed to be:

"1. The value of the property at the time of the conversion, with the interest from that time.

. . . . . .

"3. A fair compensation for the time and money properly expended in pursuit of the property."

Sec. 7145: "In any action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to actual damages, may give damages for the sake of example and by way of punishing the defendant."

In this case the defendants and their counsel knew, or ought to have known, that the property levied on was exempt. The levy and sale was made in defiance or in disregard of the law, and it was manifestly oppressive. It was a gross abuse of the process of the law, and the plaintiff has been made a very considerable expense in trying to recover the value of his exempt property.

Under our statute when a debtor desires to claim exempt property by valuation, as per § 7731, then as per § 7733, he must make a schedule of all his personal property of every kind, and deliver the same to the officer having the attachment. The schedule must be subscribed and sworn to. Then, if there is any question in regard to the valuation being excessive, or if the property is in excess of the exemptions, the property must be appraised at the actual value of the several articles, and the value of each article must be set down in the inventory or by lots, with the value opposite each article or set of articles, and, from the appraisal so made, the debtor, his agent, or attorney may select property to the amount exempt. When the total value of the property is confessedly less than the exemption, then the appraisement answers no purpose whatever; it becomes an idle act. And so it was in this case. The sheriff's appraisal or valuation amounted to nothing, because there was no claim that the total value of the property was in excess of $500. The valuation might have been put at $5 or $500, without

in any manner affecting the exemption claim. The purpose of such a valuation is merely to enable the debtor to select property to the amount of his exemptions, and not to determine the value of the property in any subsequent proceeding.

In an action for the wrongful sale and conversion of property on a writ of execution, no court has ever held that the sheriff's appraisal was conclusive evidence of the value of the property. The appraisal is made for the sole purpose of determining the exemption right, and it can be given no force or effect, only so far as it bears on the exemption right. Judgment affirmed.

BRUCE, Ch. J. (dissenting). This is an appeal from a judgment for damages occasioned by the alleged unlawful sale of exempt property.

It is first alleged that the proof shows a waiver by the plaintiff of his right to exemptions, and that the court erred in his instruction, that "you are further instructed that you should find from a fair preponderance of the evidence in this case that the plaintiff, Stringer, at any time before the sale of this property upon execution, to wit, on the 12th day of August, 1910, waived his claim of exemptions, then you should find for the defendant."

The evidence shows that the plaintiff, Stringer, made a claim for exemptions on January 15, 1914. On January 28, 1914, he wrote to the defendant as follows: "How much of that furniture do you fellows want, and what pieces do you want to satisfy your claims? I will not let the range go, but I will let anything else go if you want to be reasonable." It also shows that in reply to this letter the defendant Elsaas wrote: "Will say that we are willing to let you have the range, providing you give us bill of sale on the rest of your furniture." It also shows that no bill of sale was given, but that afterwards, and before the sale by the defendant under his execution, the plaintiff made a redemand for the goods.

There was clearly no waiver of the right to the exemption. There was no offer to relinquish the right as to all of the property but to the range only. The offer was that the plaintiff would let *anything* go. It was not that he would let *everything* go. The fact that the words, "if you want to be reasonable," were added even to this offer, empha-

sizes this fact; and that it was contemplated that, in the selection of the goods and in their valuation, reason should be shown.

Even as to this offer there was no acceptance, but merely a counter-proposal. It was that the defendant would let the plaintiff keep the range, provided that he gave a bill of sale of the rest of the furniture. This counter offer was not accepted, and there was, therefore, no contract. The redemand of the goods also, and the reassertion by the owner of the claim for exemptions before the sale, reasserted the right, and must have made it clearly apparent to the defendant that the exemption was still relied upon.

I also agree with respondent that where, in defiance and disregard of law, a party levies on and sells property known to be exempt, a jury may award exemplary damages. 11 R. C. L. 559; Comp. Laws, 1913, § 1145.

I am satisfied, however, that the trial court erred in allowing plaintiff to testify in regard to the value of the goods in controversy, and that the report of the board of appraisers appointed at the instigation of the plaintiff was the best and only competent proof of the fact.

Section 208 of the Constitution merely provides that wholesome laws shall be passed "exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value shall be fixed by law." Sections 7729 to 7743 of the Compiled Laws of 1913 put this constitutional provision into operation, and provide for the nature, extent, and mode of claiming exemptions. Except as allowed by those statutes, no exemptions exist. Sections 7734 and 7735 of the Compiled Laws of 1913 provide for the selection of appraisers when a claim for exemptions has been made, and prescribe the duties of such appraisers when chosen in the manner prescribed. The appraisers must take an oath "to truthfully and honestly appraise the property of the debtor." The same must be "appraised at the actual value of the several articles," etc. Section 7737 requires the sheriff or other officer having any process of levy or sale to make return with his writ or warrant of any inventory and appraisement of any such exempted personal property. The evident purpose of these enactments is to provide a speedy means of fixing the value of property claimed as exempt, and of making a permanent official record of such

valuation. The appraisers constitute a quasi judicial body, and act for all parties. One of them is chosen by the owner, another by the creditor, and these two select a third person. It is only the property which is scheduled by the debtor and which is appraised by them that is exempt. Surely no creditor could, in the absence of fraud or palpable mistake, set aside their determination and afterwards levy on the property that they had held to be exempt and as coming within the statutory amount, on the ground that such values had been underestimated. Surely such a determination, in the absence of a proper proceeding to set it aside, should be conclusive upon the debtor. Wood v. Bresnahan, 63 Mich. 614, 30 N. W. 206; Levi v. Groves, 3 Ohio L. J. 569, 7 Ohio Dec. Reprint, 508; 6 Enc. Ev. 529; Barney v. Leeds, 54 N. H. 128; Globe Phosphate Co. v. Pinson, 52 S. C. 185, 29 S. E. 549.

We have carefully read the cases cited by counsel for respondent. The statement in 13 Enc. Ev. 567, that "the value at the time of asserting the right to hold it as exempt or at the time of trial may be shown," is based entirely upon the case of Roden v. Brown, 103 Ala. 324, 15 So. 598. That case, however, was a direct contest of the claim for exemptions, the notice of the contest of the claim being "accepted by the attorneys of the debtor." It does not appear that any appraisement had been had, or that any appraisement was provided for by the statutes of Alabama. In the case of Lynd v. Picket, 7 Minn. 184, Gil. 128, 82 Am. Dec. 79, the action was brought for an illegal levy on property especially declared by the statute to be exempt, and no question of appraisement or value as a basis to the right of exemption was involved. I do not at all see the applicability of 6 Enc. Ev. 558.

The other cases cited by counsel for respondent do not relate to claims for exemptions, but to levies by attachment merely, and where no such right was claimed or involved, and it must readily be seen that the situations are entirely dissimilar. In the case of an attachment, where no claim for exemptions is made, the appraisal is merely directed to be made for purposes of good faith and to prevent an excessive levy. The owner is not the moving party in such proceedings, nor does even the creditor base any right to the goods or to the lien on the fact of the appraisement or on their value. Section 7546 of the Compiled Laws of 1913, which relates to attachments, provides for an

inventory by the sheriff alone, and not by any board of appraisers which is appointed by both parties.

In the case of a claim for exemptions, the case is very different. The law, out of its grace and bounty, reserves to the debtor certain property to a certain amount, provided that the provisions of the statutes are complied with. The appraisers are appointed by both parties and represent both parties. While in the case of a mere attachment the debtor relies on his right to the property not necessary to the securing of the debt as a natural and fundamental right, in the case of a claim for exemptions, the constitutional provision is not self-executing, and his rights are only such as the statutes allow.

Since there is nothing to show how much of the verdict was for exemplary damages, and how much was based on the value of the goods, I am of the opinion that the admission of the evidence was prejudicial, and that the judgment should be reversed and a new trial be had.

BUCHANAN ELEVATOR COMPANY, a Corporation, v. JENNIE LEES and James Lees.

(163 N. W. 264.)

Husband and wife — living together — general power of attorney — wife's business done by husband — business ventures — wife takes risk — loan of money — contract for — wife cannot repudiate.

When a man and wife live together, and he does business in her name under a general power of attorney, she must take the risk of his business ventures. She cannot repudiate a contract for the loan of money because it was used to pay a loss on a grain-option deal.

Opinion filed May 9, 1917.

Note.—Although in general the relation of husband and wife does not give rise to any presumption that the husband is acting in the transaction as agent of his wife, if the wife allows a husband to have charge of her property, and knows that he is contracting with reference thereto in her name, and, with knowledge of the facts, she ratifies such contracts, a general agency to act for her, so as to bind her for similar contracts made by him in her name and as her agent, will be presumed, and she will be estopped to deny the same, as will be seen by an examination of the cases in note in 17 L.R.A.(N.S.) 223, on proof of husband's agency for wife by evidence of similar acts by husband.

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

Affirmed.

Knauf & Knauf, for appellants.

Testimony which is mere conclusion of fact, irresponsive, hearsay, remote, not within the *res gestæ,* touching collateral issues or secondary, should not be received over objections. Martin v. Shannon, 92 Iowa, 374, 60 N. W. 646; Rosencrance v. Johnson, 191 Pa. 520, 43 Atl. 360; Young v. Doherty, 183 Pa. 179, 38 Atl. 587; Bradley v. Freed, — Tenn. —, 51 S. W. 124.

Conversations between two persons touching the interests of a third person (party to the action), who is not present, are not admissible. Mitcham v. Schuessler, 98 Ala. 635, 13 So. 618; Fox v. Windes, 127 Mo. 502, 48 Am. St. Rep. 648, 30 S. W. 325; Evans v. Evans, 155 Pa. 572, 26 Atl. 755; McGregor v. Wait, 10 Gray, 72, 69 Am. Dec. 305; May v. Little, 25 N. C. (3 Ired. L.), 27, 38 Am. Dec. 707; Hussey v. Elrod, 2 Ala. 339, 36 Am. Dec. 420; Goodrich v. Tracy, 43 Vt. 314, 5 Am. Rep. 283; Butler v. Price, 115 Mass. 578; Martin v. Rutt, 127 Pa. 380, 17 Atl. 993; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Games v. Stiles, 14 Pet. 322, 10 L. ed. 476.

The fact that the gambling option grain orders were sent in by plaintiff or plaintiff's stationery, with full knowledge on the part of plaintiff's actual manager and official, proves that plaintiff must have known defendant's financial inability to buy or pay for the large amounts of grain on which he only bought options. Therefore, the question of how much money he had lost on such deals was competent. Lear v. McMillen, 17 Ohio St. 464; Wagner v. Hildebrand, 187 Pa. 136, 41 Atl. 34; Phelps v. Holderness, 56 Ark. 300, 19 S. W. 921; Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 765.

Plaintiff knew that defendant was gambling in options, and all its acts were done in the light of this knowledge. Dows v. Glaspel, 4 N. D. 261, 60 N. W. 60; Melchert v. American U. Teleg. Co. 3 McCrary, 521, 11 Fed. 193.

Such disguises the courts have always sought to pierce, and to ascertain the real intention of the parties. Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Melchert v. American U. Teleg. Co. 3 McCrary, 521, 11 Fed. 193; Edwards v. Hoeffinghoff, 38 Fed. 639; Embrey v. Jemi-

son, 131 U. S. 336, 344, 33 L. ed. 172, 175, 9 Sup. Ct. Rep. 776; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 762; Colderwood v. McCrea, 11 Ill. App. 543; Carroll v. Holmes, 24 Ill. App. 458; Beveridge v. Hewitt, 8 Ill. App. 467; Beadles v. McElrath, 85 Ky. 230, 3 S. W. 152; Flagg v. Baldwin, 38 N. J. Eq. 219, 48 Am. Rep. 308; Kirkpatrick v. Bonsall, 72 Pa. 155; Waite v. Frank, 14 S. D. 626, 86 N. W. 645; Rogers v. Marriott, 59 Neb. 759, 82 N. W. 21; Sprague v. Warren, 26 Neb. 326, 3 L.R.A. 679, 41 N. W. 1115; North v. Phillips, 89 Pa. 250; Cobb v. Prell, 5 McCrary, 85, 15 Fed. 774; Re Green, 7 Biss. 344, Fed. Cas. No. 5,751; Crawford v. Spencer, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713; Lowry v. Dillman, 59 Wis. 199, 18 N. W. 4; Watte v. Wickersham, 27 Neb. 457, 43 N. W. 259; Williams v. Tiedemann, 6 Mo. App. 276; Hill v. Johnson, 38 Mo. App. 392.

It was clearly error for the court to permit plaintiff to show that none others had lost money through it by gambling in options. State v. Trott, 36 Mo. App. 29; Ah Kee v. State, — Tex. Crim. Rep. —, 34 S. W. 269; Goldstein v. State, — Tex. Crim. Rep. —, 35 S. W. 289; State v. Hildreth, 31 N. C. (9 Ired. L.) 440, 51 Am. Dec. 372; Com. v. Cooper, 5 Allen, 495, 81 Am. Dec. 762.

Where an agent knowingly participates in an illegal transaction, he cannot recover for his commissions, and the law will leave him without remedy in case of loss. Crawford v. Spencer, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; Phelps v. Holderness, 56 Ark. 300, 19 S. W. 921; Embrey v. Jemison, 131 U. S. 336, 345, 33 L. ed. 172, 175, 9 Sup. Ct. Rep. 776.

It is sufficient if defendant's purpose was to gamble, and the plaintiff knew this when it went upon the board of trade to make such large purchases and sale for defendant. Phelps v. Holderness, 56 Ark. 300, 19 S. W. 921; McCormick v. Nichols, 19 Ill. App. 337; Beveridge v. Hewitt, 8 Ill. App. 482; Miles v. Andrews, 40 Ill. App. 155; Coffman v. Young, 20 Ill. App. 82; Embrey v. Jemison, 131 U. S. 336, 33 L. ed. 172, 9 Sup. Ct. Rep. 776; Dows v. Glaspel, 4 N. D. 257, 60 N. W. 60; Cassard v. Hinman, 6 Bosw. 8.

The jury had the right to look through and to examine into the books

of account of these transactions, in order to enable them to better determine the intentions of the parties. Dows v. Glaspel, 4 N. D. 261, 60 N. W. 60; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Melchert v. American U. Teleg. Co. 3 McCrary, 521, 11 Fed. 193; Edwards v. Hoeffinghoff, 38 Fed. 639; Embrey v. Jemison, 131 U. S. 336, 344, 33 L. ed. 172, 175, 9 Sup. Ct. Rep. 776; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 864; Jamieson v. Wallace, 167 Ill. 388, 59 Am. St. Rep. 302, 47 N. E. 764; Kullman v. Simmens, 104 Cal. 595, 38 Pac. 362; Hill v. Johnson, 38 Mo. App. 383; Crawford v. Spencer, 92 Mo. 500, 1 Am. St. Rep. 745, 4 S. W. 713; Cobb v. Prell, 5 McCrary, 85, 15 Fed. 774; Carroll v. Holmes, 24 Ill. App. 458; Re Green, 7 Biss. 344, Fed. Cas. No. 5,751.

Thorp & Chase, for respondent.

"Conclusions of fact are mere inferences drawn from the subordinate or evidentiary facts." 2 Words & Phrases, 1387; Caywood v. Farrell, 175 Ill. 480, 51 N. E. 755.

"An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Comp. Laws 1913, § 6324.

"An agent has such authority as the principal actually or ostensibly confers upon him." Comp. Laws 1913, §§ 6336, 6338; 2 C. J. pp. 435–438, 574, § 32, and cases cited.

In establishing agency, proof of close relationship and dealings may be received with other evidence, and is entitled to consideration. 2 C. J. §§ 33, 36, 37, 70, 71, 213, 215, pp. 440, 441, 461–463, 574, 576; Reid v. Kellogg, 8 S. D. 596, 67 N. W. 687.

"Where an agency can be established by parol, the agent is a competent witness to prove it." 10 Enc. Ev. 14.

"When there is some other evidence of agency, then evidence of the acts and declarations of the alleged agent is admissible, the jury being the judges of its sufficiency." 10 Enc. Ev. pp. 19, 21, 23, 24, §§ 5, 6, cases cited under notes 56, 58; Nowell v. Chipman, 170 Mass. 340, 49 N. E. 631; Christ v. Garretson State Bank, 13 S. D. 23, 82 N. W. 89.

An offer of proof must be specific, and advise the court of what the facts are that the party intends to show. Austin v. Robertson, 25 Minn. 432; Wood v. Washington, 135 Wis. 299, 115 N. W. 810; Smith v.

Gorham, 119 Ind. 436, 21 N. E. 1096; Goyette v. Keenan, 196 Mass. 416, 82 N. E. 427; Smart v. Kansas City, 208 Mo. 162, 14 L.R.A. (N.S.) 565, 105 S. W. 709; Reynolds v. Continental Ins. Co. 36 Mich. 144; Taylor v. Calvert, 138 Ind. 67, 37 N. E. 536; O'Sullivan v. Griffith, 153 Cal. 502, 95 Pac. 873; Grimestad v. Lofgren, 105 Minn. 286, 17 L.R.A.(N.S.) 990, 127 Am. St. Rep. 566, 117 N. W. 515; Knatvold v. Wilkinson, 83 Minn. 265, 86 N. W. 99; Borden v. Lynch, 34 Mont. 503, 87 Pac. 609; Lucy v. Wilkins, 33 Minn. 441, 23 N. W. 861; Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528.

A cross-examination is proper when it pertains to what has already been offered, and seeks to explain or apply the testimony. State v. Kent, 5 N. D. 541, 35 L.R.A. 518, 67 N. W. 1052; Campau v. Dewey, 9 Mich. 381; Ah Doon v. Smith, 34 Or. 89, 34 Pac. 1093; Sayres v. Allen, 25 Or. 211, 35 Pac. 254; 3 Enc. Ev. 832; Abbott Civ. Jury Trials, pp. 220, 221; Hogan v. Klabo, 13 N. D. 319, 100 N. W. 847; 1 Thomp. Trials, 2d ed. § 408.

In order to constitute a grain purchase a gambling transaction, it must appear that both parties well understood that there were to be no deliveries made. Beidler & R. Lumber Co. v. Coe Commission Co. 13 N. D. 639, 102 N. W. 880.

"Preponderance of the evidence means greater weight, or evidence which is more credible than some other evidence, with which it is compared." Button v. Metcalf, 80 Wis. 193, 49 N. W. 809; 3 Words & Phrases, p. 2649.

A mere opinion or conclusion, as contradistinguished from a statement of fact, may not be proved under the rule relating to admissions and declarations. 1 R. C. L. p. 481, § 16; McCord v. Seattle Electric Co. 46 Wash. 145, 13 L.R.A.(N.S.) 349, 89 Pac. 491; Scott v. St. Louis, K. & N. W. R. Co. 112 Iowa, 54, 83 N. W. 818, 8 Am. Neg. Rep. 391; Hammond, W. & E. C. Electric R. Co. v. Spyzchalski, 17 Ind. App. 7, 46 N. E. 47, 1 Am. Neg. Rep. 225; Saunders v. City & Suburban R. Co. 99 Tenn. 130, 41 S. W. 1031; Gulf, C. & S. F. R. Co. v. Montgomery, 85 Tex. 64, 19 S. W. 1015; Plymouth County Bank v. Gilman, 3 S. D. 170, 44 Am. St. Rep. 782, 52 N. W. 869; Ohio & M. R. Co. v. Stein, 133 Ind. 243, 19 L.R.A. 733, 31 N. E. 180, 32 N. E. 831; Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Binewicz v. Haglin, 15 L.R.A.(N.S.) 1096, note; 1 Thomp. Trials, §§ 377, 379.

ROBINSON, J. This is an action on a promissory note. The defense is that the note was given on a grain-option deal and that it was made without authority by James Lees, the husband of Jennie Lees. The case was fairly tried. The jury found a verdict against the defendants for $1,843.75, and interest; and they appeal to this court. Both the defendants claim that the consideration of the note was illegal, and Jennie Lees claimed that her husband had no authority to sign her name to the note, because the note was given for gambling purposes. The issues in the case and the law of the case are very simple. The evidence shows plaintiff paid for the note the face value, $1,843.75; that it was signed by James Lees and Jennie Lees. For several years James Lees had been insolvent, and he had been doing quite an extensive business in the name of his wife with her knowledge and consent. Indeed he had a general power of attorney to make deeds and mortgages, to borrow money, and to buy and sell personal property, and to sign her name to notes. It seems the general rule is that when a man becomes insolvent he becomes an agent of his wife, and does business in her name. The note in question is signed thus: Mrs. Jennie Lees, by James Lees, her attorney in fact, and by James Lees. At and prior to the time of the making of the note in question James Lees had been doing considerable farming business, for his wife, of course. He and his sons hauled wheat to the Buchanan Elevator Company, and he habitually took storage tickets, made out checks and promissory notes in the name of J. Lees or Jennie Lees. He wanted to get rich quick, and concluded to do it by speculation in grain options with John Miller Company. He got his old-time friend, J. A. Buchanan, to do most of the correspondence with the company. When his losses amounted to about $1,900, he gave the note in question and borrowed from the plaintiff the money to pay up. Now he wants to shift the losses onto his old friend, J. A. Buchanan, because he was so kind as to do most of the correspondence for him. Now he claims that Buchanan was kind of an accessory and decoyed him into the losing speculation. Man is too much disposed to blame others for his own folly, and attorneys are too much disposed to think it an easy matter to hoodwink judges and to make them believe that there is no confidence between a man and his wife when he acts as her general agent, with her knowledge and consent.

The case was fairly submitted to the jury and it is hard to see how they could have found a different verdict. It is certainly well sustained by the evidence.

Judgment affirmed.

CHRISTIANSON, J. I concur in result.

JOHN W. JOHNSON, Respondent, v. JOHN J. CASSERLY et al., Defendants, Wyman, Partridge, & Company, James L. O'Donnell, and James F. Jordan, Appellants.

(163 N. W. 539.)

Findings — conclusions — trial court — evidence sustains.

Evidence examined and *held* to sustain the findings and conclusions of the trial court.

Opinion filed May 9, 1917.

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

Affirmed.

Edward P. Kelly and *Fred B. Dodge,* for appellants.

Where one party claims a mistake was made in a writing, and the other party disputes such claim and says he understood and intended the contract, and where the precise purport may be honestly understood in different ways, a mutual mistake cannot be found, it must be either conceded, or so clearly established as to be substantially without dispute. Bishop v. Clay F. & M. Ins. Co. 49 Conn. 167; Adair v. Adair, 38 Ga. 49; Linn v. Barkey, 7 Ind. 69; Miner v. Hess, 47 Ill. 170; Schaefer v. Mills, 69 Kan. 25, 76 Pac. 436; Stockbridge Iron Co. v. Hudson Iron Co. 102 Mass. 45; Beard v. Hubble, 9 Gill, 420; Wall v. Meilke, 89 Minn. 232, 94 N. W. 688; Home F. Ins. Co. v. Wood, 50 Neb. 381, 69 N. W. 941; Danforth v. Philadelphia & C. M. Short Line R. Co. 30 N. J. Eq. 12; Henderson v. Stokes, 42 N. J. Eq. 586, 8 Atl. 718; Allison Bros. Co. v. Allison, 144 N. Y. 21, 38 N. E. 956; Donaldson

v. Levine, 93 Va. 472, 25 S. E. 541; Newton v. Holley, 6 Wis. 592; Meier v. Bell, 119 Wis. 482, 97 N. W. 186; 1 Elliott, Contr. §§ 109, 112; Farlow v. Chambers, 21 S. D. 128, 110 N. W. 94.

A writing will not be reformed unless there was a prior agreement so certain and definite a court might enforce it. Magee v. Verity, 97 Mo. App. 486, 71 S. W. 472; Bostwick v. Mutual L. Ins. Co. 110 Wis. 402, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246; Wallace v. Chicago, St. P. M. & O. R. Co. 67 Iowa, 547, 25 N. E. 772; Martini v. Christensen, 60 Minn. 491, 62 N. W. 1127; Comp. Laws 1913, § 7202.

It is universally held under statutes like ours that the proof necessary in this class of cases must be clear, convincing, satisfactory, and specific. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Northwestern F. & M. Ins. Co. v. Lough, 13 N. D. 601, 102 N. W. 160; Little v. Braun, 11 N. D. 410, 92 N. W. 800; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714.

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

However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract, and particular clauses are subordinate to its general intent, and words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected. Comp. Laws 1913, §§ 5896, 5898, 5904, 5908, 5910, 5913.

Robinson, J. In this case the defendants Wyman, Partridge, & Company and its agents, O'Donnell and Jordan, appeal from a judgment in favor of the plaintiff, given by Judge Coffey in district court of Foster county.

O'Donnell and Jordan are merely nominal parties, as all their acts were done for their company. The complaint shows, and the facts are, John W. Johnson, the plaintiff, was the owner of a half section of land (N½—15—147—63). He sold it to John Casserly, taking back a mortgage for part of the purchase price, $3,285; that the debt and mortgage were given subject to a prior mortgage made by the plaintiff to the Benton County State Bank of Iowa for $3,000, which mortgage did not contain a power of sale; that there was also a second mortgage on the premises, made by the plaintiff to H. E. Beckwith, of Nebraska, to secure $2,700; that the debt had been reduced to $1,500,

and an agreement had been made between the plaintiff and Beckwith to release the mortgage on payment of $800 in cash and the conveyance of certain real estate to Beckwith. The plaintiff complied with that agreement. Yet Beckwith assigned the mortgage to the Security Bank Neligh, Nebraska, and the bank attempted to foreclose the mortgage by advertisement, though it contained no power of sale, and bid in the land for $1,687.63 and obtained a sheriff's certificate of sale; that after the deed to Casserly, Wyman, Partridge, & Company caused the land to be attached in an action against Casserly to recover $1,011. Then Casserly made to Wyman, Partridge, & Company a quitclaim deed of the land in the name of O'Donnell. Then O'Donnell requested the plaintiff to pay the sum due on the sheriff's void certificate of sale. The plaintiff refused and notified O'Donnell that he should have the mortgage satisfied without any payment, and that he had retained attorneys to bring an action to obtain the satisfaction of the mortgage and the cancelation of the sale certificate.

It was agreed between the plaintiff and O'Donnell that he, O'Donnell, should pay the sum due on the sale certificate, and on such payment the plaintiff should have and retain the right to recover from Beckwith the sum paid to him on such certificate, and damages, and in consideration of the same that plaintiff should give to O'Donnell a release and satisfaction of $2,000 on the Casserly mortgage. That O'Donnell made and presented to the plaintiff for signature a document which he claimed to be a true memorandum of said agreement; that the document read in one part that O'Donnell should pay and take up the Beckwith mortgage against said premises, and in another part that he might get an assignment of the sheriff's certificate of sale. Now it is manifest the plaintiff did not contract to release $2,000 on his mortgage without any consideration whatever, and a mere assignment of the sale certificate would be of no possible benefit to the plaintiff, and yet O'Donnell obtained an assignment of the sale certificate to himself, and then, by making an oral representation that he had complied with the agreement, he obtained a release of $2,000 on the Casserly mortgage. Then O'Donnell took a sheriff's deed of the land in the name of James F. Jordan and put it on record, and Jordan made a special warranty deed to O'Donnell. Then O'Donnell paid the Benton County Bank the amount due on its mortgage, $3,220.10, and took an assignment of

the mortgage to Jordan. Then he attempted to foreclose the mortgage by advertisement, though it did not contain a power of sale, and they bid in the land for $3,489.10.

The trial court gave judgment that the written instrument between the plaintiff and defendant O'Donnell be reformed to conform to the intention of the parties, and that the foreclosure of the Beckwith mortgage and the sale certificate issued thereon were void, and that the same should be canceled and annulled, and the mortgage discharged of record; and also that the attempted foreclosure of the Benton county mortgage and the sheriff's certificate of sale thereon issued are void.

The judgment was given for the foreclosure of the mortgage given by Casserly to the plaintiff. This statement of the facts shows conclusively that O'Donnell tried to play too smart, and that the judgment of the trial court is in all respects correct, and it is affirmed.

CHRISTIANSON, J. I concur in result.

GEORGE W. GETTS v. WILLIAM J. CHAMPION and Frank B. Meyer, Copartners as Champion & Meyer.

(163 N. W. 263.)

Personal property — pianos — consigned on commission — for sale — written contract — to insure — for benefit of consignor — or owner — insurable interest — consignee has.

Where a party receives pianos to be sold on commission, under a written agreement to keep the same insured, with loss, if any, payable to the consignor

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Note.—Policies on property held by bailees, factors, carriers, warehousemen, and commission merchants are generally sustained on the ground that the insurer has a special lien, and therefore has a present interest himself, and that, as regards the interest of the other party, the insured is a trustee for his interest even though the same property may not be controlled by him at the time of the fire as at the time of the insurance, as will be seen by an examination of note in 52 L.R.A. 330, on the general topic, "Time when insurable interest must exist under fire policies."

For cases discussing the question of insurable interest of consignee, see note in 8 Am. Rep. 150.

to the amount of the price payable to him, there is no legal objection to the agreement.

Opinion filed May 9, 1917.

Appeal from the District Court of William County, Honorable *Frank E. Fisk,* Judge.

Affirmed.

John J. Murphy and *Ivan V. Metzger,* for appellants.

Defendants were not factors, nor had they any insurable interest in the goods consigned to them, which were destroyed by fire. Tierney v. Phœnix Ins. Co. 4 N. D. 565, 36 L.R.A. 760, 62 N. W. 642.

The insurable interest must exist at the time of fire as well as when the insurance takes effect. Comp. Laws 1913, §§ 6145, 6369; Turner v. Crompton, 21 N. D. 294, 130 N. W. 937, Ann. Cas. 1913C, 1015; 19 Cyc. 583.

H. A. Libby, for respondent.

The defendants, who were the plaintiff's consignees of pianos for sale purposes, had an insurable interest in the property consigned to them. The pianos were consigned at jobber's prices, which were much lower than the retail prices, and the difference represented defendants' profits in the business. Comp. Laws 1913, §§ 6466–6468.

A bailee or depositary, being liable by law or under contract for the safety and preservation of the goods bailed or deposited, has an insurable interest in the goods. 13 Am. & Eng. Enc. Law, 152; Com. v. Hide & Leather Ins. Co. 112 Mass. 136, 17 Am. Rep. 72; White v. Madison, 26 N. Y. 117; Murdock v. Franklin Ins. Co. 33 W. Va. 407, 7 L.R.A. 572, 10 S. E. 777.

This is true of a person who has only a limited or special interest in the property consigned. Shaw v. Ætna Ins. Co. 49 Mo. 578, 8 Am. Rep. 150; Ins. Co. v. Chase, 5 Wall. 509, 18 L. ed. 524; Eastern R. Co. v. Howard L. Relief F. Ins. Co. 98 Mass. 420; Carter v. Humbolt F. Ins. Co. 12 Iowa, 287; Flanders, Fire Ins. p. 241; Angel, Fire & Life Ins. p. 99.

And a bailee's insurable interest is not limited to his interest or lien, but covers the full value of the goods. 13 Am. & Eng. Enc. Law, 153; Waring v. Indemnity F. Ins. Co. 45 N. Y. 606, 6 Am. Rep. 146; Stillwell v. Staples, 19 N. Y. 401.

A common carrier has such an insurable interest. 13 Am. & Eng. Enc. Law, 153, 155; Shaw v. Ætna Ins. Co. 49 Mo. 578, 8 Am. Rep. 150; Fox v. Capital Ins. Co. 93 Iowa, 7, 61 N. W. 211; Ætna Ins. Co. v. Jackson, 16 B. Mon. 242; French v. Hope Ins. Co. 16 Pick. 397; Sturm v. Atlantic Mut. Ins. Co. 63 N. Y. 77.

Further, defendants had expressly agreed in their written contract with plaintiff to insure all goods consigned, for plaintiff's benefit, in an amount equal to the consigned prices. Waterbury v. Dakota F. & M. Ins. Co. 6 Dak. 468, 43 N. W. 697; Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527, 23 L. ed. 868; Baxter v. Hartford F. Ins. Co. 11 Biss. 306, 12 Fed. 481; Hough v. People's F. Ins. Co. 36 Md. 398; Goodall v. New England Mut. F. Ins. Co. 25 N. H. 169; Waring v. Indemnity F. Ins. Co. 45 N. Y. 606, 6 Am. Rep. 146; Lockhart v. Cooper, 87 N. C. 149, 42 Am. Rep. 514; Reitenbach v. Johnson, 129 Mass. 316; 12 Am. & Eng. Enc. Law, 635, and cases cited; De Forest v. Fulton F. Ins. Co. 1 Hall, 110; The Sidney, 23 Fed. 88; Johnson v. Campbell, 120 Mass. 449; Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176; California Ins. Co. v. Union Compress Co. 133 U. S. 387, 33 L. ed. 730, 10 Sup. Ct. Rep. 365; Pennefeather v. Baltimore Steam Packet Co. 58 Fed. 481; Strong v. Manufacturers' Ins. Co. 10 Pick. 40, 20 Am. Dec. 507; Shaw v. Ætna Ins. Co. 49 Mo. 578, 8 Am. Rep. 150; Bartlett v. Walter, 13 Mass. 267, 7 Am. Dec. 143; Oliver v. Greene, 3 Mass. 133, 3 Am. Dec. 96; Herkimer v. Rice, 27 N. Y. 173; Story Agencies, § 111; Siter v. Morrs, 13 Pac. 219; Savage v. Corn Exch. F. & I. Ins. Co. 36 N. Y. 655; Crowley v. Cohen, 3 Barn. & Ad. 478, 110 Eng. Reprint, 172, 1 L. J. K. B. N. S. 158, 13 Eng. Rul. Cas. 314; Wood, Fire Ins. §§ 280, 289, and 305; Wilbraham v. Snow, 2 Wms. Saund. 47, 85 Eng. Reprint, 624; Story, Bailm. § 125; Ladd v. North, 2 Mass. 514.

Robinson, J. This is an appeal from a directed verdict in favor of the plaintiff for $1,669. Defendants were in the piano business at Williston, under a written contract that plaintiff ship to them, at Williston, eight pianos to be sold on commission, the plaintiff to receive from such sales a specified net sum. By written contract the defendants agreed thus:

We agree to take good care of all instruments consigned to us, and to be responsible for the safe-keeping of the same; also to hold ourselves responsible in case of any loss or damage to your instruments, and to keep them insured for your benefit, with the policies made payable to you to the amount at least of the consignment price of the same.

We agree to send the cash to you for each and every instrument separately as soon as sold.

We agree to furnish all necessary funds for the payment of freight charges.

It is expressly understood and agreed that nothing in this agreement shall be in any sense construed as constituting the sale of such instruments or giving us an interest of any kind whatever in them.

Then there are figures showing the price agreed upon for the different styles of pianos.

Under the agreement plaintiff shipped to the defendants six pianos, making eight pianos, with two which were on hand and which were included in the agreement. Defendants received the pianos, paid freight on them, put them into their store, but neglected to insure them, and in a few days the store and the pianos were burned.

The suit is to recover the net invoice wholesale price which plaintiffs were to receive for the pianos.

The defense is that the defendants could not insure the pianos, because they had no title or interest in them, and that at the time of the loss the pianos were in possession of the plaintiff's agent, whom they had sent to make a special advertising sale of the pianos. It does appear that the plaintiff corresponded with the defendants, purposing to aid them in making a special boom sale of the pianos, and they sent out boom literature to persons whose names and addresses were given them by the defendants. They sent their agent to aid the defendants in advertising and making the boom sale. And this the plaintiff was glad to do because of his interest in the sale. The defendants had exclusive possession and control of the pianos from the time they took them to their store, and in case of a sale the profits belonged to them. In regard to the contract to insure the pianos for the benefit of the plaintiff to the amount of the invoice price, it is no answer for defendants to say that they had no title or interest in the property. The contract was: "We agree to take good care of all instruments consigned to us,

and to be responsible for the safe-keeping of the same; and also to hold ourselves responsible in case of loss or damage to your instruments, and to keep them insured for your benefit, with the policies made payable to you in case of loss to an amount at least equal to the consignment price of the same." Surely that is a clear and specific contract, made for a valuable consideration, and there is no claim that it was obtained by any fraud or undue influence; and it was not a contract to do an impossible thing, and indeed it might well be held that defendants were liable as insurers under the contract to hold themselves responsible for any loss or damage to the instruments. That was a personal covenant against all loss or damage, in addition to the covenant to insure against special loss by fire. On the sale of each piano the defendants had a profit of a hundred dollars or more, and that was the consideration of their covenants. Clearly the defense has no merits. Judgment affirmed.

OLE T. STEEN v. JOHN NEVA.

(163 N. W. 272.)

Express trust — trustee — personal property — purchase of — consideration — vendee — debt of vendor — agreement to pay — as part purchase price.

1. Where A purchases from B a mare, and agrees on such sale, and as a part of such purchase price, to pay to a third party, C, an amount due to him by B, an action may be maintained under the provisions of § 7397 of the Compiled Laws of 1913 by B as a trustee of an express trust, as defined by that section, for the failure on the part of A to pay to C the said sum.

Auction sale — personal property — purchaser — agreement to pay debt of owner to third person — as part purchase price — defenses.

2. Where A unconditionally agrees at an auction sale to pay C a certain sum of money due to him, from B, the owner and seller, he will be held to his promise, and will not be allowed, in an action by B for a breach of the promise, to interpose defenses which B might possibly have made against the claims of C.

Justice court — appeal from — county court — statement of attorney to jury — that defendant had appealed — statement of costs incurred — error — new trial — not demanded in county court — effect of failure to demand.

3. It was error, on a trial in the county court, for the attorney for the plaintiff

to state to the jury that it was the defendant who had appealed from the justice court, and that it was he who had made all of the costs of the action. Where, however, the amount involved was only $36, and the jury was cautioned by the court to disregard this statement, and a new trial was not requested in the county court, the supreme court will not reverse the judgment on this account.

Auctioneer — authority — auction sale — purchaser cannot complain of — owner of property — ratification by — presumption as to.

4. The purchaser at an auction sale cannot complain of the alleged lack of authority of the auctioneer when the acts of such auctioneer are ratified by the owner. Ratification will be presumed from the bringing of a suit for the amount agreed to be paid.

Auction sale — written or printed conditions — oral statements of auctioneer — do not modify conditions — payments — as to whom shall be made.

5. Section 5998 of the Compiled Laws of 1913, which provides that "when a sale by auction is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer," is not violated by the auctioneer requiring a certain amount of the purchase price to be paid to a third party, when there are no written or printed conditions other than the advertisements for the sale, and the advertisements make no announcement as to the amount of the purchase price, nor as to whom it shall be paid, nor do they purport to state in full the terms and conditions of the sale.

Damages — certain — recovery of — time of — interest — pleadings.

6. Section 7142 of the Compiled Laws of 1913, which provides that "every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day," does not waive the ordinary rules of pleading in such matters.

Debt or obligation — interest on — legal consequence — pleadings silent as to — may still be recovered — debt and interest — amount claimed in complaint — cannot exceed.

7. Where interest is the legal consequence of a debt or obligation without stipulation, it may be recovered, though not claimed in the pleadings. Unless, however, it is specifically claimed, it cannot be considered as a part of the debt, but can only be recovered as damages for the detention of the money. In such a case the judgment, including the damages or interest, cannot exceed the sum claimed in the *ad damnum* clause of the complaint.

Judgment — in excess of sum claimed — objection as to — must be first made in lower court.

8. An objection that the judgment is in excess of the *ad damnum* cannot be made for the first time in the appellate court.

Opinion filed May 10, 1917.

Action for purchase price on an auction sale.

Appeal from the County Court of Stutsman County, Honorable *John U. Hemmi,* Judge.

Judgment for plaintiff. Defendant appeals.

Affirmed.

Knauf & Knauf, for appellant.

A civil action must be prosecuted by the real party in interest unless otherwise expressly provided by statute. Rev. Codes 1905, § 6807, Comp. Laws, 1913, § 7395; Code Civ. Proc. 1877, § 74, Rev. Codes 1895, § 5221.

Defendant, the purchaser of property at an auction sale, cannot be made to pay the debt of the owner of such property to a third person. If such a contract was made, all its benefits were to go to the Stutsman County Bank, and hence plaintiff is not the real party in interest. J. I. Case Threshing Mach. Co. v. Pederson, 6 S. D. 140, 60 N. W. 747; American Soda Fountain Co. v. Hogue, 17 N. D. 375, 17 L.R.A.(N.S.) 1113, 116 N. W. 339; Cassidy v. First Nat. Bank, 30 Minn. 86, 14 N. W. 363; Hogen v. Klabo, 13 N. D. 319, 100 N. W. 847; Comp. Laws 1913, § 5841; Moore v. Booker, 4 N. D. 543, 62 N. W. 607; Stewart v. Price, 64 Kan. 191, 64 L.R.A. 581, 67 Pac. 553.

The one for whom the contract is made is the beneficial party. Stewart v. Price, 64 Kan. 191, 64 L.R.A. 586, 67 Pac. 553.

There can be no recovery for the services of an unlicensed stallion under the laws of this state. Comp. Laws 1913, §§ 2763, 2765, 2766, 2769, 2775, 2778; Smith v. Robertson, 106 Ky. 472, 45 L.R.A. 510, 50 S. W. 852; Buckley v. Humason, 16 L.R.A. 423, note.

It is reversible error for plaintiff's counsel to state to the jury in his closing argument that on a former trial plaintiff recovered judgment. Attaway v. Mattox, 4 Tex. App. Civ. Cas. (Willson) 39, 14 S. W. 1017; Harsh v. Heflin, 76 Ala. 499; Atwood v. Brooks, 4 Tex. App. Civ. Cas. (Willson) 130, 16 S. W. 535; Bolar v. Williams, 14 Neb. 386, 15 N. W. 716; Bulen v. Granger, 58 Mich. 274, 25 N. W. 188; Evans v. Trenton, 112 Mo. 390, 20 S. W. 614; Randall v. Evening News Asso. 97 Mich. 136, 56 N. W. 361.

Printed conditions under which an auction sale proceeds are binding on both seller and buyer, and cannot be varied or changed by oral state-

ments of auctioneer at time of sale. Comp. Laws 1913, § 5998; 4 Cyc. 1042.

W. H. Padden, for respondent.

The auctioneer announced at and before the sale of the mares in question that the purchaser would have to pay for the stallion services, and that the horse belonged to the Stutsman County Bank. Such oral announcement does not violate the written conditions under which the sale was to be made. A. G. Becker & Co. v. First Nat. Bank, 15 N. D. 279, 107 N. W. 968; 2 Hill's Dak. Dig. pp. 102–104; Nystrom v. Lee, 16 N. D. 561, 114 N. W. 478; State v. Moeller, 20 N. D. 114, 126 N. W. 568.

Where a third party is only incidentally interested, such party cannot institute and maintain suit. 30 Cyc. 67; Code, § 5841.

Where plaintiff shows such an interest in the subject-matter of the action that judgment therein, if satisfied, will protect defendant against loss or further litigation over the same matter, this is sufficient. 1 Sunderland (Estee) § 11; Giselman v. Starr, 106 Cal. 651, 40 Pac. 8; Chungkee v. Davidson, 73 Cal. 522, 15 Pac. 100; Seybold v. Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682; 30 Cyc. 83.

"The defense of illegality, although open to the parties and those claiming under them, cannot generally be invoked by third persons." 9 Cyc. 561; Elliott, Contr. §§ 677, 680, and numerous cases cited.

"A cause should not be reversed for such references by counsel to the fact that the action was vexatious, and much costs incurred, and that his client has been successful in the lower court, where the jury is cautioned that such matters should not be by them considered." 38 Cyc. 1493, and cases cited; Smiley v. Scott, 179 Ill. 142, 53 N. E. 544; Chicago & A. R. Co. v. Dillon, 123 Ill. 570, 5 Am. St. Rep. 559, 15 N. E. 181.

The printed conditions of sale did not set out fully the terms, nor to whom or where the amounts should be paid. Kennell v. Boyer, 24 L.R.A.(N.S.) 488, and note, 144 Iowa, 303, 122 N. W. 941, Ann. Cas. 1912A, 1127; 2 R. C. L. pp. 1122–1125, and cases cited; Ashcom v. Smith, 2 Penr. & W. 211, 21 Am. Dec. 437.

BRUCE, Ch. J. This is an action to recover $36 agreed by the defendant, the purchaser at an auction sale, to be paid to a third party,

the Stutsman County Bank, as part of the purchase price of two mares, and being an amount due by the plaintiff to such bank for the service of a stallion.

The main question which is presented to us for determination is whether the plaintiff may maintain the suit, or whether § 7395 of the Compiled Laws of 1913, which provides that actions shall be brought by the real party in interest, requires it to be brought by the creditor of the plaintiff, that is, the beneficiary bank.

We are satisfied that the plaintiff may maintain this action.

Though it is true that § 5841 of the Compiled Laws of 1913 provides that when a contract is made expressly for the benefit of a third person, it may be enforced by him, § 7397 also provides that an action may be maintained by "a trustee of an express trust;" and further states that "a trustee of an express trust within the meaning of this section shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

We have examined the other assignments of error, but find no merit in them. Some of them relate to the exclusion of evidence which might tend to show a possible defense, which the plaintiff might have had against the claim of the bank. Whether, however, there might have been such a defense is immaterial. It is sufficient to say that the plaintiff exacted a promise of the defendant to pay the claim, and that the defendant agreed to do so.

Defendant also complains of the statements of counsel for the respondent to the jury, to the effect that it was the defendant who had appealed from the justice court, and that it was he who had made all of the costs of the action. Such statement should not have been made, and in some instances might justify a reversal of the judgment. Attaway v. Mattox, 4 Tex. App. Civ. Cas. (Willson) 39, 14 S. W. 1017; Harsh v. Heflin, 76 Ala. 499; Atwood v. Brooks, 4 Tex. App. Civ. Cas. (Willson) 130, 16 S. W. 535. The jury, however, was cautioned by the judge to disregard these statements, and no motion for a new trial was made. The defendant has already had two trials,—one in the justice's and the other in the county court. The claim is for a very small amount. It would be a travesty on justice to order a new trial with all of the additional expense that the same would involve, especially, when, as we view the

case, no other verdict than that arrived at could have been properly found.

There is also no merit in the exceptions which are based upon the refusal of the court to allow oral evidence of the authority of the auctioneer to require the payment of this $36 as a part of the purchase price. Even if unauthorized, it is clear that the defendant agreed to pay the amount, and that the plaintiff has ratified the sale which was made by his agent. This is all that is necessary.

Nor, too, is there any merit in the objection that the notices of the sale did not say anything about the payment of this $36; and that, therefore, the sale was in violation of § 5998 of the Compiled Laws of 1913, which provides that "when a sale by auction is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own benefit."

The advertisements stated that the property would be sold on the following terms: "On all sums under $10, cash; on sums over $10, time until October 1st, at 10 per cent interest with approved security, and 5 per cent discount for cash." Defendant contends that in these notices there was no reservation that the purchaser should pay any stallion fees.

All that the notices of sale contained was an announcement as to the credit to be given to the purchasers. They made no announcement as to the amount of the purchase price, nor as to whom it should be paid, nor did they purport to state in full the terms and conditions of the sale. Kennell v. Boyer, 144 Iowa, 303, 24 L.R.A.(N.S.) 488, 122 N. W. 941, Ann. Cas. 1912A, 1127. The suit, too, was not brought until October 12th and until after the term for the credit announced in the notices had expired.

Appellant next contends that the verdict is defective in that it allowed interest on the said sum of $36 from and after March the 6th, 1915, at 6 per cent per annum. He asserts that the *ad damnum* clause was merely that "the plaintiff demands judgment against defendant for the sum of $36, and for the costs and disbursements of this action. He argues that not only is the verdict in excess of the *ad damnum,* but no demand for interest was made in the complaint.

In these contentions defendant and appellant appears to be justified,

and we do not very well see how the jury could have awarded the interest complained of. They certainly could not have awarded it from the 6th day of March, 1915, as the sale was made on the 9th day of March, 1915, and the complaint expressly states that the sum of $36 was not due until "the time that said mares delivered standing colts." The evidence does not disclose when the colts were born. It merely states that they were born after the sale; and if the plaintiff sought to recover interest from the date of delivery of such colts, it was certainly incumbent upon him to prove that date, which, in any event, could not possibly have been before the sale had been consummated. There, too, is no proof of any demand of payment until the 27th day of August, 1915.

Not only is this the case, but, although § 7142 of the Compiled Laws of 1913 provides that "every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day is entitled also to recover interest thereon from that day," we find nothing in the Code which seems to waive the ordinary rules of pleading in such matters. Although, indeed, the rule seems to be that where interest is the legal consequence of the debt or obligation without stipulation, it may be recovered, though not claimed in the pleadings (11 Enc. Pl. & Pr. 435), it is also the rule that, unless it is specifically claimed, it cannot be considered as a part of the debt, but can only be recovered as damages for the detention of the money. Such being the case, it is very clear that the judgment, including the damages, could not exceed the sum claimed in the *ad damnum* clause of the complaint. Grand Lodge, A. O. U. W. v. Bagley, 60 Ill. App. 589.

This is undoubtedly the law; on account of the state of the record, however, it can avail the defendant and appellant nothing. He does not appear to have made any motion for a new trial, nor was the discrepancy between the verdict and the *ad damnum* brought to the attention of the trial court in any way, either before the jury was discharged or afterwards; nor was the trial court given an opportunity by any application on his part to correct the verdict, nor to reduce it, nor to allow, as we believe he could have allowed under § 7482, an amendment of the *ad damnum* clause of the complaint.

Such being the case, it is clear that the point cannot now be raised

on this appeal and in this court. Grand Lodge, A. O. U. W. v. Bagley, supra; Haven v. Baldwin, 5 Iowa, 503; Grand Lodge, A. O. U. W. v. Jesse, 50 Ill. App. 101.

The judgment of the County Court is affirmed.

CHRISTIANSON, J. I concur in the result only. I express no opinion upon the matters covered by subdivisions 6, 7, and 8 of the syllabus.

ROBINSON, J. (concurring specially): In this case defendant appeals from a judgment for $36, and costs. The plaintiff sued to recover $36 as the balance due on a sale of two mares that produced two colts. The case was fairly tried, and the verdict is well sustained by the evidence. It was the same in justice court and in the county court, and it could not have well been different. In so small a case it were an act of folly to waste time in writing a grave discussion on numerous hairsplitting and frivolous objections. The judgment is affirmed.

THOR J. SLETTEN v. THE FIRST NATIONAL BANK OF CARRINGTON, North Dakota.

(163 N. W. 534.)

Mortgagee — holding second and third mortgages — forecloses third — bids in property — for amount of the debt secured thereby — additional security — payments — redemption — time of — information as to — failure to give — bad faith.

1. Where a mortgagee holding both a second a third mortgage forecloses the third mortgage, bidding in the property for the amount of the third mortgage debt, interest, and costs, and after the sale takes additional security for the second mortgage debt which it afterwards collects in full and credits to the mortgagor on the debt secured by the second mortgage, and where the purchaser refrains from giving the mortgagor definite information in regard to the date of the expiration of the period of redemption, *held* that the circumstances indicate bad faith on the part of the mortgagee.

Evidence — findings of trial court — mortgagee — foreclosing mortgage — bad faith — intention of.

2. Evidence examined and *held* to substantiate the finding of the trial court that the mortgagee, in perfecting a foreclosure of the third mortgage, acted in bad faith and manifested an intention to secure the land of the mortgagor for the amount of the mortgage, rather than to collect the debt secured thereby.

Mortgagee — bidding at sale — stands on same terms as others — prior mortgage held by — bids made subject to.

3. Where a mortgagee bids at foreclosure sale, it must be held to bid on the same terms as others, and consequently to bid subject to a prior mortgage held by it.

Junior mortgage foreclosure — senior mortgage outstanding — to same mortgagee — land becomes primary fund — for payment of senior mortgage — mortgagee becoming purchaser at sale — his senior mortgage discharged.

4. As a consequence of the foreclosure of a junior mortgage where a senior mortgage is outstanding, the land purchased at the foreclosure sale becomes the primary fund for the payment of the senior mortgage; and where a senior mortgage is held by a junior mortgagee who bids in the land at foreclosure sale under the latter mortgage, such senior mortgage is discharged.

Mortgage foreclosure — mortgagee — property bid in by other indebtedness held by — collateral security — proceeds of — application of — reciprocal equities.

5. Where a mortgagee bids in the property of the mortgagor at foreclosure sale, and later realizes upon collateral held by it as security for other indebtedness of the mortgagor secured by a prior lien, and applies the proceeds to the payment of the mortgagor's debt, the mortgagee cannot complain when the mortgagor accepts the reciprocal equitable alternative and treats the land as being held by the mortgagee merely as security for the indebtedness.

Mortgagee — continues to treat land as security — redemption — mortgagor entitled to right of — payment.

6. Where the mortgagee continues to treat the land purchased by it at foreclosure sale as security for indebtedness of the mortgagor, the mortgagor is entitled to redeem upon the payment of the indebtedness.

Opinion filed May 12, 1917.

Appeal from the District Court, Stutsman County, *Coffey*, J.
Defendant appeals.
Affirmed.

Statement of facts by BIRDZELL, J.

This is an appeal from a judgment of the district court of Stutsman county permitting the plaintiff and respondent, Sletten, to redeem from a mortgage foreclosure sale in circumstances that appear in the statement of facts below. The case is here for trial *de novo,* and error is predicated upon certain findings of fact and conclusions of law which will be specifically treated in the opinion. The facts as we gather them from the record are as follows: In March, 1911, Thor J. Sletten was the owner of real estate in Stutsman county, described as follows: The west half of the east half of section 4, township 143, range 68, which land, with the improvements, was, conservatively estimated, worth $4,000,—the trial court finding its value to be $4,800. In order to obtain funds with which to purchase a threshing outfit, the plaintiff, on the above date, gave three notes equal in amount, aggregating $1,500, to the First National Bank of Carrington, to secure which he gave a real estate mortgage upon the above-described land. As additional security Sletten gave a chattel mortgage upon the threshing outfit bought by him. In the fall of 1912, being unable to make any payments on this obligation, Sletten authorized the First National Bank to foreclose the chattel mortgage by a sale of the mortgaged property, but it nowhere appears that any sale was made under this authorization. In the month of November, 1912, one A. T. Johnson, in company with G. S. Newberry, cashier of the First National Bank of Carrington, called at the home of Sletten and obtained from him a demand note for $220, the same representing an indebtedness of Sletten to Johnson. To secure this note Sletten gave a real estate mortgage covering the land above referred to. A little more than two weeks after this note was executed, Sletten paid Johnson the sum of $120 to apply thereon, which payment was indorsed on the note. On January 3, 1913, Johnson assigned this note and mortgage to the First National Bank, executing the assignment in blank, however. On February 5, 1913, Newberry advised Sletten that the bank had purchased the Johnson note, and notified him that unless the balance was paid foreclosure would be started. Following this notice foreclosure proceedings were started, and on the 19th day of April, 1913, the land was sold to the mortgagee at foreclosure sale for $300.04. (The notice of foreclosure sale stated that the bank had been required to pay $141.82

as interest upon the first mortgage and as real estate taxes, which amount was declared to be part of the mortgage debt.) From this foreclosure sale no redemption was made within the time prescribed by law, and after the expiration of the time for redemption the sheriff of Stutsman county duly issued a sheriff's deed to the First National Bank of Carrington. In addition to the mortgages that figure in the above transactions between Sletten and the First National Bank, Sletten had in 1910 given to the Wells-Dickey Company a first mortgage upon the land for $850, due in 1915. It appears that soon after Sletten received notice from the bank that it had purchased the Johnson note and mortgage and requesting that the same be immediately paid, he went to Carrington for the purpose of seeing Newberry and adjusting the indebtedness to his satisfaction, but Newberry, being absent at the time, nothing came of this attempt. On about May 6, 1913, plaintiff Sletten went again to Carrington, where he saw Newberry, and where he and Newberry, together with two other men named Anderson, consummated a sale of Sletten's threshing machine, upon which the bank held the chattel mortgage. The arrangement made in connection with the sale of the machine was this: The Andersons gave Sletten their notes for $1,500, secured by a chattel mortgage on the threshing outfit and other personal property, and these notes and mortgage were left by Sletten as collateral to his obligations to the bank. About this time Sletten gave another real estate mortgage on the above-described land to J. Buchanan & Sons, to secure an indebtedness of $320.25 owing to them, which indebtedness had formerly been secured by a second mortgage on the threshing machine. Soon after the above transactions were had, the plaintiff who had been unfortunate in his farming operations for two or three years, left the state and went to Canada, where he remained until the latter part of December, 1913. During his absence in the fall of 1913 the Andersons paid $500 to the bank on their threshing-machine notes, and in March, 1914, they paid the balance in full to the James River National Bank of Jamestown, to which bank the notes were later assigned by Sletten at the solicitation of Newberry.

On the occasion of Sletten's visit to Carrington in December 1913, he was there but a short time, but he took the trouble to make an appointment with Newberry to discuss with him the business relations between himself and the bank. The evidence as to this conversation

is very conflicting, Sletten testifying to the effect that Newberry avoided giving a direct answer to the question as to whether the mortgage upon the land was foreclosed, and also avoided giving a statement, in response to his demand for one, which would show how much he was indebted to the bank. Newberry, on the other hand, testified that Sletten knew and understood that the Johnson mortgage had been foreclosed, and that Sletten's indebtedness, including that represented by the Johnson mortgage, was talked over pro and con. Sletten left Carrington on the 24th of December, and the remainder of the transactions pertaining to the foreclosure are evidenced by correspondence. Sletten spent the remainder of the winter in Willmar, Minnesota, and while there attempted to negotiate a sale of his equity in the land involved herein. Early in March, 1914, he addressed a letter of inquiry to the First National Bank of Carrington to determine the amount of the bank's claim against him. This inquiry was answered by Newberry; but in his answer, while specific reference is made to the foreclosure proceedings under the Johnson mortgage, neither the date of the foreclosure sale nor the date of the expiration of the period for redemption are mentioned. Again, under date of April 10, 1914, Newberry replied to a letter written by Sletten, in which he again refers to the foreclosure proceedings, and in this letter nothing is said with regard to the expiration of the period of redemption. The reference to the foreclosure is as follows: "As regards the foreclosure against your land, you know without being told that that was begun some time ago. . . ." Acting in response to advice contained in the above letter, Sletten assigned the Anderson notes to the James River National Bank, which assignment was dated April 14th. Upon receipt of this assignment, and under date of April 15th, Newberry replied to Sletten's letter, and in this reply he again referred to the foreclosure under the Johnson mortgage as follows: "You seem to feel that it is our desire to steal this land from you . . ." "The foreclosure, as you know, is in connection with your note to A. T. Johnson, which is payable on demand, which note was sold to the bank, and on which payment was demanded, and, by reason of that demand not being met, foreclosure was begun."

It appears that during the winter and spring of 1914, while Sletten was negotiating with one Gratz for the sale of the land, the latter made a trip to Carrington for the purpose of looking at the property. Sletten

testified that on Gratz's return the deal was called off, and that Gratz advised him to go to Carrington as quickly as he could.

Edward P. Kelly, for appellant.

The mere inadequacy of price at a foreclosure sale is no ground to set aside the foreclosure in the absence of fraud, undue advantage, or prejudice. Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345; Bailey v. Hendrickson, 25 N. D. 500, 143 N. W. 134, Ann. Cas. 1915C, 739.

An assignment of a mortgage executed in blank, but with the name of the assignee written in thereafter, by express authority, is a valid assignment. Lamar v. Simpson, 1 Rich. Eq. 71, 42 Am. Dec. 345; Field v. Stagg, 52 Mo. 534, 14 Am. Rep. 435; Owen v. Perry, 25 Iowa, 412, 96 Am. Dec. 49; Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470; Stahl v. Berger, 10 Serg. & R. 170, 13 Am. Dec. 666; McClain v. McClain, 52 Iowa, 272, 3 N. W. 60; Logan v. Miller, 106 Iowa, 511, 76 N. W. 1005.

An officer taking the acknowledgment of an instrument must indorse or attach thereto the certificate required by law. Comp. Laws 1913, § 5574; Cannon v. Deming, 3 S. D. 421, 53 N. W. 863.

To entitle a party to make foreclosure, it shall be requisite that the mortgage containing such power of sale has been duly recorded, and, if it shall have been assigned, that all the assignments thereof have been duly recorded. Comp. Laws 1913, § 8077; Hebden v. Bina, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85; Morris v. McKnight, 1 N. D. 266, 47 N. W. 375; Benson v. Markee, 41 Minn. 112, 42 N. W. 787.

Where the amount claimed as due and as published in the notice, and such amount is in excess of the actual amount due, such fact will not invalidate the sale, where it clearly appears that the mistake was an innocent one, and made without actual knowledge of the true condition and with no bad motive toward the mortgagee, and where the mortgagor sustained no loss. Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345; Butterfield v. Farnham, 19 Minn. 85, Gil. 58; Hamilton v. Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Klock v. Cronkhite, 1 Hill, 107; White v. McClellan, 62 Md. 347; Ramsey v. Merriam, 6 Minn. 168, Gil. 104; Cook v. Foster, 96 Mich. 610, 55 N. W. 1019; Comp. Laws 1913, §§ 2211, 6718.

Where the notice of sale states the amount by giving the separate

items thereof, the mortgagor could not possibly have been deceived or mislead. Such a notice also dispels any thought of fraud or unfairness. Comp. Laws 1913, §§ 8088–8090; Trenery v. American Mortg. Co. 11 S. D. 506, 78 N. W. 991; Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345; Bailey v. Hendrickson, 25 N. D. 500, 143 N. W. 134, Ann. Cas. 1915C, 739.

Fraud, and the intent to injure, deceive, and mislead, must be clearly shown before a mortgage foreclosure sale will be set aside. Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345; Bailey v. Hendrickson, 25 N. D. 500, 143 N. W. 134, Ann. Cas. 1915C, 739; Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390.

S. E. Ellsworth, for respondent.

Inadequacy of price paid at a foreclosure sale, while not sufficient alone to warrant the setting aside of the sale, yet it may be considered, with other things, as ground for setting sale aside. And where the price is clearly inadequate, the purchaser can only retain his advantage by showing the proceedings are free from fault or irregularity. Dewey v. Linscott, 20 Kan. 684; Pickett v. Pickett, 31 Kan. 727, 3 Pac. 549; Capital Bank v. Huntoon, 35 Kan. 577, 11 Pac. 369; Freeman, Executions, §§ 304, 308, 309; Jones v. Carr, 41 Kan. 329, 21 Pac. 258; Means v. Rosevear, 42 Kan. 377, 22 Pac. 319; Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512.

Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale, to raise the presumption of fraud. Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686; O'Donnell v. Lindsey, 7 Jones & S. 523; King v. Platt, 37 N. Y. 155; Griffith v. Hadley, 10 Bosw. 588; Re Dwight, 15 Abb. Pr. 259; King v. Morris, 2 Abb. Pr. 296; Francis v. Church, Clarke, Ch. 475; Wiltsie, Mortg. Foreclosure, § 539, and cases cited; Kloepping v. Stellmacher, 21 N. J. Eq. 328; Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390.

To enable a party claiming as assignee of the mortgagor to foreclose a mortgage upon real estate in this state by advertisement, the record must satisfactorily show the legal title to the mortgage to be in the assignee. Comp. Laws 1913, § 8077; Morris v. McKnight, 1 N. D. 266, 47 N. W. 375; Hebden v. Bina, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85.

If the acknowledgment of the assignment is defective and the assignment not entitled to record, the foreclosure sale is void even though the assignment was actually transcribed upon the records. Erickson v. Conniff, 19 S. D. 41, 101 N. W. 1104; Langmaack v. Keith, 19 S. D. 351, 103 N. W. 210; Smith v. Clark, 100 Iowa, 605, 69 N. W. 1011; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356.

And a void instrument is not rendered effective by acknowledgment. 1 Cyc. 541; Helton v. Asher, 103 Ky. 730, 82 Am. St. Rep. 601, 46 S. W. 22.

A sale of property under mortgage foreclosure, for an amount greatly in excess of the sum of the indebtedness actually secured by the mortgage, is in itself evidence of fraud; and such sale will be set aside. 27 Cyc. 1713; Lockwood v. Mitchell, 19 Ohio, 448, 53 Am. Dec. 438; Upchurch v. Anderson, — Tenn. —, 52 S. W. 917.

The selection of a newspaper of limited circulation, when there are other and much more suitable papers at hand, is also a circumstance which may be considered. Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390.

The dealings and letters passing between the parties, prior to the foreclosure, may also be considered when they show a spirit of unfairness on the part of the mortgage or assignee. Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686.

The junior mortgagee or lien creditor will be protected by the courts to the same extent as the mortgagor. Hayes v. Pace, 162 N. C. 288, 78 S. E. 290; Finlayson v. Peterson, 11 N. D. 45, 89 N. W. 855; Cooley, Taxn. pp. 503, 504, and note 1; 15 Am. & Eng. Enc. Law, p. 820, and note 3; Ward v. Matthews, 80 Cal. 343, 22 Pac. 187; Christy v. Fisher, 58 Cal. 256; Burchard v. Roberts, 70 Wis. 111, 5 Am. St. Rep. 148, 35 N. W. 286.

The equities arising out of the application of money belonging to a mortgagor from any source, coming into the hands of a mortgagee after foreclosure, are rigidly administered in favor of a mortgagor, and courts compel a strict account of the same. Folsom v. Norton, 19 N. D. 722, 125 N. W. 310.

Birdzell, J. (after stating the facts as above). The record in this case is a long one; and, while there is considerable conflicting testimony, there can be little doubt that the facts in the foregoing state-

ment are amply substantiated by the evidence. The real controversy is as to the proper inferences of fact and the legal conclusions warranted by the facts stated. The trial court found that the acts of Newberry, as cashier of the First National Bank of Carrington, sufficiently manifested an intention on the part of the defendant to obtain the plaintiff's land for the amount due upon the Johnson mortgage, rather than to collect the indebtedness secured by the mortgage, and it was also found that the foreclosure under the circumstances was an act of bad faith on the part of the defendant. If these inferences of fact are warranted by the record, there can be no question but that the judgment of the trial court is correct. We confess it has been a matter of no little difficulty to satisfy our minds that the foregoing inferences were fully warranted by the facts adduced at the trial, but we have come somewhat reluctantly to the conclusion that the findings of the trial court are justified. We say we have come reluctantly to the conclusion, because of our appreciation of the importance of sustaining the validity and legal effect of statutory proceedings brought to foreclose mortgages where, as here, there apparently has been a full compliance with the statute, and because of the natural disinclination to ascribe unworthy motives to our fellow men in the transaction of the ordinary affairs of life. There are no circumstances tending strongly to indicate such an abuse of the statutory proceedings as was involved in the case of Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390. But here the relief the plaintiff asks is based upon the attitude of the defendant in its relations to him at the time of the foreclosure and subsequently during the period of redemption. Before the foreclosure, it would seem that the defendant bank had ample security for the $100 remaining due on the Johnson note, but it nevertheless had the right to foreclose the mortgage securing the same. After this foreclosure, however, the security held for all that was owing to it by Sletten was enhanced by the sale of the threshing machine to the Andersons, resulting in the pledge of the Anderson notes and a chattel mortgage covering additional property. During the redemption period the bank realized upon collateral held by it, whereby the amount of Sletten's obligation was decreased by more than $1,500. Assuming that Sletten's $1,500 mortgage was still equitably owing to the bank, the effect of this was to discharge it *pro tanto,* if not entirely, and it would likewise reduce the amount of money the

bank would have in the land if ultimately it should obtain the sheriff's deed. It is true that the bank held other securities for this $1,500 obligation of Sletten; but it would seem that this fact, as well as the facts mentioned above, would only heighten the obligations of the bank to proceed with the utmost good faith and fairness in its dealings with him. When Sletten's obligations to the bank are compared with the security given and realized upon, and when consideration is given to the rather indefinite and somewhat evasive answers of Newberry in response to requests for information, continuing almost to the very date of the expiration of the period of redemption, it can hardly be said that the bank acted with that degree of good faith that would be manifested by one whose sole interest was to collect a debt justly owing, with interest and costs.

But however this may be, we are of the opinion that the judgment of the trial court is right for reasons other than those assigned. When the First National Bank foreclosed the Johnson mortgage, it offered for sale the equity of Sletten. At the time of the sale anyone who desired to bid and who first consulted the records to ascertain the extent of Sletten's equity in the land would have learned that it was subject to a first mortgage of $850 to the Wells-Dickey Company, a second mortgage to the First National Bank of Carrington for $1,500, and to a third mortgage, or the one being foreclosed, upon which there was due, according to the notice of foreclosure, the sum of $300.04. Therefore, when the First National Bank bid at the sale, it must be deemed to have offered the amount bid in competition with all the world, the competitors regarding the land as subject to about $2,400 of prior claims. The bid of the First National Bank must, then, be considered to have been for an amount above those prior liens to the extent of the bid. By operation of law, the land became *ipso facto* the primary fund for the payment of such prior liens, and, so far as the relations between Sletten and the bank were concerned, the second mortgage was just as effectually discharged in equity as was the third mortgage. Had the equity been sold to a stranger, instead of to the mortgagee, and had Sletten been compelled later to pay the second mortgage debt, there can be no doubt that he would have had recourse against the property. A mortgagee purchaser stands in no different relation to the debtor in this respect. Murphy v. Elliott, 6 Blackf. 482; Biggins v. Brockman, 63 Ill. 316;

Robins v. Swain, 68 Ill. 197; American Bldg. & L. Asso. v. Waleen, 52 Minn. 23, 53 N. W. 867; American Bldg. & L. Asso. v. Stoneman, 53 Minn. 212, 54 N. W. 1115; Donohue v. Chase, 130 Mass. 137; Pioneer Sav. & L. Co. v. Freeburg, 59 Minn. 230, 61 N. W. 25; Speer v. Whitfield, 10 N. J. Eq. 107; Lydecker v. Bogert, 38 N. J. Eq. 136. The purchaser at the mortgage foreclosure sale is in the same position as one who takes by voluntary conveyance subject to the prior encumbrances. A grantee in these circumstances is not entitled to the benefits of collateral security which the vendor had placed with the mortgagee subsequent to the execution of the mortgage. Brewer v. Staples, 3 Sandf. Ch. 579; American Bldg. & L. Asso. v. Waleen, 52 Minn. 23, 53 N. W. 867. Nor in such a case is the purchaser at the foreclosure sale, who is also the owner of prior mortgages, entitled to enforce against the debtor the collection of the notes secured thereby. Weiner v. Heintz, 17 Ill. 259; Mines v. Moore, 41 Ill. 273; Belleville Sav. Bank v. Reis, 136 Ill. 242, 26 N. E. 646; Lilly v. Palmer, 51 Ill. 331. Whenever the lienholder's interest becomes merged with the estate of the mortgagor, the primary consequence is to extinguish the mortgagor's equity of redemption, not only from the mortgage foreclosed, but from the senior mortgages as well, and as a reciprocal consequence the prior mortgage debts owing by the mortgagor to the mortgagee, who purchased at the sale, is extinguished. 27 Cyc. 1383. But if the land is sold to a stranger, it becomes, according to the foregoing authorities, the primary fund for paying the senior mortgage obligations, subject to which it was sold. While the merger would not be completed until the expiration of the period for redemption, and technically, perhaps, not until the execution of the sheriff's deed (but see Belleville Sav. Bank v. Reis, 136 Ill. 242, 26 N. E. 646), the relations of the parties while the mortgagee holds the sheriff's certificate of sale should be regarded in the light of the equitable consequences of the sale. The mortgagee, having by its bid manifested a willingness to pay $300.04 for the mortgagor's equity in the land, must be held to have been willing to assume the legitimate consequences of its purchase, one of the most important of which is that it would take the title and wipe out Sletten's prior obligations to it. Having, upon the sale and as the holder of the sheriff's certificate, assumed such an attitude, and having later counseled, advised, and even solicited Sletten to assign the

Anderson notes so that they might be paid and the proceeds applied on his prior obligations to it, thus treating such obligations as still owing, it cannot now complain if the mortgagor makes a claim wholly consistent with such attitude. Insistence upon its right to collect the $1,500 debt secured by the prior mortgage, and its later collection, retention, and credit is only consistent in equity with the surrender of the rights under the sheriff's certificate upon the equitable terms proposed by the debtor. The plaintiff has at no time manifested a willingness to pay over to Sletten the amount collected on the Anderson notes, and it cannot now complain if Sletten adopts the equitable alternative and treats the land as having been held by the plaintiff only as security for the debt upon which the foreclosure was had.

The judgment of the trial court is affirmed.

ROBINSON, J. (concurring specially). This is a suit for redemption from a foreclosure sale after the making of a sheriff's deed to the purchaser. Under a mortgage made by the plaintiff on April 19, 1913, the bank foreclosed on a quarter section of land and bid in the same for principal and interest and costs, amounting to $300.04. The trial court, by Honorable J. A. Coffey, gave judgment for the plaintiff, and the bank appeals to this court.

As the trial court found and as the evidence shows, the plaintiff's equity in the land amounts to $3,600, and so it seems the bank insists on receiving from the plaintiff twelve times the total amount of its little mortgage, with interest and costs. That seems like trying to kill the goose that laid the golden egg. Under the statute a mortgagee or his assigns may fairly and in good faith become a purchaser of the property sold. Good faith consists in an honest intention to abstain from taking an unconscientious advantage of another even through the forms and technicalities of law. The law and the courts are not made to rob men of their property. The case is much the same as if a party should pledge or pawn a watch worth $120 as security for $10, payable in a month, and after the lapse of the month, when the owner comes to redeem his watch, the pawnee says to him: "You are too late. I have sold the watch to myself for $10." Of course that is not good faith. It is trying to take an unconscionable advantage of another through the

forms and technicalities of the law. And strange as it may seem, there are some court decisions that do in such cases hold in favor of giving the pound of flesh, but we prefer to base the decision of this court on a broader and better equity. As said by the trial court, the foreclosure was unnecessary; it was conducted in bad faith and for the purpose of obtaining title to the plaintiff's land, and the debt might well have been collected by fair and courteous notices and correspondence, without piling up costs of foreclosure.

McHENRY COUNTY, a Municipal Corporation, and Kiyus Albrecht, Gust Anderson, Jas. McCombs, Geo. Behner, J. E. Ellis, as Members of the Board of County Commissioners of McHenry County, a Municipal Corporation, and Meadow Township, a Municipal Corporation, and Geo. Freeman, J. E. Westford, F. T. Benson, Grimur Arheron, John Phillips, Ernest Goodman, Geo. Goodman, Riley Garrison, Bergur Magnusson, and John Svidal v. S. E. BRADY, Adam W. Gantz, Herbrand T. Lee, as Members of the Board of Drain Commissioners of McHenry County, North Dakota, and John H. Cook, of McHenry County, North Dakota, and John H. Cook, John H. Trimble, and W. R. Banks, as Members of the Board of Drain Commissioners of Bottineau County and S. E. Brady, Adam W. Gantz, Herbrand T. Lee, John H. Cook, John H. Trimble, and W. R. Banks, as Members of Bottineau and McHenry Counties, and France Dredging & Construction Company, a Corporation.

(163 N. W. 540.)

Public interests — representatives of — litigation by private persons — public improvements — constructed and completed — private rights involved — public representatives cannot relitigate.

1. The representatives of a public interest cannot stand idly by and allow the public interest to be litigated by private persons, and years after, and after the public improvements to be constructed have been practically completed, and private rights have become involved, seek to relitigate the matter.

Judgment in former action — conclusive — upon questions determined — also upon all matters necessarily involved — parties — privies — those with common interest — subsequent litigation — same subject-matter — act invalid — assigning new reasons for so holding — not permitted.

2. A judgment is conclusive, not only upon the questions actually contested and determined, but upon the matters which were necessarily involved in the suit; and parties, or their privies, or those with a common public interest, cannot afterwards, by assigning new reasons for holding an act invalid which existed at the time the prior decision was rendered, relitigate the question.

Federal Constitution — state — treaty by — with other state — foreign power — Congress — consent of — political power — drain — consent to construction of — by neighboring state — or nation — surface waters — carrying away.

3. The prohibitions of article 1 of § 10 of the Federal Constitution, which provide that "no state shall enter into any treaty, alliance, or confederation, . . . No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power," are directed against the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States. They are not directed against agreements which in no way encroach upon or weaken the general authority of Congress and which are in no way political, such as the obtaining of the consent of the authorities of the neighboring state or nation to the construction of a drain for the carrying away of surface waters which otherwise could be allowed to flow across the national boundary.

Drain commissioners — of two counties — joint action by — province of Manitoba — license — agreement — treaty — Federal Constitution.

4. The action of the joint boards or drain commissioners of the counties of McHenry and Bottineau in securing an outlet in the province of Manitoba for a drain constructed along the Mouse river for the purposes of draining lands in such counties, and constructed under the provisions of §§ 1821 and 1822 of the Revised Codes of 1905, as amended by chapter 93 of the Laws of 1907, Comp. Laws 1913, §§ 2464, 2465, and in obtaining a license from the municipality of Arthur, in said province, so to do, and in entering into an agreement to keep said drain open, is not in violation of the treaty between the United States and Canada known as treaty series No. 548 and ratified by the President of the United States April 1, 1910, and by Great Britain on March 31, 1910.

Canada — North Dakota — laws of — riparian owners — upper — natural waterways — right to use — surface waters — lower riparian owners — cannot prevent.

5. Under the laws of both Canada and North Dakota, the upper riparian owners have the right to make use of natural drain ways for the disposal of

their surface waters, and it is beyond the power of the lower riparian owners to prevent or obstruct the flow to the detriment of the upper or superior lands or territory.

Officers — acts of — de jure — attacked collaterally — cannot be.

6. The acts of *de jure* officers cannot be collaterally attacked.

Opinion filed May 14, 1917.

Action to enjoin the further construction of a proposed drain, and to declare null and void all acts and doings in connection therewith and the levying of taxes and assessments therefor.

Appeal from the District Court of McHenry County, Honorable *Charles M. Cooley*, Special Judge.

Judgment for defendants. Plaintiffs appeal.

Affirmed.

Statement of facts by BRUCE, Ch. J.

This is an action brought to restrain and enjoin the further construction or maintenance of a certain drain known as Mouse river drain No. 9, and that the acts and deed of defendants in connection with the establishment and construction of said drain, and the levying of taxes or assessment therefor, be restrained and enjoined and declared null and void, and for such other and further relief as may be just and equitable. Since, however, the drain has now been completed, the action is now merely one to enjoin its maintenance and the levying and collecting of the taxes and assessments.

The facts have been stipulated in part and may be summarized in part as follows:

Mouse river enters the state of North Dakota in the eastern part of Ward county, and thereafter flows in a southeasterly course for about 65 miles from the international boundary line. It then changes its course to an easterly and thereafter gradually to a northerly and northwesterly direction until it reaches the international boundary line at a point about 40 miles east of its entrance into the state, and after having passed through McHenry and Bottineau counties since it left Ward county.

The purported object of the drainage project is to deepen and

widen the river bed through its course for about 30 miles south of the international boundary line, and for a distance of about 14 miles north thereof, through the channel of the river after it flows into Manitoba.

The respective drainage boards of McHenry and Bottineau counties were petitioned by the residents and landowners interested, to establish a drain in the channel of the river; the petitions thereof, however, limiting the course of such drain to the point where such river enters Manitoba in a northerly direction at the boundary line.

The state engineer of North Dakota was employed, and made an examination of the river and the land affected, reporting that such lands could be reclaimed and the water drained therefrom by deepening the channel of the river, and widening the same to eliminate sharp curves in its course.

The two boards made an examination of the proposed drain, and by resolution declared that the same was necessary for the public good. Afterward the two boards met at a joint drainage board, employed the state engineer to prepare plans, profiles, and plats of the land to be drained, and passed a resolution that the drain was necessary and for the public good.

The joint board fixed July 10, 1908, as the date when objections to the proposed drain would be heard; and on such date they made an order designating the commencement and course of the drain, and declaring the same to be for the public good and necessity.

The state engineer recommended that the terminus of the proposed drain be changed from the course indicated in the petitions and established by the respective drainage boards, by extending the same to the mouth of North Antler creek, where it empties into the Mouse river, 14 miles north of the boundary line in Canada, asserting the drain would be of no value or purpose unless such extension and improvement in Canada were carried out.

The total cost of the drain was estimated at $142,000, of which about $70,000 would be required to do the work in Canada, unless it be, as was testified to upon the trial of this action, a change of plans will reduce this expense $16,000 to $20,000. Of this amount only $36,000 was assessed against the petitioners.

The territory across the boundary line, through which the improve-

ment of the river is to be made, is in the rural municipality of Aruth, and under its governmental control. This municipality passed a by-law in reference to the improvement of the river by the joint drainage board, known as by-laws No. 372, enacted by the council of the municipality of Arthur, pursuane to the municipal act of the Dominion of Canada.

The by-law recites that certain lands in McHenry and Bottineau counties are covered by water to such an extent as to render the same unfit for use. It also recites that proceedings have been taken by the joint drainage board to improve the same. The course, commencement, and terminus of the proposed drain are recited, and it is further stated in the by-law that certain lands specifically described therein, and situated in the municipality of Arthur, would be beneficially affected by the construction of the drain. It also recites that a certain number of the owners of the land affected have petitioned Bottineau and McHenry counties to construct the drain, the expense thereof to be borne by such owners.

The by-law further provides that the drainage works and improvements in the river, within the municipality of Arthur, when completed, be controlled by such municipality.

It is further provided that the reeve and secretary-treasurer of the municipality be authorized to enter into a contract on behalf of such municipality, to secure the construction and completion of the drain, and its proper maintenance, pursuant to the provisions of such by-law.

Such a contract was made between the rural municipality of Arthur and the joint drainage board on February 24, 1909.

It recites the provisions of the by-law, and specifies that the municipality of Arthur, of the Dominion of Canada, permits the drainage commissioners to construct the drain, and make the improvements northward from the international boundary, in accordance with the plans prepared by the state engineer of North Dakota.

The contract further provides that the commissioners are bound to improve the river, and complete such improvements in a good and workmanlike manner, and to keep the same in repair, and that the commissioners are to assume and pay all taxes or losses which might accrue or arise in consequence of the construction of this improvement, and that the municipality of Arthur is to be at all times made harmless

on account of making such improvements or the maintenance thereof; and that all improvements, by reason of the construction of such drain in the river north of the international boundary line, is to be controlled by the municipality of Arthur, of the Dominion of Canada, and maintained by the commissioners of McHenry and Bottineau counties.

This contract, while it purports to bind the county commissioners of McHenry and Bottineau counties to maintain the drain, is, however, entered into only on behalf of the joint drainage board, and not on behalf of any other officer of the counties of McHenry and Bottineau, or of the state of North Dakota.

The joint drainage board has attempted to assess against the counties of McHenry and Bottineau, and the township of Meadow, and other townships, a considerable portion of the cost of the improvement, by way of special assessment, and to subject such counties and townships to the payment of their respective portions of such improvement out of the general fund of such municipalities.

In the year 1909 a treaty was negotiated between the United States and Great Britain, having for its object to prevent disputes regarding the use of boundary waters, and to settle all questions then pending between the United States and the Dominion of Canada, involving the rights, obligations, or interests of either in relation to the other, or to the inhabitants of the other along their common frontier, and to make provision for the adjustment and settlement of all such questions as might thereafter arise between the high contracting parties. The terms of this treaty will be considered at length in the argument.

The following points summarize the general grounds upon which the appellants rely in this action:

1. Control of the drain or that portion upon which the successful operation of the entire drain depends is reserved in the rural municipality of Arthur, contrary to the drainage laws of this state.

2. Title to the right of way of that portion of the drain upon which the successful operation of the entire project depends has not been acquired, but is still vested and in control of the rural municipality of Arthur, and other property owners, who are residents and citizens of a foreign power, not subject to the laws of this country as to eminent domain or any other laws or regulations of this state.

3. Benefits are conferred on lands in Canada which are not assessed for such benefits.

4. No power exists in drainage boards to secure an outlet or maintain a drain or any part thereof in territory of a foreign sovereign nation.

5. The attempted construction and maintenance of that portion lying north of the international boundary line in Canada upon which the successful operation of the entire drain depends, and the negotiations and contracts with the rural municipality of Arthur, which are the basis for such proceedings, constitute an unlawful attempt to invade the treaty-making power vested in the Federal government and render the same wholly void, as an attempt on the part of the state through its agent to enter into an agreement and compact with another state or foreign power without the consent of Congress.

6. The attempted construction and maintenance of that portion lying north of the international boundary line in Canada, upon which the successful operation of the entire drain depends, is an attempt to forcibly submit these plaintiffs and their lands and goods to the sovereignty and control of a foreign independent nation, and is in violation of the Constitution and fundamental law, and (a) denies to these plaintiffs equal protection of the law; (b) deprives them of liberty and property without due process of law; (c) imposes upon them and their property the sovereignty of a foreign independent power; and (d) abridges and destroys the privileges and immunities enjoyed by these plaintiffs as citizens of the United States.

7. The petition for the drain which is the basis of the drainage proceedings confines the north terminus of the drain to the north line of Bottineau county, and the extension and maintenance of such drain, north and beyond that point, for a distance of 15 miles into the territory of a foreign, independent nation, is without jurisdiction and void.

8. That since the 13th day of June, 1911, the defendants have had no lawful right or authority to act as a joint drainage board, and that said McHenry county has not been represented therein by any of its lawful representatives, and that all proceedings taken by the defendants since that period have been and are wholly void.

9. That the defendants S. E. Brady and Adam W. Gantsz not since

the 13th day of June, 1911, had any lawful right or authority to represent said McHenry county or said drainage board, or to do any act or suffer any omission with reference to said board in any way binding upon these plaintiffs, and that the purported contract made with the defendants France Dredging & Construction Company is illegal and void.

10. The defendants are seeking by unlawful acts and contracts to impose a heavy and unjust tax and burden upon these plaintiffs, which tax is imposed for benefits conferred upon citizens of a foreign, independent nation, and which taxes cannot be of equal and uniform operation, but the basis thereof are and must be unequal, illegal, and void in that moneys are expended out of taxing districts when assessed.

11. The alleged assessment of McHenry county and Meadow township for alleged benefits is without authority and void, and a new assessment of benefits must in any event be made as a basis for taxation.

Lawrence & Murphy, and *John Thorpe,* State's Attorney of McHenry County, for appellants.

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

BRUCE, Ch. J. (after stating the facts as above). The drainage proceedings involved in this controversy have already been before this court in the case of Freeman v. Trimble, 21 N. D. 1, 129 N. W. 83. It was there held that:

(1) The joint boards of drain commissioners have power to secure an outlet to drains established within their district, in foreign territory, where a public necessity exists for securing such outlets.

(2) Where it is necessary to improve, deepen, or widen the channel or bed of a river in this state in order to drain flooded lands, and the deepening and widening of such river in this state would not be effectual in draining such lands, without deepening and widening the river bed for about 12 or 14 miles after it passes into Canada, the drain commissioners have power to secure a suitable outlet by improving the river after it passes into Canada.

(3) In such a case, the fact that the control of the improvement after its completion is not vested in the county commissioners, but in the council of the municipality through which the river passes, in

Canada, by virtue of a by-law of said municipality and a contract between it and the board of drain commissioners, does not defeat the right of the drain commissioners to secure such outlet by improving the river bed.

(4) Section 1823, Rev. Codes 1905 as amended in 1907, Comp. Laws 1913, § 2466, making it necessary to secure the right of way to land through which drains in this state pass, has no application to improvement of water courses for drainage purposes.

(5) Improving a water course after it passes beyond the drainage district for 12 to 14 miles into foreign territory, for the purpose of making an improvement of the water course in this state efficacious, is not an unreasonable exercise of the power of securing an outlet for drain purposes.

(6) The general principle that land benefited by a drain equally with other land, that is assessed for such benefits, shall not be arbitrarily omitted from such assessment, is not applicable where land in foreign territory is not, and cannot be, assessed for benefits incident to the construction of the drain in the drainage district that is assessed.

These findings practically dispose of all of the contentions of the appellants in this case except the contention that the attempted construction and maintenance of that portion of the drain which lies in Canada, and the negotiations and contracts with the rural municipality of Arthur, constitute an unlawful attempt to invade the treaty-making power, which is vested in the Federal government.

It is argued, indeed, by counsel for respondent that the prior decision makes all of these matters *res judicata*. Counsel for the appellant, however, contends that the parties plaintiff are different. An examination shows that all of the individual plaintiffs in the present action were plaintiffs in the former case, and that the only additions are McHenry county and its board of county commissioners and Meadow township. It is also shown that McHenry county contributed $300 to award the payment of expenses of the former litigation, and that both McHenry county and Meadow township were in existence when the former litigation was instituted. The defendants in the present litigation are the same as those in the former controversy. The relief prayed for in the former action was that the defendants be enjoined from letting contracts for the construction of the drain, and from taking

any further steps for the establishment or construction of such drain, and for other equitable relief. The relief prayed for in the present case is that the defendants be enjoined from proceeding any further with the construction of the drain, and that their acts in establishing and constructing the same and the levying of taxes be declared void, and for other equitable relief.

Whether the former decision constitutes *res judicata,* it is not necessary for us to say. All that is necessary to say is that the former decision certainly presents the law of the case, and that this court after such a decision, which was rendered after a full presentation and after a rehearing, will not, after the drain has been constructed, the expense incurred, and the benefits conferred, reverse its prior holdings.

The only possible defense which remains and which was not specifically passed upon in the case is that the transaction is an encroachment upon the Federal treaty-making power and a violation of the Federal constitutional provision which forbids agreements or compacts between a state and a foreign power without the consent of Congress. And this question can only be raised, if at all, by the plaintiffs McHenry county and Meadow township, as the point was certainly involved in the prior litigation. It is true it was not raised or discussed by counsel on either side, and was only incidentally raised in the dissenting opinion of Mr. Justice Spalding, but it was involved nevertheless and would ordinarily be considered to be foreclosed at this time. See Re Northwestern University, 206 Ill. 64, 69 N. E. 75; Greenberg v. Chicago, 256 Ill. 213, 49 L.R.A.(N.S.) 108, 99 N. E. 1039.

It is apparent, indeed, that the new plaintiffs merely acted in a representative capacity and as representatives of the public interests of the citizens of their county and municipality. Such representatives are privy to any other action in which the same interest is brought in question, even though not by same parties thereto. State ex rel. Davis v. Willis, 19 N. D. 209–225, 124 N. W. 706; Freeman, Judgm. § 158; Sabin v. Sherman, 28 Kan. 289; Dimond v. Ely, 28 N. D. 426, 149 N. W. 349; Greenberg v. Chicago, supra; 23 Cyc. 1269.

Nor do we believe that the fact that the treaty relied upon was not urged in the former proceedings, and was only suggested in the

dissenting opinion of Mr. Justice Spalding, in any way changes the situation.

The general rule, indeed, seems to be that a judgment is conclusive, not only upon the questions actually contested and determined, but upon all matters directly involved and which might have been litigated and decided in that suit, and that of assigning new reasons for holding an act invalid which existed at the time the prior decision was rendered, the parties cannot relitigate the question settled by that litigation.

The plaintiffs, indeed, if with any standing in court at all, come here with every equity against them. They must have known of the former proceeding, for they contributed towards its expenses, and yet they stood idly by and allowed it to be brought in the names of others. They have now practically all of the benefits of the drain, and yet they desire to escape its cost. They are the owners of, or are interested in, the upper lands. These lands have been drained into the lower lands of Bottineau county to be thence directed across the border. Now that the drain is completed and bonds have been issued, their surface waters are disposed of, and, unless a proper outlet is had, the lands of Bottineau county will themselves be flooded, they seek to block the project, and to raise questions of which they must have been, or should have been, cognizant at the time of the original action. Hackney v. Elliott, 23 N. D. 373, 398, 137 N. W. 433; Erickson v. Cass County, 11 N. D. 494, 508, 92 N. W. 841.

But whether precluded or not, we do not believe that there is any merit in the objections raised.

The question is whether the proceedings in consideration were in violation of the following section of the Federal Constitution, article 1 of § 10:

"No state shall enter into any treaty, alliance, or confederation. . . .

"No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power."

The argument of counsel for appellant is that if the engagement of the drainage board with the municipality of Arthur is a treaty or an invasion of the treaty-making power, it is void, whether undertaken with or without the consent of Congress. If it is an agreement or

compact with another state, or foreign power, it is void unless Congress has by a general law or specific statute authorized the same. He does not, however, seriously contend that it is a treaty. He argues that it is a compact or agreement. He argues that one contracting party is a public board acting pursuant to a specific grant of power from the state of North Dakota; that it acts as a public body; that its members are appointed by the governing body of their respective counties; and that the members of this governing body take an oath of office to support and defend the Constitution of the United States and of the state of North Dakota; that their compensation is paid from the public revenues; and that such members are subject to removal for cause by the governor of the state of North Dakota.

Moreover, he adds: "When this agency of government undertakes to exercise the functions prescribed by law, it keeps a public record of its meetings, it purports to execute contracts and engagements binding upon the citizens of the state thereby affected, or citizens of other states owning property therein, and so long as it exercises its functions within the scope of its statutory authority, it may and does impose heavy burdens upon the property of the citizens by virtue of its public authority; and as defendants assert in this case, it enjoys the additional power of imposing such burdens under legal authority upon the counties of the state and other governmental subdivisions, which burdens in the case of the counties of McHenry and Bottineau, if legally assessed and imposed, are payable as a debt of such counties out of the general revenues raised by taxation of all citizens and property owners within such counties."

He also maintains that the municipality of Arthur in the Dominion of Canada occupies the same relationship to the parent state.

We do not believe that there was any violation of § 10 of article 1 of the Federal Constitution, which provides that "no state shall enter into any treaty, alliance, or confederation. . . . No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power." It is true that the case of Holmes v. Jennisen, 14 Pet. 540, 10 L. ed. 579, uses quite sweeping language in regard to the clause in question. The case, however, was one which involved the right of extradition, which is essentially a national and governmental power, and its language must

be construed in connection with the subject under consideration. Although, indeed, there is language in that case which seems to preclude any intercourse between a state and a foreign state, the later decisions of the court seem to adopt the theory that not all intercourse is forbidden, or contracts prohibited, but only those agreements or compacts which affect the supremacy of the United States, or its political rights, or which tend in any measure to increase the political power of the states as against the United States or between themselves.

In the case of Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728, the Supreme Court of the United States held that an agreement made without the consent of Congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between the states, was not in violation of the Federal rights. Among other things, the court through Mr. Justice Field said:

"Is the agreement made without the consent of Congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of this clause? The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

"There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York

for the transportation of the exhibits through that state in that way. If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus removing the cause of disease. So, in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. *If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another,* for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

"We can only reply by looking at the object of the constitutional provision and construing the terms 'agreements' and 'compact' by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of *any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.* Story, in his Commentaries (§ 1403) referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language 'may be more plausibly interpreted from the terms used, "treaty, alliance, or confederation," and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for

mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;' and that 'the latter clause, "compacts and agreements," might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of states bordering on each other.' And he adds: 'In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.'

"Compacts or agreements—and we do not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate the boundary line between two states, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition. Nor does a legislative declaration, following such line, that it is correct, and shall thereafter be deemed the true and established line, import by itself a contract or agreement with the adjoining state. It is a legislative declaration which the state and individuals affected by the recognized boundary line may invoke against the state as an admission, but not as a compact or agreement. The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it; for example, as made upon a similar declaration of the border or contracting state. The mutual declarations may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not upon the full and free exercise of Federal authority. If the boundary established is so run as to cut off an important and valuable

portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary or rather for its adoption afterwards, the consent of Congress may well be required. But the running of a boundary may have no effect upon the political influence of either state; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey, would in no respect displace the relation of either of the states to the general government. There was, therefore, no compact or agreement between the states in this case which required, for its validity, the consent of Congress, within the meaning of the Constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the states. Such ratification was mutually made by each state in consideration of the ratification of the other."

This language was quoted with approval in the case of Wharton v. Wise, 153 U. S. 155–168, 38 L. ed. 669–674, 14 Sup. Ct. Rep. 787. In that case the validity of a compact between the states of Virginia and Maryland, which gave to the citizens of Maryland the right to enjoy freely the right to take oysters in common with the citizens of Virginia in Pocomoke Sound, was passed upon by the court.

In addition to quoting the language in the case of Wharton v. Wise, the court said:

"So, in the present case, looking at the object evidently intended by the prohibition of the Articles of Confederation, we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach upon or weaken the general authority of Congress under those articles. Various compacts were entered into between Pennsylvania and New Jersey and between Pennsylvania and Virginia, during the Confederation, in reference to boundaries between them, and to rights of fishery in their waters, and to titles to land in their respective states, without the consent of Congress, which indicated that such consent was not deemed essential to their validity. Virginia and Maryland were sovereign states, with no common superior and no tribunal to determine for them the true construction and meaning of its provisions in case of

a conflict of opinion upon the subject. Each state was left to decide for itself as to their true construction and meaning, and to its own sense of the obligations of the compact for their enforcement. If, therefore, the Congress of the United States, which, as said above, never complained of the compact of 1785, had interposed objections to its adoption or enforcement as being within the meaning of the terms 'treaty' or 'confederation,' or as establishing an alliance within the prohibition of the articles mentioned, yet it would not lie in either of the states that were parties to the contract to allege its invalidiy on the subject. As said by Mr. Steele, in his very able and elaborate opinion, upon the construction of provisions of the compact, given to the governor of Maryland, and which is referred to in the record, they cannot complain that there was in its adoption any breach of good faith towards themselves, and we may add, or any rupture by them of the league of friendship declared to be the object of the articles to establish.

"In our judgment the compact of 1785 was not prohibited by the Articles of Confederation. It was not a treaty, confederation, or alliance within the meaning of those terms as there used, and it remained as a subsisting operative contract between them in full force when the Confederation went out of existence upon the adoption of the present Constitution of the United States. And it was not affected or set aside by the prohibitory clause of that instrument. Its prohibition extends only to future agreements or compacts, not against those already in existence, except so far as their stipulations might affect subjects placed under the control of Congress, such as commerce and the navigation of public waters, which is included under the power to regulate commerce."

The same language was again quoted with approval in Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73, and again in Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

In the case of Fisher v. Steele, 39 La. Ann. 447, 1 So. 888, the validity of an appropriation made by the Louisiana legislature for the construction of levees in Arkansas and along the Mississippi river north of Louisiana was involved. This case is very similar to the one at bar, as it was to prevent the flooding of lands in Louisiana, just the same as the improvement in question was to prevent the flooding of lands in North Dakota. A compact between two states was involved, as the

levees were only to be built after an agreement or consent of the state of Arkansas. In its opinion the Louisiana court said:

"The seventh objection invokes the 2d paragraph of § 10 of article 1 of the Constitution of the United States, which reads: 'No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit delay.'"

"On reading that objection in connection with the constitutional prohibition just quoted, the mind would naturally expect a charge that the state of Louisiana was projecting a treaty of alliance with the state of Arkansas, or contemplating some joint scheme of commercial or industrial enterprise, or perhaps conspiring for the establishment of a new confederacy; but great is the relief when the mind is informed that the purpose which the plaintiff resists with such a powerful shield is merely to build a piece of levee in the state of Arkansas, if necessary, and if that state does not object, or consents. It is, indeed, too clear for argument that such a transaction is no more a prohibited compact between two states than is contained in the requisition of our governor for, and the consent of another to, the capture and arrest of a fugitive from justice."

Again, and as early as 1853, and in the case of Union Branch R. Co. v. East Tennessee & G. R. Co. 14 Ga. 327, the Georgia court upheld the right of the state to authorize a foreign railroad to construct a bridge across the boundary line, with the consent and agreement of the two states. In its opinion, the court said: "This prohibition applies only to such an 'agreement or compact' as is in its nature political; . . . the framers of the Constitution clearly intended nothing more . . . than to prohibit the several states from exercising their authority in any way which might limit or infringe upon a full and complete execution by the general government of the powers intended to be delegated by the Federal Constitution."

See also Dover v. Portsmouth Bridge, 17 N. H. 200.

In the Barron Case, 7 Pet. 243–248, 8 L. ed. 672–674, Mr. Chief Justice Marshall said:

"The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and estab-

lished by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. There are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes. . . . The 9th section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the 10th proceeds to enumerate those which were to operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the states. 'No state shall enter into any treaty,' etc. Perceiving, that in a Constitution framed by the people of the United States, for the government of all, no limitation of the action of government on the people would apply to the state government, unless expressed in terms, the restrictions contained in the 10th section are in direct words so applied to the states.

"It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the states feel an interest. A state is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely upon the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the states which are contained in this section. They will be found, generally, to restrain state legislation on subjects intrusted to the govern-

ment of the Union, in which the citizens of all the states are interested. In these alone were the whole people concerned. The question of their application to states is not left to construction. It is averred in positive words."

It is true these words were largely *dicta,* but they are illuminating nonetheless. See also Mackay v. New York, N. H. & H. R. Co. 82 Conn. 73, 24 L.R.A.(N.S.) 768, 72 Atl. 587; Searsburg v. Woodford, 76 Vt. 370, 57 Atl. 961.

The rule is summed up in 36 Cyc. 838, as follows: "This provision, however, does not apply to every possible agreement or compact between two states, *but only to such as might tend to increase the political power of the states affected,* and thus encroach upon or interfere with the supremacy of the United States; agreements which can in no respect concern the United States may be made by the states without the consent of Congress. The consent of Congress to an agreement between states may be given after as well as before the making of the agreement, and need not be expressed in any particular form; it is sufficient that Congress, by some positive act in relation to the agreement, has signified its consent thereto."

The same considerations apply when we come to consider appellants' point, that the attempted construction and maintenance of the portion of the drain which lies north of the international boundary line is an attempt to forcibly submit the plaintiffs and their lands to the sovereignty and control of a foreign independent nation, and to deprive them of liberty and property without due process of law and the equal protection of the laws, and to abridge and destroy the privileges and immunities of citizens of the United States. How the purchase or the agreement for the construction of a right of way or drain in Canada, which is necessary for an outlet to a drainage system in the United States, subjects any person to the control of a foreign nation, it is difficult for us to see. This is not a case of constructing a drain in Canada with an outlet in the United States, but of constructing a drain in the United States with an outlet in Canada; the outlet merely being the incident. It is no different than the purchase of a piece of land by the state of Virginia in the state of New York, which the former state might desire to acquire as a site for a public building, or for the purchase of a building in Illinois for the purpose of exhibiting

at a World's Fair, which is spoken of by Mr. Justice Field in Virginia v. Tennessee, 148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728.

Nor, too, do we believe there is any merit in the contention that the defendants had any authority to stipulate to pay damages or losses which might occur to the Canadian municipality on account of the drain. Whether this agreement could be enforced or not, is a matter which we do not care to pass upon. The municipality of Arthur does not seem to have repudiated the contract, and no demand for any such losses has yet been made, and we do not believe that the contract can be collaterally attacked.

Nor do we believe that the agreement was in any way in conflict with the treaty between the United States and Canada, known as treaty series No. 548, ratified by the President of the United States, April 1, 1910, and by Great Britain on March 31, 1910.

The preamble of this act limits it (1) to disputes regarding the use of boundary waters; (2) the settlement of all questions which are now pending between the United States and Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other along their common frontier; (3) to make provision for the adjustment and settlement of all such questions as may hereafter arise. This preamble in no way covers the situation which is before us. There has been no dispute,—there has merely been a request for a license. Neither do we find, from the body of the act, any provisions which seem to deprive the local municipalities of the powers exercised in the case before us. The only provisions cited by counsel are the following:

"Article III. It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions, and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission."

"Article IV. The High Contracting Parties agree that, except in

cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

"It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."

"Article VIII. —The International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under articles III. and IV. of this treaty the approval of this Commission is required. . . .

"In cases involving the elevation of the natural level of waters on either side of the line, as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby." [36 Stat. at L. 2449–2452.]

It is clear that these provisions do not apply. There is here before us no question of artificial dams or of the artificial raising of waters. The waters are not boundary waters. All we have before us is a case where the drainage commissioners are seeking to dispose of the surface waters of their district. The Mouse or Souris river is a natural drain way, even though not a navigable river. Under the laws of both Canada and of North Dakota the upper riparian owners have the right to make use of it as a drain way, and it is beyond the power of the lower riparian owners to prevent or obstruct the flow to the detriment of the upper or superior lands or territory. See Soules v. Northern P. R. Co. 34 N. D. 7, L.R.A.1917A, 501, 157 N. W. 823. If the commissioners had stopped their work at the border, we hardly believe

that any of the residents of Canada or any of its municipalities would have had any ground for complaint, even though the flooding of their land would have been the result. An agreement or license by which that flooding is prevented can, therefore, hardly be said to be an interference with any treaty rights which relate merely to obstructions in the boundary waters.

There is no merit in the contention that the defendants S. E. Brady and Adam W. Ganstz, not since the 13th day of June, 1911, had any lawful right or authority to represent said McHenry county or said drainage board, or to do any act or suffer any omission with reference to said board, and that the purported contract made with the defendants France Dredging & Construction Company, is illegal and void. The officers in question were at least *de jure* officers, and it is quite clear that their acts cannot be here attacked. Page & Jones, Taxation by Assessment, § 1009; 2 High, Inj. 4th ed. 1312–1335; Graeff v. Felix, 200 Pa. 137, 49 Atl. 758.

The judgment of the District Court is affirmed.

CHRISTIANSON, J., being disqualified did not participate.

ROBINSON, J. (dissenting specially). In this case several years ago the drainage commissioners of Bottineau and McHenry counties undertook as a drainage project to deepen, widen, and straighten the channel of the Mouse river in the said counties and for 15 miles into Canada. In so doing they acted under the statute for the construction of drains, and all their doings must be governed by that statute in just the same manner as though there were no stream called Mouse river. The total cost of the drain as estimated was $142,000, of which $70,000 was for improvements in Canada. This suit is a second edition of an appeal from Judge Templeton in which the weight of judicial authority was about equally divided. 21 N. D. 1, 129 N. W. 83. The suit is to restrain further proceedings for the construction of the drain, and that all doings of the commissioners be adjudged null and void. The majority of the judges denied the relief, and the result must be a multitude of suits,—a suit by each person to abate and cancel any assessment that may be laid against his land for any sum in excess of special benefits. With so large an expenditure in Canada charged

against the land on this side of the line, it is but fair to presume that nearly all the special assessments are or will be for an excessive amount. When a special assessment against land is materially in excess of benefits, the landowner is in no way compensated for the excess, by the good faith or bad faith or the mental capacity of the parties making the assessment. The law has no means of measuring their mental status. Good motives do not justify the confiscation of property by means of a special assessment.

The owner of land benefited by a drain must contribute his *pro rata* share to the expense of the drain to this extent that it contributes to the value of his land. That is the limit of his liability. The drain commissioners are bound to know the simple rule of law, and to levy no assessment against property in excess of actual benefits to the same. Drain commissioners are not judicial officers. They act under a statutory power and must keep within the limits of their power. When an assessment is materially in excess of benefits, it is a fraud on the law and a usurpation of power which the courts must correct.

Of course the drainage commissioners had no power to make any special assessment against the lands in Canada, and they did not attempt to do it. The moment they stepped across the boundary line they ceased to have any official authority to contract or to do anything whatever. Then every act done by them was that of a volunteer private party. And yet for the drainage improvements made, or to be made in Canada, the commissioners have assessed the total expense against the land and municipalities on the south side of the line, and in that way every assessment has been made for an excessive amount. The excess depends mainly on the sum which was added to defray the improvements made in Canada, including the surveys, the commissioners' charges, and everything thereto appertaining, and there may be other excessive charges.

It is needless to spin out a long decision on questions of estoppel, *res judicata,* and the power of a state to make treaties with other states. In any view that may be justly taken of this case, the special assessments which have been made are all excessive and void. It is said that during the pendency of this action the drainage boards have gone on and completed the drainage project, and that Bottineau county has

issued a large amount of drainage bonds, and that a large amount of special assessments have been paid from year to year by landowners and by townships and by Bottineau county, and that in McHenry county the special assessments have not been extended against the lands or the municipalities. But all that is immaterial under the stated law which governs this case. Drainage bonds are not negotiable, and the purchasers take them at their own risk, and when a party has once paid on his void special assessment he must have a proper credit in case of a valid reassessment. Regardless of the legal defects in a drainage proceeding, every person benefited is bound to contribute his *pro rata* share to the sum total of the legal expense, but a special assessment must never exceed the special benefits. And that is true even though the sum total of the expense be swollen to twice the amount of the special benefits. There is much reason for claiming that the drainage statute is void in so far as it permits a board of men to sum up and allow all the costs and expenses incurred in the making of a drain, without notice to any party. The cost does commonly include a large sum for themselves, their attorneys, and other matter in which they have a personal interest. And under the statute the board fixes the total amount, and then makes a list assessing a specific amount against each municipality, lot, or tract of land benefited by the drain. Then the list is filed in the office of the county auditor, and he extends the several amounts on the general tax list as a special tax against each tract of land and municipality, which special tax is collected and enforced in the same manner as other taxes. Comp. Laws 1913, § 2474. Thus, without notice, judgment is given and execution is issued for the sum of the special assessment. Certain it is that such a statute cannot be sustained without holding that any landowner may go into court and show that a special assessment against his property is excessive and unjust.

The right to a preliminary contest on the mere percentage of benefits is no protection. It is only a contest on the percentage of cost and plunder that may be charged and extended as a tax against each tract of land. It in no manner affects the total amount, and that is by far the most important matter.

In so far as the Erickson Case, 11 N. D. 494, 92 N. W. 841, holds

to the contrary, it has no support in reason or in the cases cited to sustain it.

In this case it is clear that, without any legal notice to the parties interested, the sum total of the expense of the drain was computed and allowed by the commissioners, and extended, in whole or in part, against the lands and municipalities, and it was grossly excessive. Hence, it should all be set aside and declared and adjudged to be void.

Then on a proper notice and hearing, a personal notice by mail or otherwise, to every party interested, the board of commissioners might compute the total necessary expense of the drainage proceedings in McHenry county and in Bottineau county, and apportion and extend the same against the several tracts of land and municipalities. But regardless of the total expense, the sum extended and charged against any tract of land or municipality must not exceed the special benefits to the same.

In this case there is no use of talking of *res judicata* or the force of any prior decision binding on this court. Though it is the custom of courts to adhere to their own blunders and pile error upon error, the nefarious custom is not a law, and the custom is of less force when a party invokes a prior decision made by a bare majority of one judge, or by three judges voting against three judges, including the trial judge.

It is high time for the supreme judicial tribunal of this state to reconsider its errors and to place its decisions on a higher and better plane. In this state the drainage statutes have been used to promote graft and jobbery, with big fees and expenses for drain commissioners and their attorneys. The drainage laws and decision have given a rich reward to jobbery and oppressive litigation. In 11 N. D. reports, there are decisions in fourteen drainage cases arising in Cass county, and in each case the sum total of the drainage assessment was twice the benefits. In each case the legal fight was a mere sham; it was a game with loaded dice. In the Erickson Case, supra, the total cost was $42,000, including $13,000 for attorneys' fees and commissioners' fees and junketing trips around the country. Bridges costing $500 or $600 were built for no possible use only to make costs; bridges that have lain there to rot, without any possibility of using them. This Erickson Case has been a blind leader of the blind. It has no support

in reason or in the cases cited to sustain it. It is directly contrary to the cases which are cited to sustain it.

As the Drainage Law was construed in the Erickson Case it is not constitutional. It puts the citizen completely at the mercy of the drain commissioners, permitting them to fix the total amount of an assessment against lands, including the charges of themselves and their attorneys and friends, without giving any notice to the owner of the land. Under the law of the land a person must have a fair hearing and a fair opportunity to contest the sum total of all costs and plunder that drain commissioners may charge against his land, and not merely a bootless opportunity to contest the rate or per cent of the amount. The one may be clearly right, and the other clearly outrageous.

Inasmuch as the Drainage Law gives no opportunity for a hearing on the sum total of all loot and costs the drain commissioners may cause to be extended as a lien and judgment against lands on the tax list, the law does in effect give judgment and execution without a hearing. Comp. Laws 1913, §§ 2474, 2479. Hence the law cannot be sustained without holding that the landowner has an ample remedy by a suit to abate any assessment in excess of benefits to his land. In the Erickson Case, 11 N. D. at page 498, 92 N. W. 841, it is said thus: "It is well settled that where a provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what portion of the taxes shall be assessed upon his land, there is no taking of his property without due process of law." That proposition is grossly erroneous when applied to a special assessment, because, as we have said, the per cent may be just and reasonable, and the total amount may be outrageous. On this the court cites several decisions which hold directly to the contrary.

There is Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663. This was under the laws of California, and the special assessment was made without notice and sustained because it could only be enforced by legal proceedings in which the landowner might avail himself of any defense going either to the validity of the amount or of the assessment.

So in State ex rel. Dorgan v. Fisk, 15 N. D. 226, 107 N. W. 191, this court cites a Wisconsin and Nebraska case to sustain the power of commissioners to make drains and to levy assessments for the same.

But in Wisconsin the drain commissioners are appointed by the court, and authorized to assess the amount of benefits, and to report the same to the court, and then the court causes notice to be given to every person, and gives every person a fair opportunity to contest the amount, and even to call for a jury trial of the amount.

In Nebraska the statute makes the county commissioners a drainage board, and authorizes them to make assessments without notice; but the court holds that on such an assessment a party cannot be denied the right to a review by the courts.

In Hackney v. Elliott, 23 N. D. 373, 137 N. W. 433, Ex-Judge Goss wrote a thirty-seven page opinion on the drainage question, and concluded that the validity of the statute had been sustained by the United States Supreme Court. But the case was merely an appeal from a decision on demurrer, and it presented no question on the power of drain commissioners to levy a final assessment, without notice, or to act as judges in their own case. And the judges of this court may well take judicial notice of what is known to every person of common sense and observation in drainage cases, that a large bulk of the cost is composed of charges going into the pocket of the drainage commissioners. It is no uncommon thing for them to meet ten minutes on a day and charge up for a day's work, and to allow their attorney a fee of $1,000 as a retainer. That was the retainer in the Erickson Case.

In this case we must realize that drain commissioners act under a statutory power, which must be strictly observed. They are not judges; they have no judicial power. The statute gives them no power to expend $70,000 on the construction of a drain in a foreign country, and to charge the same against land in this state. Yet, that is what they have done in this case. Hence, as this court does not provide for a fair and just rating and adjustment of the legal charges against the lands, the result will be a multiplicity of suits, because every landowner will have a perfect legal right to commence and maintain an action for himself to abate all illegal and excessive charges against his own land, and to abate any assessment in excess of actual benefits to the land. Of course so far as the special assessments have not yet been made and extended against any lands, there is nothing in the decision to prevent the same from being limited to actual benefits,—so as to avoid needless litigation.

The DONNYBROOK STATE BANK, a Domestic Banking Corporation, v. V. A. CORBETT.

(163 N. W. 275.)

Chattel mortgage — amount of, fully stated — promissory note — same date and place — mistake in — as to amount — evidence — sham defense — judgment.

In this case defendant made to the plaintiff a chattel mortgage to secure $1,500, with interest at 10 per cent, and at the same time he made a note corresponding to the mortgage in all respects only that by inadvertence the word "hundred" was omitted after the word "fifteen." The note and mortgage were made for an honest value, without any fraud or deception. The defense was a sham. Judgment is affirmed.

Opinion filed June 2, 1917.

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

Affirmed.

Palda & Aaker and *I. M. Oseth,* for appellant.

A promissory note is complete without any notation in the margin. Where figures are inserted in the margin, it is usually done for convenience only, a mere memorandum, and is no part of the note. Therefore, any alteration in such figures, entry, or memorandum is not material. Smith v. Smith, 53 Am. Dec. 652 and note, 1 R. I. 398; Merrit v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; Hollen v. Daris, 59 Iowa, 444, 44 Am. Rep. 688, 13 N. W. 413; Johnston Harvester Co. v. McLean, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177; Williamson v. Smith, 1 Coldw. 1, 78 Am. Dec. 478.

An alteration cannot be made in the body of the note, as to the amount thereof, by the payee, without the consent of the maker, merely to satisfy the payee as to his idea of what the transaction really was. Blenkiron Bros. v. Rogers, 87 Neb. 716, 31 L.R.A.(N.S.) 127, 127 N. W. 1062, Ann. Cas. 1912A, 1043.

Note.—As to effect on mortgage of alteration of note secured by it, see notes in 4 L.R.A. 197; 16 L.R.A. 468; and 41 L.R.A.(N.S.) 230.

As to what is, and effect of alteration of instrument, see note in 10 Am. Dec. 271.

No court can, nor has any court ever assumed the right to, substitute new agreements for those actually entered into, under the pretense of correcting an error on the part of one party. It is not sufficient for one party to say a mistake was made. The mistake must be a mutal mistake. Forester v. Van Auken, 12 N. D. 182, 96 N. W. 301; 17 Cyc. 775.

John J. Coyle and *P. M. Clark,* for respondent (*A. W. Gray,* on oral argument).

Upon proof of actual fraud, the alteration of an instrument invalidates it for all purposes, except as an evidence of indebtedness for the true amount; but the law is that where there is no fraud, and while the instrument itself may be canceled on account of the alteration, the original indebtedness still remains and can be sued upon; and if any security has been given, such as a mortgage, the mortgage can be enforced regardless of the alteration. 2 Cyc. 183; Gordon v. Robertson, 48 Wis. 493, 4 N. W. 579; 2 C. J. 1181, 1182, and note; Osborn v. Hall, 160 Ind. 153, 66 N. E. 457; Savage v. Savage, 36 Or. 268, 59 Pac. 461.

The alteration here made was wholly immaterial, for the reason that it was clearly made with the intention of making the instrument conform to the intention of the parties, and without fraud. Clute v. Small, 17 Wend. 230; 1 R. C. L. 980; Woodworth v. Bank of America, 10 Am. Dec. 271, note; Blenkiron Bros. v. Rogers, 87 Neb. 716, 31 L.R.A.(N.S.) 127, 127 N. W. 1062, Ann. Cas. 1912A, 1043; Eaton v. Delay, 32 N. D. 328, L.R.A.1916D, 528, 155 N. W. 647; Edington v. McLeod, 87 Kan. 426, 41 L.R.A.(N.S.) 230, 124 Pac. 163, Ann. Cas. 1913E, 315; Van Eps v. Newald, 139 Wis. 129, 120 N. W. 853; Savage v. Savage, 36 Or. 268, 59 Pac. 461.

A mortgage executed to secure a promissory note which has been altered so as to destroy it is not, in the absence of fraud, affected by the alteration, and may be enforced. Clough v. Seay, 49 Iowa, 111; Elliott v. Blair, 47 Ill. 342; Gillette v. Smith, 18 Hun, 10; Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837; Eckert v. Pickel, 59 Iowa, 545, 13 N. W. 708; Barton Sav. Bank & T. Co. v. Stephenson, 51 L.R.A. (N.S.) 346, note; 11 C. J. 1229, 1230; First Nat. Bank v. Wolff, 79 Cal. 69, 21 Pac. 551, 748; Wallace v. Tice, 32 Or. 283, 51 Pac. 733; Croswell v. Labree, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331;

Styles v. Scotland, 22 N. D. 469, 134 N. W. 708; Busjahn v. McLean, 3 Ind. App. 281, 29 N. E. 494; Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162.

The term "alteration" implies intention, and in order that an alteration may have the effect of avoiding an instrument it must have been made intentionally in the sense of "wilfully." 2 C. J. 1227.

Where there has been an honest mistake in drafting an instrument as to a material part thereof, and it is executed under the misapprehension that it embodies the agreement actually made, equity will reform it to comply with the intention of the parties. Kinman v. Hill, — Iowa, —, 156 N. W. 168; Buck Auto Carriage & Implement Co. v. Tietge, 174 Iowa, 103, 156 N. W. 313; Day v. Dyer, 171 Iowa, 437, 152 N. W. 53; First Nat. Bank v. Meyer, 30 N. D. 388, 152 N. W. 657; Richards v. Market Exch. Bank Co. 81 Ohio St. 348, 26 L.R.A. (N.S.) 99, 90 N. E. 1000; Comp. Laws 1913, § 7004.

The defendant ratified the change in the note.

"Consent to alteration may be given afterward by ratification. Ratification may be express or it may be implied from custom, or from the acts of the parties. It will be implied where the facts are such as to warrant the implication." Shinew v. First Nat. Bank, 84 Ohio St. 297, 36 L.R.A.(N.S.) 1006, 95 N. E. 881, Ann. Cas. 1912C, 587; Edington v. McLeod, 87 Kan. 426, 41 L.R.A.(N.S.) 230, 124 Pac. 163, Ann. Cas. 1913E, 315; Holyfield v. Harrington, 84 Kan. 760, 39 L.R.A.(N.S.) 131, 115 Pac. 546.

ROBINSON, J. In this case defendant appeals from a judgment against him for $1,500 and the foreclosure of a mortgage securing the same. The defendant was owing one A. W. Gray a sum in excess of $2,000, which was secured by a chattel mortgage. Pursuant to agreement Gray gave defendant a release of the $2,000 mortgage; gave him credit for $1,500, and he made to the defendant bank, for the use and benefit of A. W. Gray, a chattel mortgage to secure the payment of $1,500 and a promissory note, which, according to contract, should have been for $1,500, but by some inadvertence the word "hundred" was omitted after the word "fifteen," though the figures "$1,500" were plainly written at the top of the note. After the making of the note, a clerk of the plaintiff, discovering the mistake, innocently wrote the

word "hundred" on a diagonal across the face of the note. The word "hundred" was written as a memoranda, without any fraud or deception.

The answer of the defendant is that at the time of making the note and mortgage he was not indebted to the plaintiff, and that he made the note to the bank at the request of A. W. Gray as an accommodation note for $15; and that it was made without any consideration whatever; and that it was made only for the purpose of pacifying the state bank examiner. Also, that after receiving the note the plaintiff or its employees wrongfully changed and altered it so as to read "fifteen hundred." The defense is an obvious sham. People do not give accommodation notes for $15, and such notes do not pacify bank examiners. The plaintiff owed Gray over $2,000, and on making the note to the bank he obtained credit for $1,500 and a release of his $2,000 chattel mortgage. It was a fair business deal in which there was no fraud or deception. The note is in evidence, and it shows the word "hundred" written across its face after the word "fifteen." The word "hundred" is written diagonally as a memoranda. It is in a different handwriting and there is no attempt at disguise; and at the top of the note there is the plain figures "$1,500." The note is dated June 1, 1914. The mortgage is made to secure a promissory note to the Bank of Donnybrook for $1,500, dated June 1, 1914, due June 1, 1915, with interest at 10 per cent. The note is in all respects the same, excepting the omission of the word "hundred" after the word "fifteen." Really it seems that people should be ashamed to make such a defense or to appeal such a case to this court. Judgment affirmed.

CHRISTIANSON, J. I concur in result.

PETER SCOTT v. STATE OF NORTH DAKOTA.

(L.R.A.1917F, 1107, 163 N. W. 813.)

Trial court — refusal to advise verdict — not guilty — testimony — offered by defendant thereafter — motion not renewed — close of case — not error.

1. Error cannot be predicated upon a refusal to advise a verdict of not guilty

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Note.—On conviction for keeping common nuisance by proof of single sale of intoxicating liquor in violation of Prohibition Law, see annotation to case of Scott v. State, L.R.A.1917F, 1107.

at the close of plaintiff's case, when testimony is thereafter introduced by defendant, unless the motion is renewed at the close of all the testimony.

Common nuisance — keeping and maintaining — intoxicating liquors — single sale — proof of — sufficient.

2. A single sale will warrant a conviction under an information for keeping and maintaining a common nuisance by keeping a place where intoxicating liquors are sold as a beverage in violation of the Prohibition Law of this state.

Opinion filed June 7, 1917.

Appeal from the County Court of Ward County, *Murray*, J.

Defendant was convicted of the crime of keeping and maintaining a common nuisance in violation of the State Prohibition Law, and appeals.

Affirmed.

E. T. Burke and *J. E. Burke*, for appellant.

A defendant in a criminal case is entitled to have his case given to the jury under proper instructions as to the law, and where erroneous instructions are given, defendant has not had a fair trial.

Correct instructions given, but immediately followed by erroneous instructions, entitle defendant to a new trial, for no one can say upon which the jury based their verdict. State v. Kruse, 19 N. D. 207, 124 N. W. 385.

Wm. Langer, Attorney General, *D. V. Brennan*, and *G. K. Foster*, Assistant Attorneys General, and *O. B. Herigstad*, State's Attorney, and *R. A. Nestos*, Assistant State's Attorney, for respondent.

The charge of the trial court must be taken and considered as a whole, and not be separated into parts, which, when read alone, would be erroneous.

Where defendant requests the court to advise a verdict of not guilty, and then offers testimony, he cannot complain that the court overruled his request, unless he renews it at the close of the entire case. He is deemed to have waived such request. Buchanan v. Occident Elevator Co. 33 N. D. 346, 157 N. W. 122; Halvarson v. Lasell, 33 N. D. 613, 157 N. W. 682.

CHRISTIANSON, J. The defendant was tried and convicted of the crime of keeping and maintaining a common nuisance in violation of the

provisions of the prohibitory law of this state, and appeals from the judgment of conviction.

The first error assigned is predicated upon the denial of defendant's motion for an advised verdict of not guilty. The record shows that this motion was made at the close of plaintiffs' case in chief; that after the denial of the motion, defendant introduced evidence, and that the motion was not renewed at the close of all the evidence. Hence, under numerous decisions of this court, the error, if any, in the denial of defendant's motion for an advised verdict of not guilty, was waived. See Buchanan v. Occident Elevator Co. 33 N. D. 346, 157 N. W. 122; Halverson v. Lasell, 33 N. D. 613, 157 N. W. 682.

An examination of the evidence, however, also discloses that the trial court very properly denied the motion. The testimony clearly showed that the house involved herein was occupied by and under the control of the defendant. One David Franzen testified that during the months of January, February, and March, 1915, he frequented the house occupied by the defendant, about once a week, sometimes alone and sometimes in company with friends, and that during these visits he purchased beer from the defendant, paying him therefor 35 cents per bottle, or $1 for three bottles; that he purchased this beer both from the defendant and others in his presence, and that he and his friends drank the same upon the premises in the presence of the defendant, and that at times the defendant himself drank with them. Another witness, Henry Solberg, testified that he obtained beer from the defendant at the house in question, for which he (Solberg) paid 35 cents per bottle or $1 for three bottles; that he drank such beer on the premises. He further testified that he did not know where defendant obtained the beer, but that it was nice and cool "and suited him all right."

It is virtually conceded that this testimony, if true, is sufficient to establish the crime alleged. But it is asserted that the witness Franzen was not worthy of belief, and that his testimony should be disregarded. The credibility of this witness and the weight of his testimony was manifestly a question for the jury, and there is nothing in the record to justify a court in adjudging the same incredible as a matter of law.

The court instructed the jury as follows: "The information in this case charges the maintaining of a common nuisance. Under our

laws all places are common nuisances (1) where intoxicating liquors are sold, bartered, or given away in violation of law; or (2) where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage; or (3) where intoxicating liquors are kept for sale, barter, or delivery, in violation of the law.

"It is the maintaining of a place where these things, or one or more of them, are done, that constitutes the crime. The selling of intoxicating liquors contrary to law does not constitute the offense, nor does the keeping of intoxicating liquors for sale contrary to law constitute the offense. Neither is the offense committed by permitting persons to resort to the place for the purpose of drinking intoxicating liquors as a beverage. They are evidences of the offense. It is keeping the place where these things are done that constitutes the offense. Proof of keeping by the defendant, and that any of the prohibited acts was done by the defendant in such place during such keeping, would make the offense complete. So, if you find from the evidence beyond a reasonable doubt that the defendant kept the place as charged in the information, or at any time between the dates set out in the information, and that any of the prohibited acts mentioned above were done by him at such place during such time, you should find him guilty as charged in the information. Should you fail to find that the defendant kept the place during said time, or fail to find that any of the acts above set out were done as charged in the information, you should find the defendant not guilty.

"In this connection, I charge you that it is a violation of law to sell or keep for sale intoxicating liquors as a beverage."

The defendant assigns error upon that portion of the instruction which is italicized. No exceptions were taken to the instructions, and under the rule announced by this court in State v. Reilly, 25 N. D. 339, 141 N. W. 720, no error can be assigned on the instructions, in absence of proper exceptions filed in the court below. As this point has not been raised by respondent's counsel, however, we shall not rest our decision upon this point, but will consider the reasons presented by appellant in support of his contention that the instruction is erroneous.

Appellant concedes that the instruction assailed is abstractly correct; but he says: "The effect of this charge was to tell the jury that they

might convict Scott of a single sale of liquor, whereas the law is well settled that a single sale does not constitute keeping a nuisance." Appellant's entire argument is predicated upon the proposition just stated.

In our opinion appellant's argument is predicated upon an erroneous legal premise. Section 10117, Compiled Laws 1913, provides: "All places where intoxicating liquors are sold, bartered or given away, in violation of any of the provisions of this chapter, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this chapter, are hereby declared to be common nuisances."

Under the express terms of this statute a place where intoxicating liquors are sold is a common nuisance, and the person who keeps and maintains such place keeps and maintains a common nuisance. It is not essential that the place shall be kept and maintained for any particular or designated length of time, or that any particular number of prohibited acts take place. A person who keeps and maintains a place where intoxicating liquors are sold, as a beverage, becomes guilty of keeping and maintaining such place when the first sale is made, and the place thereby utilized for the prohibited purpose. The authorities seem to be in accord on the proposition that a single sale is evidence of keeping and maintaining a common nuisance within the purview of the statute. State v. Reyelts, 74 Iowa, 499, 38 N. W. 377; State v. Benson, 154 Iowa, 313, 134 N. W. 851; Bepley v. State, 4 Ind. 264, 58 Am. Dec. 628; Shideler v. Tribe of the Sioux, 158 Iowa, 417, 139 N. W. 900. See also Com. v. Kerrissey, 141 Mass. 110, 4 N. E. 820; State v. Cooster, 10 Iowa, 453, 457.

We have found no authorities to the contrary, and appellant's counsel have cited none in their brief.

It will be observed that the instruction assailed is merely one sentence of an instruction. No rule is better settled than that the instructions must be construed as a whole. The first words of the sentence assailed refers to what had been said immediately before, and states that what follows must be considered, "in connection" with the language preceding.

We are agreed that no prejudicial error was committed by the use of the sentence assailed. This disposes of the only errors assigned on

this appeal. It follows from what has been said that the judgment of conviction must be affirmed. It is so ordered.

ROBINSON, J. (dissenting). In a crusade against wrong, good people have often done wrongs that would shame the Devil. A long-conducted and zealous crusade for a special object becomes a hobby which narrows the mind and dulls the mental and moral vision of the crusaders until they at length do evil that good may come. Such has been the grave fault for which the over-zealous Jesuits have been banished from many countries. Thus, in the crusade against liquor, charity and human kindness have been thrown to the wind and replaced by cruelty. The most drastic and cruel laws have been enacted; jury trials have been denied; personal liberty has been disregarded; witnesses, prosecuting attorneys, and even judges, have been bribed by love or fear or filthy lucre. Detective witnesses are employed and given pay in excess of regular witness fees, and are in the business for their dirty fee. In some cases prosecuting attorneys are allowed a bribe of $10 for each count on which a party may be convicted,—and the judges—they have reason to fear and tremble for their office if they fail to join the crusade and to manifest their zeal.

In this case the complaint is under a statute declaring all places to be a common nuisance where intoxicating liquors are sold or kept for sale or gift as a beverage, and where persons resort for the purpose of drinking intoxicating liquors as a beverage. The punishment of the first offense is a fine of not less than $200 nor more than $1,000, and by imprisonment of not less than ninety days nor more than one year; and, for the second and every successive offense, the punishment is imprisonment in the penitentiary not less than one nor more than two years.

This drastic statute is under this section of the Constitution: Section 217. No person . . . shall . . . manufacture for sale or gift, any intoxicating liquors, and no person . . . shall import any of the same for sale or gift, or keep or sell or offer the same for sale or gift . . . *as a beverage.*

The prohibition of the statute and the Constitution is only against a sale or gift as a beverage. In this case the complaint charges defendant with keeping and maintaining a common nuisance by keeping a

certain building in which intoxicating liquors were sold and bartered and given away as a beverage.

The case was tried before the county judge, and he granted a stay of proceedings pending the appeal. In his order granting the stay he certified that in his opinion the substantial rights of the defendant as to the merits of the case had been violated. Of course, that being true, it was the duty of the judge to suspend sentence or to order a new trial.

The evidence fails to show that any intoxicating liquors were sold or given away to be drunk as a beverage. The witnesses do not mention the word *beverage* or any similar word. As the testimony shows, the defendant was a widower of sixty-three years. He was a regular drayman. He lived in a small house with three small children and a housekeeper. The star witness had been rooming in the house of the defendant, and the housekeeper fired him because of his misconduct. Then, instead of paying his room rent and wash bill, he went and made the complaint. He testified that during three months he had roomed in the house of defendant and that about once a week he had bought and drank some beer. The testimony does fairly show an occasional drinking of beer in the house of defendant, but there is nothing to show that the house was a resort for beer drinking, or that it was in any way a disorderly house or a common nuisance. Defendant swore to his innocence. Then he was arrested on a charge of perjury. He again swore to his innocence and was again arrested. Thus he was put out of business; his dray outfit was confiscated; his home was broken up; his children made wards of charity, and he himself confined and kept in idleness at the expense of the taxpayers. Oh cruelty! Thou art a wickedness. One swallow does not make a summer; one love affair does not make a bawdyhouse. The house must be kept as a resort for illegal and immoral purposes; the wrong must be common or it is not a common nuisance, and the legislature cannot make it otherwise. It is perfectly absurd to say that the keeping of a house wherein one, two, or three drinks are sold or given away, is the keeping of a common nuisance.

In Cana of Galilee there was a wedding feast, and the mother of Jesus was there; and both Jesus and his disciples were called to the marriage; and when they wanted wine, the mother of Jesus said unto him, "They have no wine." Jesus said unto the servants: "Fill the

waterpots with water. And they filled them up to the brim. Then he said unto them: "Draw out now, and bear unto the governor of the feast." And they bear it. When the ruler of the feast had tasted the water that was made wine, and knew not whence it was, the governor of the feast said to the bridegroom: "Every man at the beginning doth set forth good wine; and, when men have well drunk, then that which is worse; but thou hast kept the good wine until now." This beginning of miracles did Jesus in Cana of Galilee, and manifested forth his glory.

It cannot be truly said that any person at that feast was guilty of keeping or maintaining a common nuisance, or that in North Dakota the recurrence of such a marriage feast would constitute the keeping or maintaining of a common nuisance. In Scripture, drunkenness is everywhere denounced, but on occasions the drinking of wine and even strong drink is commended. Thus we did read: "Give strong drink unto him that is ready to perish, and wine unto those that be of heavy hearts. Let him drink, and forget his poverty, and remember his misery no more." "Go they way, eat they bread with joy, and drink thy wine with a merry heart; for God now accepteth thy works." He brought forth food out of the earth and wine that maketh glad the heart of man.

And the Apostle Paul writes to the Apostle Timothy: "Drink no longer water, but use a little wine for thy stomach's sake and thine often infirmities."

It is right to forbid the sale of drinks to Indians, minors, to some persons of Celtic blood, and to any person who does not know enough to care for himself and his family, but to forbid a taste of wine, beer, ale, or Dublin stout to an Anglo-Saxon or a Teuton, why that is cruelty. And cruelty, thou art a wickedness!

The majority opinion says it is virtually conceded that, if the testimony as stated be true, it is sufficient to establish the crime alleged. That is a grave mistake. There is no such foolish and false concession; and, if there were, it would in no way justify the court in sustaining the conviction. The testimony wholly fails to show that the defendant kept a disorderly house or a common nuisance, or a house in any way given to the sale or drinking of intoxicating liquors; or that he did an injury to any person. Under the rulings of the court, were Christ

to come to this state and to keep a house and to repeat the miracle of the marriage feast, he might be convicted and sentenced to the state's prison. That is neither law nor gospel.

It is a matter of regret that in some cases judges are too ready to give a narrow and cold-blooded construction to drastic statutes, and to impose on others burdens grievous to be borne, which they themselves touch not with one of their fingers.

At the Grand Pacific I have a nice, exclusive bachelor apartment ($45 a month). Now, if the governor, the bishop, or one of the justices call on me and I open a bottle of foamy Dublin Stout,—my elixir of life,—and for his stomach's sake or for good fellowship give him a glass and join him in a drink with a thousand earnest wishes for his health and happiness, does that make my nice exclusive apartment a common nuisance? If I call on the good bishop, and he treat me to a glass or a bottle of wine, does that turn his palace into a common nuisance? If not, then is there one law for the palace and another law for the cottage? In administering the law we should never forget that the primary purpose of law and government is to build up, and not to pull down; to assure the right of all to enjoy and defend life and liberty, to acquire, possess, and protect property, and to pursue and obtain safety and happiness.

The judgment should be reversed.

STATE OF NORTH DAKOTA v. CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY.

(163 N. W. 730.)

Railroad Commissioners — order of — complaint based on — cause of action — jurisdiction — want of — must affirmatively appear.

1. A complaint based upon an order issued by the Board of Railroad Commissioners, which sets forth a cause of action under § 4732 of the Compiled Laws of 1913, is not demurrable where it does not affirmatively appear either in the complaint or the order, which is made a part of the complaint that the Board has exceeded its jurisdiction in making such order.

Board of Railroad Commissioners — order of — proceedings — equitable in their nature — district court — trial in — enforcement of order — conditions — other public authorities — jurisdiction.

2. Proceedings to enforce an order of the Board of Railroad Commissioners under § 4732, Comp. Laws 1913, are equitable in their nature; and if, upon a trial in district court, it should appear that compliance with the order could only be enforced upon certain conditions being complied with by other public authorities, the district court has power to enter an appropriate order.

Board of Railroad Commissioners — highway across railroad right of way — authority to establish — has not.

3. The Board of Railroad Commissioners has no authority to establish a highway across the right of way of a railroad company.

Board of Railroad Commissioners — orders of — railroad company — right of way — highway across — expenditure of money — in compliance with order — reimbursement — not entitled to.

4. Where the Board of Railroad Commissioners enters an order which is referable to the police power of the state, being designed to protect the lives and property of the public; and where compliance with such order would involve an expenditure of money by a railroad company, the railroad company is not entitled to reimbursement or compensation.

Opinion filed June 7, 1917.

Appeal from District Court, Slope County, *W. C. Crawford,* J.

Defendant appeals.

Affirmed.

Porter & Grantham and *Harvey J. Miller,* for appellant.

Highways are established by law on section lines. The Board of Railroad Commissioners has no authority to establish or lay out a highway across the right of way of a railway company. Comp. Laws 1913, §§ 1920, 1940, 3599, subdiv. 7, 3985, 4689–4690; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Grafton v. St. Paul, M. & M. R. Co. 16 N. D. 313, 22 L.R.A.(N.S.) 1, 113 N. W. 598, 15 Ann. Cas. 10; State ex rel. La Follette v. Chicago, M. & St. P. R. Co. 16 S. D. 517, 94 N. W. 406; Seward v. Denver & R. G. R. Co. 17 N. M. 557, 46 L.R.A.(N.S.) 242, 131 Pac. 980; Emery v. Chicago, M. & St. P. R. Co. 35 S. D. 583, 153 N. W. 655; Winona & St. P. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. 1077.

Property once having been acquired for public use cannot be taken

for or appropriated to another public use, except by specific legislative authority. Winona & St. P. R. Co. v. Watertown, supra.

Wm. Langer, Attorney General, and *H. A. Bronson,* Assistant Attorney General, for respondent.

The complaint states facts sufficient to constitute a cause of action,—the cause of action set out therein,—and is not open to demurrer. Laws 1890, chap. 127; Comp. Laws 1913, § 4732, Laws 1897, § 11 chap. 115; State ex rel. Board of Transportation v. Fremont, E. & M. Valley R. Co. 22 Neb. 313, 35 N. W. 119; State ex rel. Tompkins v. Chicago, St. P. M. & O. R. Co. 12 S. D. 305, 47 L.R.A. 569, 81 N. W. 503.

Where there is is a clear public necessity for the proposed improvement, the Board of Railroad Commissioners have the power to order it made. State ex rel. Tompkins v. Chicago, St. P. M. & O. R. Co. supra.

In this state such board has power to make orders, which in their nature closely resemble judgments, and to invoke the aid of the courts to compel obedience. Such Board is invested with more than mere advisory powers. Elliott, Railroads, § 674; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; State ex rel. Board of Transportation v. Fremont, E. & M. Valley R. Co. 22 Neb. 313, 35 N. W. 118; McWhorter v. Pensacola & A. R. Co. 24 Fla. 417, 2 L.R.A. 504, 12 Am. St. Rep. 220, 5 So. 129; State ex rel. Railroad & W. Commission v. Chicago, M. & St. P. R. Co. 38 Minn. 281, 37 N. W. 782.

The powers to create such boards rests upon the principle that property or rights affected with the public interest are subject to legislative control.

The general rule is that very important powers relative to the matter of requiring railroad corporations to construct and maintain crossings are generally granted. Const. art 7, § 142; Elliott, Railroads, § 684.

Where a complaint contains allegations of facts sufficient to reasonably and fairly apprise the defendant of the nature of the cause of action against him, it is sufficient. Weber v. Lewis, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105; Northern Trust Co. v. First Nat. Bank, 25 N. D. 74, 140 N. W. 705; First Nat. Bank v. Messner,

25 N. D. 267, 141 N. W. 999; Hocksprung v. Young, 27 N. D. 322, 146 N. W. 547.

The common-law rule as to the construction of a complaint no longer obtains in this state, and pleadings are liberally construed when attacked by demurrer, with a view to substantial justice. Comp. Laws 1913, §§ 7371, 7458; Donovan v. St. Anthony & D. Elevator Co. 7 N. D. 513, 66 Am. St. Rep. 674, 75 N. W. 809; Hocksprung v. Young, 27 N. D. 322, 146 N. W. 547.

It will not be presumed that the legislature, in employing the general term "highways," meant to include the streets in a municipal corporation. Elliott, Roads & Streets, p. 16; Kerney v. Barber Asphalt Paving Co. 86 Mo. App. 573; Mobile & O. R. Co. v. State, 51 Miss. 137; Re Woolsey, 95 N. Y. 135; Const. art. 3, § 18; Re Burns, 155 N. Y. 23, 49 N. E. 246.

The law requires of railroad corporations that they construct and maintain at their own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed. State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047.

Birdzell, J. This is an appeal from an order of the district court overruling a demurrer to a complaint. The complaint is based upon an order of the Railroad Commission of the State of North Dakota, issued on the 25th day of July, 1914, directing and requiring the Chicago, Milwaukee, & St. Paul Railway Company to construct and maintain a viaduct or passageway across its right of way, under its track, in the town of Marmarth. The relief demanded is a compliance with the order of the Board of Railroad Commissioners. Upon this appeal the appellant argues that the complaint fails to state a cause of action in that, (1) it is not alleged that the point or place where the underground passageway is required to be constructed is upon any street, alley, or public ground, or that the same is upon a public or private highway; (2) that there is no authority in the Board of Railroad Commissioners to establish such a highway over or across the depot grounds and right of way of the defendant; (3) that the

establishment of a public passageway over the right of way or depot grounds of defendant company would involve a deprivation of property without due process of law; and (4) that to so extend a street or highway across the depot grounds and right of way would involve a taking of property now appropriated to a public use and a subjection of the same to another use not authorized by statute.

In the view that we take of this case, the contentions of the appellant are in no way decisive of this appeal. The complaint, aside from its formal allegations as to the official character and personnel of the Railroad Commission and as to the defendant and its business, is merely a recital of the proceedings had prior to the issuance of the order of the Commission, coupled with a statement of the substance of the order and an allegation of noncompliance therewith by the defendant. It is specifically alleged, though we do not deem it important, that the order made was within the power and jurisdiction of the Board of Railroad Commissioners. In our opinion the complaint contains every allegation that is essential to a complaint under § 4732, Comp. Laws 1913. It nowhere appears in the complaint that the municipal authorities of the village of Marmarth have not taken the steps necessary to extend a village street across the right of way of the railroad company at the point where the order required the building of the subway. It does not even appear that such steps on the part of the village authorities were ever necessary. For aught we know, the railroad at this point may intersect an established highway, the use of which might have been discontinued at the time the railroad was constructed on account of the high grade. The court will not, upon a demurrer, assume the nonexistence of facts which, if they did not exist, would render the order of the Railroad Commission untimely and inappropriate. We are not prepared to say, however, that there is a rigid order of chronological sequence in the extension of a highway by the village authorities across a railroad right of way, and the ordering by the Railroad Commission of the construction of a necessary safety device in the shape of a subway. We do not understand it to be seriously contended on behalf of the respondent that the Railroad Commission has authority to lay out or extend highways across railroad rights of way, but it is contended that in so far as the establishing of

a highway is a prerequisite to the relief demanded in the complaint, the existence of such fact should be assumed as against a demurrer. There was no appeal from the order, and every fact requisite to have made the order regular and valid when made is impliedly alleged when the order is made the basis of relief. If, upon a trial of the issues framed by the complaint and the answer to be filed, it should appear that there is no legally established highway at the point in question, the district court will have ample power to enter a conditional decree requiring compliance with the order whenever the highway or street shall be legally extended. The proceeding is equitable in its nature, and the court is given ample authority to administer the appropriate relief.

Finding no provision of the statute granting the power, we are of the opinion that the Board of Railroad Commissioners has no authority to establish a highway across the right of way of the defendant company. But in response to the contention that the establishment of a public highway would involve a deprivation of property without due process of law, and the taking of property now appropriated to a public use and subjecting it to another use not authorized by law, we need only cite the case of Ashley v. Minneapolis, St. P. & S. Ste. M. R. Co. post, 147, 163 N. W. 727, just decided by this court. In so far as compliance with the order of the Railroad Commission may involve an expenditure of money by the defendant railroad company, we are of the opinion that it is but the fulfilment of an obligation which rests upon the railroad company by reason of the character of its business, for which it is not entitled to reimbursement or compensation. The order of the Railroad Commission, being an exercise of the police power of the state, must be justified as a reasonable measure for the protection of the lives and property of the public, or as being reasonably required for the safe conduct of the defendant's business. For necessary expenditures in this direction the railroad company is not entitled to reimbursement. State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; affirmed in 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Cincinnati, I. & W. R. Co. v.

Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206.

The order appealed from is affirmed.

ROBINSON, J. (dissenting). The complaint is based on a supposed order of the Railroad Commissioners directing the railway company to construct a crossing under its railway at a point where there is not and never has been a highway. The case comes here on an appeal from an order overruling a demurrer to the complaint.

Now it is certain the Railroad Commissioners have no authority only such as expressly given them by statute. The statute does not make it the duty of the railway companies to construct a crossing of any kind where there is no highway, and Railroad Commissioners have no power to impose such a duty. If they had such power, then they might order twenty similar underground crossings in the same village, and put the company to a needless expense of $20,000 or $40,000—and who would pay the expense? Of course a city or a village may proceed in a legal manner to lay out a highway across a railroad right of way in the manner provided by statute, but the property of the railroad has the same protection as the property of an individual. It cannot be taken for public use without just compensation. Under our statutes it is provided that, 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; and, if such allegation is controverted, the party pleading it shall be bound to establish on the trial the facts conferring jurisdiction. Now, the complaint contains no averment to the effect that the order in question was duly given or made; but, if it did, the Commissioners are not a court or officer within the meaning of the statute. Hence it was necessary to specifically aver each and every fact necessary to give the Commissioners authority to make such an order. Without a proper complaint stating the facts, it would be folly to incur the expense of a trial.

In the opinion as written by Judge Birdzell the alleged order of the Commissioners is treated as if it were entitled to the same presumptions as an order or judgment of a court of general jurisdiction. Thus it is said: "For aught we know the railroad at the point may intersect

an established highway." Then it is said that "every fact requisite to have made the order regular and valid is impliedly alleged when the order is made the basis of relief." That is all grossly erroneous, and it does violence to the fundamental principles of pleading. If it were true, then it were sufficient to aver merely that such an order was made by the Railroad Commissioners, without attempting to aver any facts to sustain it. Under the plain words of the statute the complaint must state facts sufficient to constitute a cause of action. The demurrer admits only the facts well pleaded. It does not admit conclusions of law, *such as that the order was made within the power and jurisdiction of the Railroad Commissioners.* That is the conclusion of law to be derived from the facts pleaded. It is entirely clear that the complaint does not state a cause of action, and the demurrer should be sustained.

STATE OF NORTH DAKOTA v. PETER SCOTT.

(163 N. W. 810.)

Perjury — crime of — information for.

1. Information examined, and *held* to state the crime of perjury.

Court reporter — short-hand notes of — read in evidence — must be accurately taken — must not have been changed — stenographer — testimony of.

2. Before the shorthand notes of a court reporter can be read in evidence, the stenographer must be willing to swear not only that such notes were accurately taken, but that they have not been changed or altered since the taking. This is *held* to have been the substantial import of the stenographer's testimony in the case at bar.

Person — acting in a public office — regularly appointed thereto — presumption.

3. There is a presumption that a person who has acted in a public office was regularly appointed thereto.

Note.—On sufficiency of averment in indictment or information for perjury as to jurisdiction or authority to administer oath, see note in 32 L.R.A.(N.S.) 142, which states that the modern statutory rule is that such matters are sufficiently averred by setting forth the substance of the offense, in what court or before whom the oath was taken, and that such court or person has competent authority to administer the oath.

County court — clerk of — oaths — administered by — law — question of — for court.

4. Whether the clerk of a county court is competent to administer an oath is a question of law for the court to pass upon.

Perjury — prosecution for — questions asked on former trial — materiality of — for the court.

5. In a prosecution for perjury the materiality of the questions asked on the former trial, and of the answers given thereto, is for the court, and not the jury, to pass upon.

Perjury — information for — distinct assignments — proof of one — sufficient.

6. Where, in an information for perjury, there are several distinct assignments, proof of any one of them is sufficient.

Witness — hostile to party against whom called — competent to show.

7. It is always competent to show that a witness is hostile to a party against whom he is called.

Opinion filed June 7, 1917.

Prosecution for perjury.

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

Judgment for plaintiff. Defendant appeals.

Reversed.

Statement of facts by BRUCE, Ch. J.

This is a prosecution for perjury. The information charges:

"That, heretofore, to wit, on or about the 28th day of January, in the year of our Lord, one thousand nine hundred and sixteen, at the county of Ward, in said state of North Dakota, one Peter Scott, late of said county of Ward and state aforesaid, did wilfully, unlawfully, feloniously, knowingly, and falsely commit the crime of perjury committed as follows, to wit:

"That at the said time and place at the regular January term, in the year of our Lord, one thousand nine hundred and sixteen, of the county court of Ward county, North Dakota, being then and there a county court of increased jurisdiction, at the city of Minot, in the said county, there came on to be tried before the said court in that term of the said court before the Honorable William Murray, then and there and still the judge of the said court, and before the jury duly impaneled

and sworn for that purpose by R. E. Hopkins, the duly appointed clerk of the county court of the said Ward county, North Dakota, a certain issue being then and there in due manner joined between the state of North Dakota, as plaintiff, and Peter Scott, as defendant, upon a certain criminal information then pending in the said court against him, the said Peter Scott, for the crime of keeping and maintaining a common nuisance within Ward county, North Dakota, and at and upon the trial of the said issue in the said court before the said judge and jury, to wit, on or about the 28th day of January, 1916, within the said county, Peter Scott, late of the said county and state, appeared and was produced as a witness on behalf of the said defendant in the said information, and was then and there sworn by the said R. E. Hopkins, clerk of the said county court of the said county, and he, the said Peter Scott, then and there took his corporeal oath as such witness before the said court that the evidence which he, the said Peter Scott, should give on the said trial, should be the truth, the whole truth, and nothing but the truth, the said R. E. Hopkins, as such clerk of the county court of Ward county, North Dakota, having then and there due and competent authority to administer said oath to the said Peter Scott in that behalf, and the said Peter Scott being sworn, as aforesaid, it then and there upon the said trial of the said issue became and was a material matter of inquiry as to certain occurrences within Ward county, North Dakota, during the period between the 1st day of October, A. D. 1914, and the 2d day of August, A. D. 1915, as to whether the said Peter Scott had sold any whisky or beer or any intoxicating liquors unto David Franzen or any other person or persons in the house in which he, the said Peter Scott, then resided, being the first house back of the Porter-Qualley-Nelson Grocery Store in Minot, Ward county, North Dakota, or whether during the period between October 1st, A. D. 1914, and August 2d, A. D. 1915, in the place of residence of the said Peter Scott, being the first house back of the Porter-Qualley-Nelson Grocery Store in Minot, Ward county, North Dakota, he, the said Peter Scott, had brought to any person or persons and delivered to such person or persons either beer or whisky which he, the said Peter Scott, had at the said time brought or delivered to such person or persons from some place within the said house, and then received money in payment of such beer or whisky from such person or persons, or whether

he, the said Peter Scott, had at any time during the period between October 1st, 1914, and August 2, 1915, in the said house, being the first house back of the Porter-Qualley-Nelson Grocery Store, received money from any person for beer or whisky and then procured such beer or whisky for and delivered it to such person or persons, such beer or whisky then and there taken by him, the said Peter Scott, from the cellar or some other place within the said house; and he, the said Peter Scott, having been sworn and having taken his corporeal oath at the time and place aforesaid, upon the said trial of the said issue, did wilfully, unlawfully, feloniously, knowingly, falsely, and corruptly, and contrary to his said oath, swear before the said court and jury, among other things, in substance as follows:

"In answer to the question: 'Did you sell any of these fellows he mentions or anybody else any beer in your house?' he, the said Peter Scott, replied, 'No, sir,' meaning and indicating thereby that in the first house back of the Porter-Qualley-Nelson Grocery Store and during the period between October 1st, 1914, and August 2d, 1915, he, the said Peter Scott, had not sold any beer to David Franzen or any other person or persons.

"In answer to the question: 'Now then, referring to this house, the first house back of the Porter-Qualley-Nelson Grocery Store and between October 1st, 1914, and August 2d, 1915, did you at any time in that house during that period sell either beer or whisky to any person?' he, the said Peter Scott, replied, 'No, sir,' meaning and indicating thereby that in this first house back of the Porter-Qualley Nelson Grocery Store and between October 1st, 1914, and August 2d, 1915, he, the said Peter Scott, had sold neither beer nor whisky to any person or persons.

"In answer to the question: 'Did you during that period between October 1st, 1914, and August 2d, 1915, at any time furnish to anybody beer in that house, and then have them pay by laying money on the table there and you take it up later on?' he, the said Peter Scott, replied, 'No, sir,' meaning and indicating thereby that in the first house back of the Porter-Qualley-Nelson Grocery Store during the period between October 1st, 1914, and August 2d, 1915, he, the said Peter Scott, had furnished no beer to any person or persons, and received his pay by picking up money that they had laid down on a table in payment of such beer.

"In answer to the question: 'During the period between October 1, 1914, and August 2, 1915, did you at any time furnish beer to anybody who came into your place, that was taken by you from the cellar in your house, after they had first paid you money in one of the rooms in your house, given the money to you?' he, the said Peter Scott, replied, 'No, sir,' meaning and indicating thereby that in the said first house back of the Porter-Qualley-Nelson Grocery Store in Minot, Ward county, North Dakota, between October 1, 1914, and August 2, 1015, he, the said Peter Scott, had at no time received money from any person or persons for beer in any room of that house and then brought the beer in exchange for such money from the cellar of the house.

"In answer to the question: 'Sometimes when you received money, either 35 cents or 70 cents or a dollar from Mr. Solberg or others in one room in your house, did you not as a matter of fact go down into the cellar of your own house and get the beer?' he, the said Peter Scott, replied, 'I did not,' meaning and indicating thereby that at the said time and place the said Peter Scott had at no time received either 35 cents or 70 cents or a dollar from Solberg or any other person or persons in one room in the said house, and then go into the cellar and secure the beer for such purchaser.

"In answer to the question: 'Did you during the period between October 1, 1914, and August 2, 1915, at the house just testified to, being the first house back of the Porter-Qualley-Nelson Grocery Store or at any other place in Ward county, North Dakota, sell beer or whisky to any person?" he, the said Peter Scott, replied, 'No, sir,' meaning and indicating thereby that in the said house, being the first house back of the Porter-Qualley-Nelson Grocery Store, in Minot, Ward county, North Dakota, and between October 1, 1914, and August 2, 1915, he, the said Peter Scott, had at no time sold beer or whisky to any person or persons.

"In answer to the question: 'During the period between October 1, 1914, and August 2, 1915, in the house just testified to, being the first house back of the Porter-Qualley-Nelson Grocery Store, Minot, Ward county, North Dakota, did you at any time receive money from any person and then bring to them and deliver to them beer which was at the time taken by you from some place in that house, either in the cellar or at any other place in the building?' he, the said Peter

Scott, replied: 'I answered that before. I answered no,' meaning and indicating thereby that in the said house, being the first house back of the Porter-Qualley-Nelson Grocery Store, Minot, Ward county, North Dakota, during the period between October 1, 1914, and August 2, 1915, he, the said Peter Scott, had at no time received money from any person or persons and then brought and delivered to them beer which he, the said Peter Scott, had at that time taken from the cellar or some other place in the said building.

"Whereas, in fact it was not true, and at the time of so swearing and stating the same the said Peter Scott knew that it was not true, that in the said house, being the first house back of the Porter-Qualley-Nelson Grocery Store in Minot, Ward county, North Dakota, and during the period between October 1, 1914, and August 2, 1915, he the said Peter Scott, had not sold beer or whisky to David Franzen or to any other person or persons, nor that he, the said Peter Scott, at the said time and place, had not received from any person or persons money for which he brought and delivered to said person or persons beer or whisky, which he, the said Peter Scott, had then and there taken and brought from some place in the cellar or other portion of the house and then received money from such person or persons in payment of the same, which said money such person or persons had put down on a table in the said house.

"Whereas, in truth and in fact, at said house being the first house back of the Porter-Qualley-Nelson Grocery Store, in Minot, Ward county, North Dakota, during the period between October 1, 1914, and August 2, 1915, the said Peter Scott did sell beer and whisky unto David Franzen and divers other persons in said house, and that the said Peter Scott at the said time and place did receive money from divers persons, and did in return for such money procure and deliver to such persons beer and whisky taken and brought by the said Peter Scott from the cellar or some other place in the said house, and that the said Peter Scott did at the said time and place bring beer and whisky from the cellar or some other place in the said house to divers persons who were then and there in other rooms of the said house, and did receive money which such person or persons had first placed upon a table in said room, all of which the said Peter Scott well knew, whereby he, the said Peter Scott, did then and there, as

aforesaid, wilfully, unlawfully, feloniously, knowingly, and falsely, and corruptly commit perjury.

"This contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of North Dakota."

J. E. Burke and *E. T. Burke,* for appellant.

Where oral evidence is relied upon exclusively to prove the crime of perjury, there must be two witnesses or one witness corroborated by circumstances proved by independent testimony. 30 Cyc. 1448.

To warrant the use of the court reporter's shorthand notes taken upon a former trial, the stenographer must swear that they were accurately taken, and have not been changed or altered in any way. State v. Longstreth, 19 N. D. 276, 121 N. W. 114, Ann. Cas. 1912D, 1317.

Defendant had the right to show the hostility of the witnesses who appeared against him, and the reasons for such hostility, and to deprive him thereof was reversible error. State v. Malmberg, 14 N. D. 523, 105 N. W. 614.

The trial court stated what was proved and admitted, told the jury what "amounted to the full measure of proof," commented upon the evidence, and this invaded the province of the jury. This was error. Comp. Laws 1913, § 10,822; Territory v. O'Hara, 1 N. D. 30, 44 N. W. 1003; State v. Peltier, 21 N. D. 188, 129 N. W. 451; State v. Barry, 11 N. D. 428, 92 N. W. 809.

Wm. Langer, Attorney General, *D. V. Brennan,* and *G. K. Foster,* Assistant Attorneys General and *O. B. Herigstad,* State's Attorney and *R. A. Nestos,* Assistant State's Attorney, for respondent.

The clerk of the county court may administer oaths to witnesses in criminal actions, and the court did not err in so instructing the jury. The law presumes that a person acting in a public office was regularly appointed thereto, that official duties are regularly performed, and that a court or judge acts within the lawful exercise of his jurisdiction. Comp. Laws 1913, §§ 7936, 7937; State v. Clough, 111 Iowa, 714, 83 N. W. 728; Cothran v. State, 39 Miss. 541; State v. Brown, 128 Iowa, 24, 102 N. W. 799; State v. Caywood, 96 Iowa, 367, 65 N. W. 385; State v. Swafford, 98 Iowa, 362, 67 N. W. 284.

Where in the indictment for perjury there are several distinct assign-

ments, proof of anyone of them is sufficient to support conviction. 30 Cyc. 1452.

BRUCE, Ch. J. (after stating the facts as above). It is first alleged that the trial court erred in overruling an objection to the introduction of evidence under the information, on the ground that the latter did not state a cause of action.

The defendant and appellant asserts that "the information is grossly unfair and vicious. We are in effect charged with pigging, with a penalty of perjury if convicted. We are therein accused of false swearing in half a dozen instances, whereof there was no testimony produced. And to cap the climax, the information merely (if carefully read) charges that the 'said Peter Scott did then and there, as aforesaid, knowingly, falsely, and corruptly commit perjury.' This, to our minds, states a conclusion and is a nullity as a pleading."

There is no merit in this objection. The information may have contained more than was necessary, and may have been unfair and vicious. The objection, however, was that it did not state a cause of action, and this is the only matter that we have to consider. There is much more in the information than the statement of the matters of inducement in relation to the prosecution for the crime of keeping and maintaining a common nuisance. It is stated that material questions were asked, that each of these questions was answered, "No," and that the truth was opposite to that testified to, and that the said Peter Scott had knowledge of this fact. It also alleges that, in swearing to these facts, the said Peter Scott was knowingly, and falsely swearing to an untruth. It then alleges that in so swearing the said Peter Scott wilfully, unlawfully feloniously, knowingly, falsely, and corruptly committed perjury contrary to the statute.

Nor is there any duplicity in the information. There is no attempt to charge the crime of maintaining a common nuisance and to obtain punishment therefor, but merely a charge that in a prosecution for such crime the false statements were made. It, too, seems to us that the statements made were in relation to material matters.

The next objection is that the court erred in overruling the objection of the defendant and appellant to the following question:

Q. You may produce such shorthand notes in the trial of State of

North Dakota v. Peter Scott, in the county court of Ward county, North Dakota. Was Peter Scott, who is the defendant in this action, asked the following question: "Now then, referring to this house back of the Porter-Qualley-Nelson Grocery Store, and between October 1, 1914, and August 2, 1915, did you at any time in that house, during that period, sell either beer or whisky to any person?" and did the defendant answer, "No, sir?"

The objection was that such testimony was incompetent, irrelevant, and immaterial; no foundation laid.

The examination which led up to the question was as follows:

"Q. Did you in the month of January, or January 28, 1916, act as official stenographer for the county court, Ward county, North Dakota?

A. Yes, sir.

Q. As such official stenographer did you take the testimony in the case of North Dakota v. Peter Scott, the defendant?

A. Yes, sir.

Q. In the trial of that action on January 28, 1916, did you as such official stenographer of the county court, Ward county, North Dakota, take the testimony of Peter Scott, who is the defendant in this case?

A. Yes, sir.

Q. Are you at this time able to read the testimony or from your shorthand notes, the testimony given by Peter Scott, in the trial of the case of State of North Dakota v. Peter Scott, as given on January 28, 1916, in the county court of Ward county, North Dakota?

A. Yes, sir.

Counsel for appellant contends that the rule now generally adopted is that, before the stenographer will be allowed to testify from his notes, rather than from his memory of the testimony, or from his memory as refreshed by such notes, that he must be willing to swear that he has such confidence in his notes that he will swear that the defendant testified as therein disclosed; that he must be willing to swear that the witness said so and so, because the notes so read, and he can swear that the notes are accurate. In other words that, if the stenographer bases his answers to the questions, "Did the witness testify

so and so?" on his perusal of the notes, and not on his memory or knowledge, he must be willing to swear not only that the notes were accurately taken, but that they have not been changed since they were taken.

This we believe to be the correct rule. Yet we believe that the witness in the case at bar practically met these requirements. He testified that he correctly wrote in shorthand the testimony given by Peter Scott; that the notes he read from were the notes taken at the trial, and that he was "able to read the testimony from his shorthand notes given by Peter Scott in the trial of the case of State of North Dakota v. Peter Scott *as given on January 28, 1916.*" He, it is true, did not say that the notes had not been changed. He did say, however, that they were correctly taken, and he did say that in reading from said notes he could read the testimony "as given on January 28, 1916." This we believe meets all of the requirements of the rule.

It is next urged that the trial court erred in instructing the jury, and violated the plain provisions of § 10822 of the Compiled Laws of 1913, and assumed to pass upon matters of fact. It is claimed that he erred in charging the jury as a matter of law that the clerk of the county court of Ward county is a *competent* and proper person to administer an oath to a witness in any criminal action, and also in charging them that "the matters hereinbefore set forth in the questions alleged to have been asked the defendant are matters which were *material* to the issues in the case then being tried in county court."

There was certainly no error in the charge as to the competency of the clerk of the county court. Section 7936 of the Compiled Laws of 1913 names, among other denominational presumptions, the presumption (14) that a person acting in a public office was regularly appointed to it.

Whether the clerk of a county court is competent to administer an oath is a question of law. State v. Clough, 111 Iowa, 714, 83 N. W. 728.

The materiality of the questions asked on the former trial, and of the answers given thereto, were also questions of law for the court. Cothran v. State, 39 Miss. 541; State v. Caywood, 96 Iowa, 367, 65 N. W. 385; State v. Swafford, 98 Iowa, 362, 67 N. W. 284; 30 Cyc. 1456.

Nor was any error committed by the trial court in charging the jury that "it is not necessary that the state prove all of said matters were testified to by the defendant knowingly, wilfully, and corruptly, but it is sufficient, and the defendant would be guilty, if the state proved all of the other material allegations of the information to be true, and that the defendant wilfully and knowingly testified falsely in any one particular stated in this charge as being material matters at issue in the said case of State v. Scott in county court." The general rule is that "where, in the indictment for perjury, there are several distinct assignments, proof of any one of them is sufficient to support the indictment." 30 Cyc. 1452.

We believe, however, that error was committed in the case, and that the trial court erred in excluding the testimony of Mrs. Smith, the housekeeper, which tended to show bias upon the part of the witness Franzen against the defendant. The man Franzen was the principal witness in the case. He had been asked whether he had been fired out of Scott's house because he had given a party whereat men and women had been drinking beer. He hesitated and said that he could not remember the occurrence. He was then asked whether, when Mrs. Smith came home, she did not find him in the house with one or two other men and a couple of girls sitting around a keg of beer, and he answered, "No, sir." He was then asked, if immediately thereafter he did not come and make complaint in the case on trial, to which he again answered "No." Mrs. Smith was later called by the defendant to contradict Franzen's testimony, and was asked, "While Dave Franzen was in your house, did you come there one evening and find him there with some other people?" An objection was made to this question, and it was sustained. She was again asked, "Q. Does David Franzen owe you some money?" And an objection was again sustained. In this we think the court erred. Franzen, as we have before stated, was a material witness, and the evidence showed that he had been boarding at the house of the defendant, and the defendant sought to discredit the witnesses of the state by proof that the prosecution was merely spite work, and had been instituted by the man Franzen because he was incensed with the plaintiff on account of being turned out of his house and being asked for the payment of a bill. " 'It is always competent to show that a witness is hostile to the party against

whom he is called, . . . A jury would scrutinize more closely and doubtingly the evidence of a hostile, than that of an indifferent or friendly witness. Hence, it is always competent to show the relations which exist between the witness and the party against, as well as the one for, whom he is called.' If the witness denies his hostility or bias, this may be proved by other witnesses. The cross-examination would be of little value if the witness . . . could conclude the adverse party by his statements denying his prejudice or interest in the controversy. . . . Although it is the general practice to first interrogate the witness on cross-examination as to his feelings of bias or hostility, yet it is proper to prove the hostility of the witness by other competent witnesses who can swear to the fact." 5 Jones, Ev. § 828, pp. 142–149; State v. Malmberg, 14 N. D. 523, 525, 105 N. W. 614.

This evidence we believe to have been competent, and its exclusion under the circumstances of the case to have been prejudicial error.

The judgment of the District Court is reversed and a new trial ordered.

CHRISTIANSON, J. I concur in a reversal and in the foregoing opinion, but express no opinion on whether the rule contended for by appellant's counsel and discussed in that portion of the opinion covered by paragraph 2 of the syllabus is correct or not.

EDGAR C. STRATTON v. N. T. ROSENQUIST.

(163 N. W. 723.)

Judgment notwithstanding verdict — new trial — alternative motive for — new trial — order granting — appeal from whole order — order not appealable.

The defendant made an alternative motion for judgment notwithstanding the verdict or for a new trial. The trial court made its order denying the first request, and granting a new trial. The defendant appealed from the whole order. *Held* that the order is not appealable.

Opinion filed June 9, 1917.

From an order of the District Court of Williams County, *Fisk*, J.

Defendant appeals.

Dismissed.

Palmer, Craven, & Burns, for appellant.

The action for fraud and deceit will not lie. There was a total failure of proof of these, upon the trial, and judgment notwithstanding the verdict should have been given. The question for the trial court was, not whether there was literally *no* evidence to sustain the charge of fraud and deceit, but whether there was any evidence that might reasonably satisfy the jury, and if such question is answered in the negative, the case should be withdrawn from the jury. 6 Enc. Ev. 50; Marshall-McCartney Co. v. Halloran, 15 N. D. 71, 106 N. W. 293; Nounnan v. Sutter County Land Co. 81 Cal. 1, 6 L.R.A. 219, 22 Pac. 515; 20 Cyc. 12, note 29; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138.

Where the evidence clearly shows that the person charged with fraud had no knowledge of the matters to which his statements related, the representations are not false and fraudulent. Davidson v. Jordan, 47 Cal. 351, 7 Mor. Min. Rep. 54; Krause v. Cook, 144 Mich. 365, 108 N. W. 81; Cole v. Smith, 26 Colo. 506, 58 Pac. 1086; Marsh v. Falker, 40 N. Y. 562.

Where representations are merely the expression of belief or opinion, they do not amount to fraud and deceit. Oberlander v. Spiess, 45 N. Y. 175; Allison v. Ward, 63 Mich. 128, 29 N. W. 528; Hatch v. Spooner, 37 N. Y. S. R. 151, 13 N. Y. Supp. 642; Levy v. Scott, 115 Cal. 39, 46 Pac. 892; Boles v. Aldridge, — Tex. Civ. App. —, 153 S. W. 373; Bumpas v. Stein, 18 Idaho, 578, 111 Pac. 127; McLeod v. Johnson, 96 Me. 271, 52 Atl. 760; State, Cummings, Prosecutor, v. Cass, 52 N. J. L. 77, 18 Atl. 972; 20 Cyc. 31, subd. C.

Also statements made upon information or belief. 20 Cyc. 17, 51, subd. 2; Hutchinson v. Poyer, 78 Mich. 337, 44 N. W. 327.

Fraud must be proved by clear and convincing testimony. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714; Anderson v. Anderson, 17 N. D. 275, 115 N. W. 836; Kenmore Hard Coal, Brick & Tile Co. v. Riley, 20 N. D. 182, 126 N. W. 241; Miller

v. Smith, 20 N. D. 96, 126 N. W. 499; Englert v. Dale, 25 N. D. 587, 142 N. W. 169.

The statements must be inconsistent with an honest purpose. Droge Elevator Co. v. W. P. Brown Co. 172 Iowa, 4, 151 N. W. 1048; Levy v. Scott, 115 Cal. 39, 46 Pac. 892; Graham v. Graham, 184 Mich. 638, 151 N. W. 596; Hatch v. Spooner, 37 N. Y. S. R. 151, 13 N. Y. Supp. 642; Hollister v. Loud, 2 Mich. 309; Pierce v. Pierce, 55 Mich. 629, 22 N. W. 81, 15 Mor. Min. Rep. 675; State Sav. Bank v. Emge, — Iowa, —, 108 N. W. 530; Lane v. Parsons, 108 Iowa, 241, 79 N. W. 61.

Recovery cannot be had for constructive fraud, under a complaint alleging actual fraud. Haynes v. McKee, 19 Misc. 511, 43 N. Y. Supp. 1126; Fowler v. Wood, 73 Kan. 511, 6 L.R.A.(N.S.) 162, 117 Am. St. Rep. 534, 85 Pac. 763; St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 237.

William G. Owens and *George H. Moellring,* for respondent.

The motion for judgment should not have been granted, and the trial court committed no error in so holding, or in granting a new trial.

That the wrong theory of measure of damages was pursued by parties and court throughout the trial cannot be doubted, and on this account the instructions of the court were erroneous, and to correct these errors, a new trial was granted. Richmire v. Andrews & G. Elevator Co. 11 N. D. 453, 92 N. W. 819; Welch v. Northern P. R. Co. 14 N. D. 19, 103 N. W. 396; Meehan v. Great Northern R. Co. 13 N. D. 432, 101 N. W. 183; Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299; Pine Tree Lumber Co. v. Fargo, 12 N. D. 360, 96 N. W. 357; Houghton Implement Co. v. Vavrosky, 15 N. D. 308, 109 N. W. 1024; Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Kirk v. Salt Lake City, 12 L.R.A.(N.S.) 1022, and note, 32 Utah, 143, 89 Pac. 458.

Before a judgment notwithstanding the verdict can be ordered, it must reasonably appear that the defect in proof cannot be remedied if a new trial be granted. Welch v. Northern P. R. Co. 14 N. D. 19, 103 N. W. 396; Meehan v. Great Northern R. Co. 13 N. D. 432, 101 N. W. 183.

Any positive assertion in a manner not warranted by the information of the person making it, of that which is not true, even though he

believes it to be true, or the suppression of that which is true and ought to be told, or the suggestion as a fact of that which is not true, or any other act or statement fitted to deceive, amounts to fraud. Comp. Laws 1913, § 5849; Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550; Whitbeck v. Sees, 10 S. D. 417, 73 N. W. 915; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; Lunscheon v. Wocknitz, 21 S. D. 285, 111 N. W. 632; McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341; Sallies v. Johnson, 85 Conn. 77, 81 Atl. 974, Ann. Cas. 1913A, 386; 20 Cyc. 27; Tappan v. Albany Brewing Co. 80 Cal. 570, 5 L.R.A. 428, 22 Pac. 257.

CHRISTIANSON, J. This is an action for damages alleged to have arisen out of a "land deal." The jury returned a verdict in favor of the plaintiff for $771.85. The defendant then made an alternative motion for judgment notwithstanding the verdict or for a new trial. The trial court refused to order judgment notwithstanding the verdict, but granted a new trial. The defendant appeals from such order.

Respondent contends that the order is not appealable, and after a careful consideration of this question we have arrived at the conclusion that this contention must be sustained. This court has repeatedly held that an order denying a motion for judgment notwithstanding the verdict is nonappealable. See Turner v. Crumpton, 25 N. D. 134, 141 N. W. 209; Houston v. Minneapolis, St. P. & S. Ste. M. R. Co. 25 N. D. 471, 46 L.R.A.(N.S.) 589, 141 N. W. 994, Ann. Cas. 1915C, 529; Starke v. Wannemacher, 32 N. D. 617, 156 N. W. 494.

The order appealed from, so far as adverse to the defendant, merely denied the motion for judgment notwithstanding the verdict. That portion of the order was nonappealable. St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077; Ripon Hardware Co. v. Haas, 141 Wis. 65, 69, 123 N. W. 659. See also Turner v. Crumpton; Houston v. Minneapolis, St. P. & S. Ste. M. R. Co.; and Starks v. Wannemacher, supra.

Appellant directs our attention to the decision of the Minnesota supreme court in Westacott v. Handley, 109 Minn. 452, 124 N. W. 226, wherein an order similar to the one involved in the case at bar is held to be appealable. That decision was based upon the Minnesota statute which reads as follows: "When, at the close of the testimony,

any party to the action moves the court to direct a verdict in his favor, and such motion is denied, upon a subsequent motion that judgment be entered notwithstanding the verdict, the court shall grant the same if the moving party was entitled to such directed verdict. An order for judgment notwithstanding the verdict may also be made on a motion in the alternative form asking therefor, or, if the same be denied, for a new trial. If the motion for judgment notwithstanding the verdict be denied, the supreme court, on appeal from the judgment, may order judgment to be so entered, when it appears from the testimony that a verdict should have been so directed at the trial; and it may also so order, *on appeal from the whole order denying such motion when made in the alternative form,* whether a new trial was granted or denied by such order." Rev. Laws 1905, § 4362.

The statute of this state relative to motions for judgment notwithstanding the verdict reads as follows: "In all cases where, at the close of the testimony in the case tried, a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have such verdict directed in his or its favor; and the supreme court of the state on appeal *from an order granting or denying a motion for a new trial* in the action in which such motion was made, or upon a review of such order or on appeal from the judgment, may order and direct judgment to be entered in favor of the party who was entitled to have such verdict directed in his or its favor, whenever it shall appear from the testimony that the party was entitled to have such motion granted." Comp. Laws 1913, § 7643. It will be noticed that there is considerable difference between the Minnesota statute and our own statute on this subject.

And while it is true that the Minnesota supreme court, in the case cited, held an order similar to that here involved to be appealable, we are agreed that that rule should not be adopted under our statute and the former decisions of this court. In this connection it may be mentioned that the supreme court of Wisconsin has reached a conclusion diametrically opposite to that reached by the Minnesota court. See Ripon Hardware Co. v. Haas, 141 Wis. 65, 69, 123 N. W. 659. While

it is permissive under our practice to unite a motion for a new trial with one for judgment notwithstanding the verdict, it is not essential that the motions be so united. They are in fact two separate motions, and ask for two different kinds of relief. A party who moves for judgment notwithstanding the verdict and fails to unite with it a motion for a new trial does not waive his right to make a motion for a new trial in the usual statutory way. Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299. If a party desires to move for judgment notwithstanding the verdict he may do so, without asking in the alternative for a new trial. If he desires a new trial he may move for this alone; or he may combine the two motions in the alternative form as was done in the case at bar. If he makes the alternative motion, he ought not to complain if the trial court grants the one least favorable to the moving party. If a party does not want a new trial he ought not to ask for it.

Appeal dismissed.

ROBINSON, J., concurring specially. The complaint avers that in September, 1914, the plaintiff conveyed to the defendant certain land in exchange for a quarter section of 27—154—97, which defendant conveyed to the plaintiff by warranty deed, with covenants of quiet possession when in truth the Missouri river had and held possession of the greater part of the land and had divided it. The jury found a verdict against defendant for $771.85, and he moved for judgment notwithstanding the verdict, and, in the event of refusal, for a new trial.

The motion for judgment was denied, and the motion for a new trial was granted, and defendant appeals. It appears that the case was tried on the basis of fraud and false representations by the defendant, and, in granting the motion for a new trial, the court said: "The evidence on the question of fraud is not very clear and convincing." However, the actual damage to the plaintiff in no way depended on the condition of the defendant's mind at the time of making the contract, or his knowledge of the facts as to whether or not the Missouri river had taken possession of the land.

As the plaintiff has not appealed from the order granting a new trial, the appeal presents no question for consideration. With regard to the question of fraud, the plaintiff was clearly entitled to a judgment,

fraud or no fraud. It was only a question of damages, which the jury had fully passed on, and that should have ended the litigation; and the order for a new trial was granted on defendant's own motion and surely he has no ground for an appeal from it.

Order affirmed.

M. SIGBERT AWES COMPANY, a Corporation, v. T. A. HASLAM.

(163 N. W. 265.)

Specific performance — contract — action for — reformation of contract — true agreement — intention of parties — may be had in same action — fraud — mistake of fact — in execution of — proof of.

In an action for the specific performance, the contract sued upon may be reformed to conform to the true agreement upon proper proof of fraud or mistake of fact in its execution; and if, on the trial, the proof does not justify relief under the contract as reformed, the action may be properly dismissed.

Opinion filed February 27, 1917. Rehearing denied June 2, 1917.

Action for the specific performance of a contract.

Appeal from the District Court of Ramsey County, Honorable *C. W. Buttz*, Judge.

Judgment for the defendant. Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, Ch. J. This is an action for the specific performance of a contract for the sale of certain land on an alleged price of $10,000. The answer, among other things, alleges that on or about April 5th, 1915, the defendant listed for sale with the plaintiff as agent, the property described and at the time of said listing a written memorandum was made of the terms thereof, which memorandum was intended by both plaintiff and defendant to conform to the terms of said listing, and to contain all of the terms of the agreement of listing as made by plaintiff and defendant, but through mutual mis-

Note.—On effect of mistake of fact by defendant on right to the specific performance of a contract induced thereby, see note in 15 L.R.A.(N.S.) 81.

On failure to read contract before signing, see note in 115 Am. St. Rep. 626.

take on the part of both parties said written memorandum failed to embody all of the terms of said agreement between the parties in this, —that it was a part of said listing agreement, and expressly understood by plaintiff and defendant that, if a sale of said real estate was to be made by plaintiff, acting as agent for defendant, said sale must have been consummated on or before July 1, 1915, if the same was to include the crops sown and grown upon said premises, and if said sale was not consummated on or before said date it was mutually agreed that the price at which said property was listed was not to include said crops, but that the same would on that date, if no sale was consummated before that time, remain the property of the defendant, to be severed and appropriated by him for his own personal use and benefit . . . —and it was understood and agreed by both parties that the terms of said agreement and understanding with reference to said crops was incorporated in and made a part of such written memorandum; and it was understood by both parties and supposed that said memorandum did contain the true agreement made by the parties, including the provisions with reference to said crops, until shortly before the commencement of this action, when it was discovered that, through a mutual mistake and error in preparing the said memorandum, the provision above referred to was not included therein.

The answer also prays that said agreement "and memorandum made between plaintiff and defendant and above described be reformed by inserting therein the real agreement of the parties and the provisions and stipulations with reference to the crops and the date of the termination of said offer for sale, and that the plaintiff's complaint be dismissed, and that the defendant be allowed his costs."

The learned trial court found, among other things, "that prior to the execution and delivery of said instrument plaintiff's agent Dryden and the defendant talked over and agreed upon the terms of listing of said property, and also of other property, and at same time defendant decided to list and did list the property in question he listed three other several tracts of land with plaintiff for sale as follows:

"The northwest quarter and west half of the northeast quarter of section 36, and lots 1 and 2 in section 36, and lots 1 and 2 in section 35, in township 151, range 62, containing 286.82 acres, none of which tract was under cultivation, listed for net price of $20 per acre.

"The southeast quarter of section 23, township 151, range 62, containing 160 acres, all of which was under cultivation, listed for a net price of $22.50 per acre, or if sold before July 1, 1915, including the 1915 crop, for $25 per acre.

"The west half of section 18, township 151, range 61, containing 300 acres, of which 190 acres was under cultivation, listing for a net price of $22.50 per acre, or, if sold before July 1, 1915, including 1915 crop, for $25 per acre.

"That each of said foregoing tracts was listed for a period of seven months, and each contained a reservation in defendant of the right to effect a sale himself at any time, said reservation being in effect similar to the like provision contained in the instrument effecting the premises involved in this action, and above quoted, and each of the foregoing tracts of land were listed for sale by defendant with the plaintiff before the tract involved in this action was listed.

"That after the listing of the foregoing three tracts as described, and on the same day and as part of the same transaction, it was finally agreed between plaintiff and defendant, on plaintiff's solicitation, that defendant would list with plaintiff for sale premises described in the instrument hereinbefore quoted; and it was further expressly agreed between the parties that a sale of said premises involved in this action, if it were to be made, including the crops grown on said premises for the year 1915, there being growing on said premises about 720 acres of crop, said sale must be made on or before July 1, 1915, and if said sale were not made on or before that date the crops grown and raised upon said premises during the year 1915 were not to be included, and it was in consideration of the price at which said premises were listed that it was mutually agreed that the crops would not be included or would they pass to the purchaser if the sale were made after July 1, 1915.

"It was also mutually agreed between the parties that the said premises involved in this action and property described in the foregoing quoted instrument were not for sale, nor to be sold, separately, but either in one sale of all of the premises listed on said day or else after each of the other three described tracts listed first had been sold; and it was in consideration of this agreement that the defendant did list the property involved in this action at the price stated in said instrument.

"That it was the intention of both parties to incorporate fully all of the foregoing agreement with reference to the property involved in this action in the listing agreement above quoted, but through mutual mistake on the part of plaintiff and defendant said instrument and memorandum of the terms of said listing agreement did not embody the real agreement had between the parties in this, that said instrument omitted to recite the agreement made to the effect that the crops for the 1915 season were not to be included unless said premises were sold before July 1, 1915; and further omission was made in not embodying in said instrument the real agreement of the parties, to the effect that the premises involved in this action were not to be sold separately or until after each of the other three tracts had been sold; and that both plaintiff and defendant were mistaken in supposing and believing that said instrument did incorporate each and all of the foregoing provisions in accordance with the true intent of the parties.

"That on or about July 1, 1915, plaintiff solicited of the defendant an extension of the period of time within which said premises involved in this action might be sold, including the crops for the year 1915, and and on the occasion of said solicitation both parties are found to have been under the belief and mutual mistake in supposing that the instrument of listing hereinbefore quoted in so far as it related to the crops grown on the premises during the 1915 season had expired on July 1, 1915; and on or about said date defendant acceded to plaintiff's request for an extension of said time for a period of three days after July 1, 1915, and granted plaintiff three days further time in which to sell said premises including the crops for the 1915 season; that thereafter, and on the expiration of said extension, plaintiff again requested an extension of time, representing to defendant that it had in mind a proposed sale of all of said premises and required a few days further time in which to consummate the same, and thereupon again plaintiff and defendant agreed for a few days, further extension, in consideration of which agreement and concession on the part of the defendant plaintiff agreed to reimburse defendant for any improvements that he might make on said premises during the interval of said extension; that thereafter and on or about the 1st day of August, 1915, and long prior to the commencement of this action, it was agreed between

plaintiff and defendant that said time would not be longer extended so as to include the crops for the year 1915, and that it would not be just nor reasonable to expect defendant to take chances any longer of the injury to the crop and the hazard and uncertainty of the harvesting thereof; and that said option in so far as it included the crops on any of the tracts above described had fully expired and was no longer in effect; and on or about the 1st day of August, 1915, the plaintiff's agent, Dryden, was requested by defendant to notify the plaintiff company that said option had expired in so far as it affected the crop, and he would not grant any further or other extensions of time; and upon such request said Dryden informed defendant that he knew that the option had expired, and that it was unnecessary to notify plaintiff; and in order to assure defendant that such notification was unnecessary exhibited a copy of the listing agreement with reference to one of the other tracts of land above described, and called defendant's attention to the provision therein with reference to the expiration of said option on July 1, 1915, in so far as it affected the 1915 crop, and assured defendant that said option in so far as it related to the crops on the premises in question had expired.

"It is further found that the defendant was in complete ignorance of the fact that the listing agreement with reference to the property involved in this action did not contain the provision with reference to the 1915 crops agreed upon between the parties, nor the provision with reference to selling the property involved in said instrument, either together with all of the other property listed or after all of the other tracts had been sold, until shortly before the commencement of this action and until service upon him of the notice of tender hereinafter referred to; and relying upon the agreement between the parties and understood by both of them to be contained in said listing contract, defendant during the month of July, 1915, made improvements upon said premises and expended moneys in maintenance thereof, and in conducting farming operation in reliance upon the new agreement made by the parties for an extension of time on or about July 1, 1915, and that the crops grown upon said premises for the 1915 season, having passed the danger and hazard and risk from the elements and other risks and hazards, had ripened and at the time of the commencement of this action were approximately of the value of $10,000."

It further found "that the defendant, although ignorant of the omissions in the original instrument of listing and ignorant of the fact that it did not contain the real agreement between the parties, was not informed thereof by plaintiff, but on the contrary was informed by plaintiff on or about the 1st day of August, 1915, that said option contract in so far as it concerned the 1915 crops had terminated, and rested in a belief that the same was true, and it was so agreed between the parties on or about the 24th day of August, 1915, until after he had completed the harvesting of the crops on the premises involved in this case, and had expended in good faith large sums of money thereon and had himself borne all the risk and hazard of the elements, believing, as he had a right to believe, that said contract was terminated in so far as it related to the crops, and on or about August 24, 1915, defendant was served by plaintiff with a notice of tender and of deposit in the First National Bank of Devils Lake by plaintiff of the sum of $10,000 as a cash payment on said contract, and notified that plaintiff would accept the terms and conditions thereof and required by said notice to perform the conditions in said contract; also that it was known by plaintiff that said instrument was no longer in force and effect, in so far as it related to the crops, after July 1, 1915, and the further time of the extension granted by defendant, according to the real agreement between the parties, and upon service of said notice defendant learned for the first time of the mutual mistake made in preparing and executing said instrument of listing.

"That no actual consideration was paid by plaintiff nor received by defendant for the execution of said listing agreement involving the property in this case.

"It is further found that the plaintiff made no effort to sell or dispose of the property involved herein separately and distinct from the other tracts of land listed at the same time with plaintiff by defendant.

"It is further found that defendant's ignorance of the mutual mistake in said instrument of listing was encouraged and induced by the acts of plaintiff, and that he was not negligent in not knowing of said mistake, and was induced and led by the acts of the plaintiff and its agent at the time of the making of the original listing agreement, to rely upon plaintiff to properly incorporate the real agreement in the written instrument, and supposed that it had been done; and by the

subsequent acts of plaintiff in asking an extension of time as above found defendant was encouraged to continue in the belief that the said instrument executed and delivered by him on April 5, 1915, did conform to the real agreement between the parties; and by the further act of the plaintiff, at the time of the last extension which was granted by defendant had expired, in exhibiting to defendant one of the other listing agreements in which the crop clause was contained, defendant was either intentionally, or through a like mistake on plaintiff's part, led to believe that said instrument embodied the real agreement between the parties, and because of plaintiff's said acts upon which defendant relied the court finds that he was not negligent in not knowing of the mistakes which existed in the original instrument of listing."

Flynn & Traynor, for appellant.

The adding of the name of a witness to a contract is not a material alteration thereof. 2 C. J. 1207; Canfield v. Orange, 13 N. D. 622, 102 N. W. 313.

One who negligently signs a contract without reading it, when he can read and has the opportunity to read it, but relies on statements of the other party, is not entitled to have it reformed, or set aside for fraud, where he had no right to rely upon the statements of the other party. Kimmell v. Skelly, 130 Cal. 555, 62 Pac. 1067; Funded Debt v. Younger, 29 Cal. 172; Hawkins v. Hawkins, 50 Cal. 558.

The unsupported evidence of the party seeking reformation alone is wholly insufficient where such evidence is expressly contradicted by the other party. 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. Swecker, 129 Iowa, 151, 105 N. W. 392; Bushert v. A. W. Stevenson Co. — Iowa, —, 113 N. W. 916; Chapman v. Dunwell, 115 Iowa, 533, 88 N. W. 1067; Miles v. Shreve, 179 Mich. 671, 146 N. W. 374; Messer v. Baldwin, 262 Ill. 48, 104 N. E. 195; Lines v. Willey, 253 Ill. 440, 97 N. E. 843; Stewart v. McArthur, 77 Iowa, 162, 41 N. W. 604; Des Moines v. County Agri. Soc. v. Tubbessing, 87 Iowa, 138, 54 N. W. 68; Hoyer v. King, 101 Iowa, 363, 70 N. W. 695; Marshall v. Westrope, 98 Iowa, 324, 67 N. W. 257; Roundy v. Kent, 75 Iowa, 662, 37 N. W. 146; Metropolitan Loan Asso. v. Esche, 75 Cal. 513, 17 Pac. 675; Comp. Laws 1913, § 7207; 34 Cyc. 989.

The failure of a man who can read, to read his contract before he signs, especially where there is no confidential relation or trust between him and the other party, is such negligence as will defeat his right to reformation. 34 Cyc. 949; Weltner v. Thurmond, 17 Wyo. 268, 129 Am. St. Rep. 1113, 98 Pac. 590, 99 Pac. 1128; Grieve v. Grieve, 15 Wyo. 358, 9 L.R.A.(N.S.) 1211, 89 Pac. 569, 11 Ann. Cas. 1162; Banfield v. Banfield, 24 Or. 571, 34 Pac. 659; Grant Marble Co. v. Abbot, 142 Wis. 279, 124 N. W. 264; Mitchell v. Holman, 30 Or. 280, 47 Pac. 616; Sayre v. Moir, 68 Or. 381, 137 Pac. 215; Carlson v. Druse, 79 Wash. 542, 140 Pac. 570.

The fact that the contract is signed by only one party does not prevent specific performance. Comp. Laws 1913, § 7195; Merritt v. Adams County, Land & Invest. Co. 29 N. D. 496, 151 N. W. 11; Beddow v. Flage, 22 N. D. 53, 132 N. W. 637; Kerr v. Moore, 6 Cal. App. 305, 92 Pac. 107.

Nor does it make any difference that there were crops and personal property included in the contract. 36 Cyc. 564; Fleishman v. Wood, 135 Cal. 256, 67 Pac. 276; Young v. Porter, 27 Wash. 551, 68 Pac. 362; Brown v. Smith, 109 Fed. 26; Comp. Laws 1913, §§ 7192, 7201; 36 Cyc. 605.

Middaugh & Hunt, for respondent.

Parol evidence is admissible to show or prove mistake of fact in the making of a contract. Newton v. Wooley, 105 Fed. 541; Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429; 36 Cyc. 605, 608.

Unilateral mistake of defendant not caused or contributed to by plaintiff has frequently been admitted as a defense, when to enforce the contract would be harsh and unreasonable. 36 Cyc. 606; Bear Track Min. Co. v. Clark, 6 Idaho, 196, 54 Pac. 1007; Godwin v. Springer, 233 Ill. 229, 84 N. E. 234; Jones v. Prewitt, 128 Ky. 496, 108 S. W. 867; Berry v. Frisbee, 120 Ky. 337, 86 S. W. 558; Aiple-Himmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480, 14 Ann. Cas. 652; New York Brokerage Co. v. Wharton, 143 Iowa, 61, 119 N. W. 969; Andrew v. Whitwer, 3 Neb. (Unof.) 55, 90 N. W. 924; Marks v. Gates, 14 L.R.A.(N.S.) 317, 83 C. C. A. 321, 154 Fed. 481, 12 Ann. Cas. 120; King v. Hamilton, 4 Pet. 311, 327, 7 L. ed. 869, 874; Willard v. Tayloe, 8 Wall. 567, 19 L. ed. 501; Pope Mfg.

Co. v. Gormully, 144 U. S. 224, 236, 36 L. ed. 414, 419, 12 Sup. Ct. Rep. 636.

There is a distinction between an action for specific performance and also between the facts which would warrant a court of equity to grant specific performance, and facts which would induce a court to grant to defendant in such action the remedy of reformation. Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120; Newton v. Woodley, 105 Fed. 541.

Equity will act in either case where the mistake is mutual, or where it is unilateral and there is fraud, or inequitable conduct, on the part of the other party. 34 Cyc. 907, 920, 921, and cases cited; McCormick Harvesting Mach. Co. v. Woulph, 11 S. D. 252, 76 N. W. 939; James v. Cutler, 54 Wis. 172, 10 N. W. 147; Welles v. Yates, 44 N. Y. 525; Winans v. Huyck, 71 Iowa, 459, 32 N. W. 422; Goodenow v. Curtis, 18 Mich. 298; Higgins v. Parsons, 65 Cal. 280, 3 Pac. 881; Day v. Day, 84 N. C. 408; 2 Beach, Eq. Jur. 544; Dane v. Derber, 28 Wis. 216; Benesh v. Travelers' Ins. Co. 14 N. D. 39, 103 N. W. 405.

Equity looks beyond all forms and to the real substance of things. Pyne v. Knight, 130 Iowa, 113, 106 N. W. 505; Lloyd v. Hulick, 69 N. J. Eq. 784, 115 Am. St. Rep. 624, 63 Atl. 616; Smelser v. Pugh, 29 Ind. App. 614, 64 N. E. 943; Walden v. Skinner, 101 U. S. 577, 25 L. ed. 963; American Freehold Land & Mortg. Co. v. Pace, 23 Tex. Civ. App. 222, 56 S. W. 377; Labbe v. Corbett, 69 Tex. 503, 6 S. W. 811; Roberts v. Plaisted, 63 Me. 335; Matlock v. Todd, 19 Ind. 130.

BRUCE, Ch. J. (after stating the facts as above). After a thorough examination of the record, we concur in the findings of the trial court, and we are satisfied that the defendant was entitled to have the contract reformed so as to contain the provision that the crops would not go with the land unless the sale was consummated before the 1st day of July. We are satisfied, indeed, that at the same time the defendant signed the contract in question he signed a number of other contracts, and that these contracts contained the provision mentioned, and that the defendant thought and had reason to believe that the one in question also contained that provision. We are satisfied, also, that the subsequent acts and dealings of the parties were such as to confirm

the defendant in this belief. We are therefore satisfied that the defendant was entitled to have the contract reformed.

As all that the plaintiff has tendered, and now in open court states that all he is willing to pay, is the $10,000, and as he has failed to tender and refused to pay the value of these crops, and has stated in open court that it does not desire specific performance of the contract unless such crops can be recovered, the judgment of the District Court is affirmed.

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

ROBINSON, J. (specially concurring). This is an action for the specific performance of a listing land contract. The plaintiff is an irresponsible nonresident corporation, and it never put up a dollar on the contract. That alone is quite enough to show that the plaintiff has no standing in a court of equity.

The land contract is in the form of a sharp listing agreement, such as a party may be induced to sign when he is tricked or hypnotized, or when he has taken leave of his senses. The defendant agrees to list for sale with an irresponsible nonresident corporation, 960 acres of land in Benson county, at the net price of $35 an acre, including a complete farming outfit, and to give the plaintiff the exclusive right of sale or purchase for seven months. Terms of sale, $10,000 cash and balance in five years, with interest. The contract was dated April 5, 1915, and by its terms it purports to give plaintiff the exclusive right of sale or purchase for seven months. The answer avers that it was a part of the listing contract that the sale, if any, must be consummated before July 1, 1915, and it was so understood by both parties,—and such appears to be the fact,—and that on July 1, 1915, the plaintiff requested an extension for three days. That several extensions were granted until the time of harvesting.

It appears that after the defendant had harvested a crop to the value of about $10,000 the plaintiff makes a tender of $10,000, and asks for the crop, the land, and the farming outfit, consisting of a large amount of personal property. Of course Judge C. W. Buttz very justly found against the plaintiff. The case will not bear any discussion. Obviously, it has no equity and no merits. Indeed a party

who asks a court of equity to enforce such a deal well deserves to be sent to jail for contempt. The judgment of the district court is affirmed, with costs of both courts.

J. H. RUDDICK v. JOHN BUCHANAN, Sr., Thomas Buchanan, David Buchanan, and John Buchanan, Jr., Copartners Doing Business as J. Buchanan & Sons.

(163 N. W. 720.)

Evidence — erroneous exclusion of — prejudicial error — none — where subsequently admitted.

1. No prejudicial error results from the erroneous exclusion of evidence, where the same evidence is subsequently admitted.

Cross-examination — limits of — trial judge — discretion.

2. The limits as to relevancy on cross-examination are in a large measure within the sound discretion of the trial judge.

Trial court — instructions — jury.

3. Certain instructions examined and *held* to be nonprejudicial for reasons stated in the opinion.

Opinion filed June 9, 1917.

From a judgment of the District Court of Foster County, *Coffey*, J., plaintiff appeals.

Affirmed.

Geo. H. Stillman, for appellant.

Duly authenticated books of account may be received in evidence. Comp. Laws 1913, § 7909; Winslow v. Dakota Lumber Co. 32 Minn. 237, 20 N. W. 145.

Note.—Refusal to allow cross-examination of a witness upon matters brought out on direct examination and relevant to the issue is a denial of an absolute right, and has geen generally held to be sufficient ground for reversal, as will be seen by an examination of the cases collated in note in 25 L.R.A.(N.S.) 683. So that the action of the court in RUDDICK v. BUCHANAN in allowing cross-examination of matters covered by the direct examination was manifestly proper.

Where goods are delivered to one person, upon the promise of another person to pay for same, the fact that the books of the seller show the account in the name of the person to whom the goods were delivered is proper to be considered upon the question as to whom credit was given, but it is not decisive against the admissibility of the books in evidence. 17 Cyc. 382, note 61; Wilkins v. Sublette, 111 Minn. 339, 126 N. W. 1089; Coleman v. Retail Lumbermen's Ins. Asso. 77 Minn. 31, 79 N. W. 588; Union Cent. L. Ins. Co. v. Prigge, 90 Minn. 370, 96 N. W. 917; Winslow v. Dakota Lumber Co. 32 Minn. 237, 20 N. W. 145; Kamm v. Rees, 100 C. C. A. 432, 177 Fed. 23.

When goods sold are charged to one person on the books, it merely raises the presumption that credit was extended on the books to such person; but such presumption may be rebutted and overcome by proof of the fact that the goods were sold and delivered, on the credit of another. Clark v. Jones, 87 Ala. 474, 6 So. 362; Lusk v. Throop, 189 Ill. 127, 59 N. E. 529; Lance v. Pearce, 101 Ind. 595, 1 N. E. 184; Burkhalter v. Farmer, 5 Kan. 477; Kaiser v. Alexander, 144 Mass. 71, 12 N. E. 209.

The assignee of a chose in action who holds the legal title to it may maintain an action thereon as the real party in interest. Rev. Codes 1905, §§ 6807, 6808, Comp. Laws 1913, §§ 7395, 7396, Assignee Equities; Seybold v. Grand Forks Nat. Bank, 5 N. D. 460, 67 N. W. 682; Queen City F. Ins. Co. v. First Nat. Bank, 18 N. D. 606, 22 L.R.A.(N.S.) 509, 120 N. W. 545.

Where goods are sold on the market, the market value is the amount due, and where plaintiff testifies to the value, and defendant offers no evidence to refute such testimony, the value as fixed by plaintiff cannot be questioned. Fried v. Olsen, 22 N. D. 381, 133 N. W. 1041; Cochrane v. National Elevator Co. 20 N. D. 169, 127 N. W. 725.

Plaintiff was entitled to interest on the account from the day his right of action accrued, and it was not proper to tell the jury they could allow interest in their discretion. Helman v. Strong, 34 N. D. 228, 157 N. W. 986; Walker & Co. v. Hoopes, 30 N. D. 398, 152 N. W. 666.

Such erroneous instructions were prejudicial. Bush v. Northern P. R. Co. 3 Dak. 444, 22 N. W. 508; Bolte v. Equitable F. Asso. 23 S. D. 240, 121 N. W. 773.

It is also error to submit to jury an hypothetical state of facts on which the evidence stands uncontradicted. 38 Cyc. 1667–1685 et seq. and note; Thomp. Trials, 2d ed. § 2319; Turner v. Osgood Art Colortype Co. 223 Ill. 629, 79 N. E. 306; Wright v. Ft. Howard, 60 Wis. 119, 50 Am. Rep. 350, 18 N. W. 750; Cronin v. Delavan, 50 Wis. 375, 7 N. W. 249; St. Louis, I. M. & S. R. Co. v. Cain, 79 Ark. 225, 95 S. W. 137; Gibbons v. Wisconsin Valley R. Co. 62 Wis. 546, 22 N. W. 533; Spaulding v. Chicago & N. W. R. Co. 33 Wis. 582; Read v. Morse, 34 Wis. 315; Cockburn v. Ashland Lumber Co. 54 Wis. 619, 12 N. W. 49; Brusberg v. Milwaukee, L. S. & W. R. Co. 55 Wis. 106, 12 N. W. 416.

C. W. Burnham and *T. F. McCue,* for respondents.

Books of account, to be capable of being offered in evidence, must be authenticated. Comp. Laws 1913, § 7909.

The testimony of a witness that an account is correct, is not sufficient to prove the account, where he was not cognizant of the transaction involved therein. 1 C. J. 663; Waldron v. Evans, 1 Dak. 11, 46 N. W. 607; 17 Cyc. 377; Prince v. Smith, 4 Mass. 455.

A special promise to answer for the debt, default, or miscarriage of another in cases like this one, must be in writing and subscribed by the party to be charged, or his agent. Comp. Laws 1913, § 5888, subdiv. 2; Hardman v. Bradley, 85 Ill. 162; Langdon v. Richardson, 58 Iowa, 610, 12 N. W. 622; Ruppe v. Edwards, 52 Mich. 411, 18 N. W. 193; Hurst Hardware Co. v. Goodman, 68 W. Va. 462, 32 L.R.A.(N.S.) 598, 69 S. E. 898, Ann. Cas. 1912B, 218; 29 Am. & Eng. Law, 2d ed. 180, 181, 924; 20 Cyc. 180, 181, 183; Swabora v. Throgmorton-Bruce Co. 88 Ark. 592, 115 S. W. 380.

Christianson, J. The plaintiff sues to recover $59.90 for goods, wares, and merchandise alleged to have been sold and delivered to the defendants, at their special instance and request, by the firm of Miller & Posey, during the fall of 1913, which account it is alleged is the property of the plaintiff by virtue of assignment thereof to him by Miller & Posey. The answer is a general denial. The evidence shows that the goods in question were sold to one William Bowman, who owned and operated a threshing machine which he had purchased from the defendants. There is some testimony given by Bowman to the

effect that the defendants had an interest in the threshing machine, but his testimony as a whole does not bear out this contention, as will appear from the following testimony given by him:

Q. And what interest in the threshing rig or in its operation did J. A. Buchanan & Sons have?

A. Why, I bought the machine on payments.

Q. They owned the machine, did they?

A. Yes, sir, I run it.

Q. You ran the machine?

A. Yes, sir.

Q. Whenever they had their pay, you paid the stipulated price for it, then the machine was to be yours?

A. Yes, sir. . . .

Q. This is the machine you spoke about sold you by J. A. Buchanan & Sons?

A. Yes, sir.

Q. You had taken possession of it?

A. Yes, sir.

Q. And was there any writing at the time they delivered it to you?

A. Yes, sir.

Q. What was it?

A. Well, what kind of a writing do you mean?

Q. I don't know. That is what I was asking you for?

A. There was a writing made out, yes.

Q. You gave your promissory notes for it, did you not?

A. Yes, sir.

Q. Gave them back a mortgage, to J. A. Buchanan & Sons?

A. Yes, sir.

Q. To secure those notes?

A. Yes, sir.

The defendant Thomas Buchanan testified as follows with respect to this matter:

Q. What is the fact with reference to this threshing machine that had been mentioned in the evidence here as the Bowman rig?

A. You mean in regard to the settlement for it?

Q. Whose was it during this time?

A. Mr. Bowman's. We sold him the rig and took his notes for it. I can't say the exact amount. The last payment,—$1,800, and some odd dollars. So much a year.

Q. He made the ordinary settlement for it, gave his notes, and we took a chattel mortgage?

A. Yes, sir.

Q. Did you have any title to that rig?

A. No, sir.

Q. During any of this time?

A. No, sir.

Q. Who was it that engaged the threshing for this rig?

A. Mr. Bowman.

Q. Who was it that collected the accounts for the rig?

A. Mr. Bowman. I got the orders for so many jobs, and credited it until we got the payment.

Q. The payment that was due that Fall?

A. He did not pay the whole payment after we figured up; no, sir.

Q. You got some orders on men that he threshed for?

A. Yes, sir.

Q. Written orders?

A. Yes, sir.

Q. You collected those upon his written orders?

A. Yes, sir.

Q. Did you have any other interest in that rig?

A. No, sir.

Q. Did you have anything to say relative to the management of the rig?

A. No, sir. He hired his own men, and attended to his own rig. Bought it himself, and was to pay for it out of the rig.

Q. Under your collection arrangement, from whom did you get the orders?

A. Mr. Bowman.

The evidence further shows that in the early fall of 1913, the defendants gave a written order requesting the firm of Miller & Posey to advance certain credit to William Bowman. The order was not produced in evidence, and the evidence is in conflict as to its terms. Miller,

a member of the firm of Miller & Posey, gave certain testimony, which, while vague and indefinite, was to the effect that the order was general and not limited in amount. Thomas Buchanan, the person who prepared the order and who apparently was in full charge of the entire transaction in behalf of his firm, testified positively that the order was limited to $25, and requested Miller & Posey to advance credit to William Bowman to the extent of $25 only, and charge the same to the account of the defendants. The evidence further shows that about September 30, 1913, Thomas Buchanan, representing the defendants, and Miller, representing the firm of Miller & Posey, settled the accounts then existing between those firms, and that such settlement included goods furnished to Mr. Bowman in an account considerably exceeding $25.

The present controversy grew out of a conversation had between Thomas Buchanan and Miller immediately following such settlement.

In his brief appellant says: "Following the settlement comes the only disagreement as to the facts and the sole issue of facts which should have been submitted to the jury. Appellant insists that then respondents authorized Miller & Posey to furnish to Bowman such further provisions as he might require." In support of this contention appellant calls our attention to the following testimony of Miller, with respect to the conversation then had between him and Thomas Buchanan: "I asked him (Buchanan) if it was all right to let Bill Bowman have more goods, and he said, 'Yes, sir,' to let him have what meat and groceries he wanted." The testimony of Miller on this point is corroborated by a witness who was present at the time the conversation took place. On the other hand, Thomas Buchanan denies that the conversation was as testified to by Miller, and claims that, after the settlement had been made, Miller inquired whether defendants would take care of any account which might thereafter arise by reason of goods which might thereafter be purchased by Bowman from Miller & Posey, and Buchanan says that he (Buchanan) thereupon replied: "That any goods that he (Bowman) had an order from us for will be taken care of."

The questions of fact were submitted to the jury. The court, among others, gave the following instructions to the jury:

"The plaintiff claims by his complaint that the contract and agree-

ment which was made between Miller & Posey and J. Buchanan & Sons and that whatever agreement was made in this case, is made between those parties. The plaintiff asks to collect from J. Buchanan & Sons upon no other ground nor theory than that the transaction was one with the defendants, J. Buchanan & Sons, so it is necessary for you to find in this case, gentlemen of the jury, that there was an agreement existing at the time the goods were furnished, if they were furnished, between Miller & Posey and J. Buchanan & Sons. *If you find there was such an agreement and that J. Buchanan & Sons agreed with Miller & Posey to pay for these goods, then you should find for the plaintiff in this case.*" The jury returned a verdict in favor of the defendants. Plaintiff appeals and assigns error upon rulings in the admission and exclusion of evidence and in the instructions to the jury.

The evidence shows that the books of the firm of Miller & Posey were destroyed in a fire, and objection was offered to the account when offered in evidence, on the ground that it was merely a transcript of the book of account, and that proper foundation had not been laid for its introduction, which objection was sustained by the trial court. Subsequently Miller testified that he had personal knowledge of the account involved, and that he knew the books to contain a true and correct statement of the account; that he had compared the account offered in evidence with the books, and that it was a correct transcript of the books. The statement was then admitted in evidence without further objection. A considerable portion of appellant's brief is devoted to a discussion of the admissibility of books of account in evidence. We are satisfied that no sufficient foundation had been laid for the admission of the copy of the entries in the books of account at the time the objection was sustained. But even though the court erred in excluding the statement, the error, if any, was cured by its subsequent admission. 38 Cyc. 147 et seq.

Miller testified with respect to the assignment of the claim to the plaintiff. On cross-examination he was interrogated on this matter with respect to the time and place of the execution of the assignment and the consideration paid therefor. It is asserted that this cross-examination was improper and constituted prejudicial error. The

extent of cross-examination is in a large measure within the trial court's discretion. 3 Enc. Ev. 880. The matters referred to in the cross-examination related to matters covered by the direct examination, and we are unable to see wherein the trial court abused its power in allowing such cross-examination.

Plaintiff contended that the amount of the account was not in dispute, and that the same bore interest as a matter of law at 7 per cent per annum. It is therefore contended that the court should have instructed the jury: (1) That the amount of the account for the goods furnished to Bowman by Miller & Posey was correct: (2) that such account bore interest at the rate of 7 per cent per annum. A sufficient answer to both propositions is that no such instructions were requested. See, Halverson v. Lasell, 33 N. D. 613, 621, 157 N. W. 682; Buchanan v. Occident Elevator Co. 33 N. D. 346, 352, 157 N. W. 122. And we are unable to see wherein the failure to instruct upon these matters could have prejudiced the plaintiff. By what possible means of reasoning the failure of the court to instruct upon the question of interest could be prejudicial, in view of the verdict, is beyond comprehension.

Error is also assigned upon the court's instruction to the jury to the effect that "it is necessary for the plaintiff to show that the plaintiff is now the owner and holder of this claim." It has been said that, in order to recover upon an assignment of a chose in action, it is essential that plaintiff establish: First, that there was a cause of action; second, that it was such a cause of action as could be assigned; and, third, that it has been assigned. 5 C. J. 1015.

The instruction challenged was abstractly correct. It related to an issue framed by the pleadings. No request was made for instruction withdrawing the issue covered thereby from the jury's consideration. In this case, however, it is at least doubtful if any error can be predicated on the giving of an instruction upon an issue framed by the pleadings, in the absence of a request for an appropriate instruction. See Guild v. Moore, 32 N. D. 432, 475, 155 N. W. 44. The evidence upon the question of the assignment, while uncontradicated, was not wholly convincing; and we are agreed that the trial court committed no error in submitting the question to the jury, especially in view of

the fact that no request was made for an appropriate instruction withdrawing the same from the jury.

The judgment must be affirmed. It is so ordered.

ROBINSON, J. (dissenting). In this case the plaintiff sues to recover $59.90 for meats and groceries sold and delivered to the defendants at their request. The plaintiff claims under a written assignment made to him by Miller & Posey. The answer is a general denial. The defense was that the goods in question were sold to one Bowman, and that the sale was not for and at the request of the defendants. The plaintiff appeals from a judgment and order denying a new trial. There was no fair question on the sufficiency of the assignment of the correctness of the account. The goods were delivered to Bowman as necessary supplies to run a threshing machine in the operation of which Bowman and the defendants were jointly interested. As it seems, Bowman was competent to run a threshing machine, but he had no means to buy a machine or to operate it. The defendants owned a threshing machine and arranged with Bowman to run it. They sold the machine to him, taking back a chattel mortgage for the full amount of the purchase money, as he had no means to buy or to operate a machine. The agreement was that the defendants should pay the expense of operating the machine and receive nearly all its earnings. It was a joint venture in which Bowman and the defendants were in reality partners, and they were to receive the greater part of the profits. Hence, regardless of any special promise, they might well be held for the meats and groceries necessary to operate the machine. And the evidence does fairly show that the defendants specially promised and agreed to pay the expense, and on the faith of that agreement Miller & Posey parted with their meats and groceries. The fact that the defendants sold the machine to Bowman and took back a mortgage for the purchase money, agreeing with him to operate the machine for their mutual benefit, does not relieve the defendants of responsibility. He who takes the benefit must bear the burden. The law respects form less than substance. There was not a fair trial. The judgment is reversed and a new trial granted.

GUS GOHL v. LOUIS BECHTOLD, Carl Bechtold, Carl Oster, Peter Schlect, and Ed. Schlect.

(163 N. W. 725.)

Action — termination of — expiration of time for appeal — trial court — no authority thereafter — judgment — final character of — suspended by proceedings taken — appeal — time of — expiration of — prior to.

1. Under § 7966, Compiled Laws 1913, an action is terminated when the time for an appeal from the judgment has expired, and the trial court has no authority thereafter to entertain a motion for a new trial, over the objection of the adverse party, unless the final character of the judgment has been suspended by proceedings commenced prior to the time for appeal expired.

New trial — motion for — time of making — notice of motion — served prior to expiration of time to appeal — motion heard after — final character of judgment — not suspended — trial court — authority to hear — has none.

2. When a motion for a new trial is noticed to be heard after the expiration of the time in which an appeal may be taken, the final character of the judgment is not suspended so as to authorize the court to entertain the motion by the mere fact that the notice of motion was served prior to the time for appeal expired.

Opinion filed March 15, 1917. Rehearing denied June 25, 1917.

From an order of the District Court of Ward County granting a new trial, *Leighton,* J.

Plaintiff appeals.

Reversed.

E. R. Sinkler and *M. O. Eide,* for appellant.

Where a notice of motion for a new trial is given and served within the statutory time for appeal, but is not presented to and heard and determined by the court until after the expiration of the time for appeal, the trial court has no jurisdiction, and the final character of the judgment is not suspended by such proceedings. Grove v. Morris, 31 N. D. 8, 151 N. W. 779; Higgins v. Rued, 30 N. D. 551, 153 N. W. 389; Garbush v. Firey, 33 N. D. 154, 156 N. W. 537.

The jury in this case had the right to award both actual and exemplary or punitive damages, and the verdict given is not excessive. Comp. Laws 1913, § 9947.

J. E. Burke, Francis Murphy, and *E. T. Burke,* for respondents.

The service of the notice of motion for a new trial is sufficient to begin and maintain an appeal, and to keep the action alive in the lower court. Comp. Laws 1913, § 7966; Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707.

The courts of many of the other states have so held. Lurvey v. Wells, F. & Co. 4 Cal. 106; Copper Hill Min. Co. v. Spencer, 25 Cal. 18, 3 Mor. Min. Rep. 267; Walker v. Hale, 16 Ala. 26; Vallentine v. Holland, 40 Ark. 338; McGee v. Ancrum, 33 Fla. 499, 15 So. 231; Central R. & Bkg. Co. v. Farley, 89 Ga. 180, 15 S. E. 34; State ex rel. Druliner v. Clark, 16 Ind. 97; Spalding v. Meier, 40 Mo. 176; Century Dig. (New Trials) 315; Decen. Dig. (New Trials) 155.

The legislatures of the several states have not the power to arbitrarily take from courts the powers invested in them for the general conduct of the business of the courts. Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797.

CHRISTIANSON, J. This is an appeal from an order of the district court of ward county granting defendants' motion for a new trial. The action was tried to a jury, which returned a verdict in plaintiff's favor. On December 11, 1915, judgment was entered pursuant to the verdict, and notice of entry of the judgment was duly served upon the defendants' attorneys on that same day. From time to time orders were made extending the time within which to settle the statement of case and move for a new trial. The last order of extension which was made on April 18, 1916, extended the time in which to settle the statement and move for a new trial to the 18th day of May, 1916. No further or additional extension of time was either applied for or granted. On June 9, 1916, the defendants served a notice of motion for a new trial, noticed to be heard on July 1, 1916. When such motion came on to be heard, plaintiff appeared specially and filed written objections to the hearing thereof on the ground that more than six months had elapsed since the notice of entry of judgment had been served, and that as no appeal from the judgment had been taken the action was no longer pending. The trial court overruled the objections and entered an order granting a new trial, unless the plaintiff agreed to a certain reduction of the verdict. Plaintiff appeals from this order.

The first reason assigned for a reversal is that the motion for a new trial was noticed to be heard, and heard over plaintiff's objection, more than six months after notice of entry judgment had been served. Questions somewhat analogous to the one now under consideration have been considered by this court in several recent cases. See Grove v. Morris, 31 N. D. 8, 151 N. W. 779; Higgins v. Rued, 30 N. D. 551, 153 N. W. 389; Garbush v. Firey, 33 N. D. 154, 156 N. W. 537; Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707.

In the first three cases cited,—this court held that when a notice of motion for a new trial is served more than six months after the date of notice of entry of judgment,—*i. e.*, after the time for appeal from the judgment has passed,—the district court is without authority to entertain such motion over the objection of the adverse party. In the last case cited (Skaar v. Eppeland, supra), this court held that where a motion for a new trial is duly noticed to be heard at a date prior to the expiration of time for appeal from the judgment, but continued by consent of the parties, and finally submitted and determined after the time for appeal from the judgment has expired, the final character of the judgment is suspended by the pending proceedings, and the court has jurisdiction to determine the motion for a new trial even though the time for appeal from the judgment has expired.

Defendants' counsel contends that the service of notice of motion within the six-month period suspended the final character of the judgment, and brings the case within the rule laid down in Skaar v. Eppeland, supra. We are wholly satisfied with the rule announced in Skaar v. Eppeland, but it has no application in this case, as an examination of that decision will show. The following language used in Skaar v. Eppeland is peculiarly significant: "Where a motion for a new trial is duly noticed to be heard within the six-month period, and final hearing thereon postponed by consent of the parties, or the delay of the court in deciding the motion, the final character of the judgment is suspended by the proceedings so pending."

In the case at bar the motion for a new trial was not noticed to be heard within the six-month period. The mere service of notice of motion within that time does not suspend the final character of the judgment.

Defendants' counsel also contend that under the provisions of § 7666,

Compiled Laws of 1913 (which is a literal re-enactment of § 7068, Rev. Codes 1905), the trial court is vested with power to extend the time in which to move for a new trial for such length of time as in its discretion may be deemed necessary, or to fix another time in which to move for a new trial even after the six-month period has expired. If defendants' counsel are correct in the interpretation to be given to this section of our statute, a judgment would never become final, and a trial judge might permit a motion for a new trial to be made at any time. So far as we know, such unlimited power has never been granted to any court. Under the common law a court retained control over its judgments during the term at which they were rendered only. See Skaar v. Eppeland, supra. We do not believe that the legislature intended to grant such unlimited power to the trial courts. As we said in Garbush v. Firey, 33 N. D. 154, 156 N. W. 537: "There must be some end to litigation. Public policy demands that there be some point of time when a valid judgment, regularly entered, becomes final and unassailable. The legislature recognized this fact, and its intent as declared by § 7966, Compiled Laws, is that a judgment shall become final and conclusive when the time for appeal has expired, *and that no proceedings shall thereafter be instituted, over the objections of the adverse party, for a reversal of such judgment.*"

The statutory provisions relative to motions for a new trial must be given a reasonable interpretation, and construed in harmony with § 7966, Compiled Laws of 1913, which provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is soon satisfied."

In our opinion the trial court had no authority to entertain the motion for a new trial in this case.

The order appealed from is reversed.

ROBINSON, J., concurs in the foregoing opinion, and concurs, further, upon the ground that the verdict and judgment is well supported by the evidence.

On Petition for Rehearing. Filed June 25, 1917.

CHRISTIANSON, J. In respondents' petitions for rehearing it is as-

serted that we overlooked or disregarded §§ 7663 to 7666 Comp. Laws 1913, in our former decision. An examination of the foregoing opinion will show that this assertion is unwarranted. Respondents' counsel also contend that the sections cited give to the trial court power to entertain motions for a new trial in its discretion, whether such motions are made within or after the expiration of the time in which an appeal from the judgment may be taken. If this contention is correct, a trial judge might entertain and grant a motion for a new trial years after the judgment had been rendered and the time to appeal therefrom had elapsed. Is there anything in these statutory provisions to justify the belief that the legislature intended to grant such power or make such results possible? We think not. One of the purposes of the 1913 Practice Act was to prevent delay in litigation. The time in which an appeal from the judgment might be taken was reduced from one year to six months, and the whole tenor and effect of the act was to make it possible, as well as to require, that proceedings for the reversal of a judgment be instituted within a shorter period of time than that which had formerly prevailed.

It is also contended that the service of notice of motion for a new trial within the time in which an appeal from the judgment might be taken operated to suspend the final character of the judgment. In support of this contention respondents' counsel has cited the following authorities: Re McCall, 76 C. C. A. 430, 145 Fed. 899, and Mills v. Fisher, 16 L.R.A.(N.S.) 656, 87 C. C. A. 77, 159 Fed. 897; Conradt v. Lepper, 13 Wyo. 99, 78 Pac. 1, 3 Ann. Cas. 627, and Thomp. New Trials, § 2730.

An examination of these authorities discloses that they in no manner relate to the proposition involved in this case. They merely hold that where a motion for a new trial, or a motion for a rehearing, is filed, that the final character of the judgment and *ipso facto* the time in which an appeal from the judgment may be taken, is extended. That is, the decisions cited hold that where a motion for a new trial or a motion for a rehearing is filed, the time in which an appeal or proceeding in error must be taken or commenced is to be computed from the date of the denial of the motion, and not from the date of the rendition or entry of the judgment or decree.

Ordinarily, "unless the case comes within some special statutory

provision, neither an appeal, writ of error, nor exceptions will now lie from an order granting or denying a motion for a new trial, . . . but the ruling of the court on the motion is reviewable, if at all, only on appeal, writ of error, or exceptions after final judgment or decree." 3 C. J. p. 505, § 337.

An examination of the authorities cited, as well as the cases collated in the note to Conradt v. Lepper, 3 Ann. Cas. 630, will disclose that the authorities sustaining the rule contended for by the respondents arose in jurisdictions where no appeal would lie from an order granting or denying a new trial; but the ruling on such motion was reviewable, if at all, on appeal from, or proceedings in error, upon the final judgment. But these authorities can have no force or application in this state, because our statute expressly provides that "an appeal from a judgment may be taken within six months after the entry thereof by default or after written notice of the entry thereof, in case the party against whom it is entered has appeared in the action; and from an order within sixty days after written notice of the same shall have been given to the party appealing." Comp. Laws 1913, § 7820. Manifestly this statutory provision leaves no room for application of the rule announced in the authorities cited by respondents, even if it was invoked in a proper case.

Under our statute a motion for a new trial may be reviewed directly on an appeal from the order refusing or granting a new trial. And while a party who moves for a new trial must embody in his motion all grounds which constitute statutory reasons for a new trial, or be deemed to have waived such grounds, still the remedy afforded by an appeal from the judgment and an appeal from an order denying a new trial are independent remedies.

The statutes furnish ample opportunity for persons aggrieved with a decision to obtain a review thereof. And, in our opinion, a party aggrieved must move for a new trial before the time in which an appeal may be taken from the judgment has expired. After that time no proceedings can be instituted for a reversal of the judgment over the objections of the adverse party. If a motion is made within that time and continued by the consent of the parties or by action of the court until a later date, then the final character of the judgment is suspended. The motion is not made until it is submitted to or brought

within the breast of the trial court and some affirmative action taken thereon either by the court or the adverse party. The unsuccessful party cannot, by his own act and by the mere service of a notice of hearing of a proposed motion for a new trial at such future time as he may see fit to designate, suspend and keep in abeyance the final and conclusive character of the judgment.

After a careful reconsideration of the questions involved, we are agreed that the former opinion should stand.

Rehearing denied.

VILLAGE OF ASHLEY, in McIntosh County, North Dakota, v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation.

(163 N. W. 727.)

Villages — boards of trustees — powers of — streets — railroads — right of way — across — ordinances.

1. Under subdivision 9 of § 3861 of the Compiled Laws of 1913, which confers upon boards of trustees of villages the power to lay out, open, grade, and otherwise improve streets, such board is authorized to pass an ordinance extending a village street across a railroad right of way.

City councils — legislative — powers conferred by — condemnation — railroads — right of way — laying out street across — villages — boards of trustees — same powers.

2. From the fact that the legislature has conferred upon city councils by express provision (Comp. Laws 1913, § 3599, subd. 68) authority to lay out and extend streets, by condemnation or otherwise, across the rights of way

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Note.—On power to lay out street or highway across railway property or right of way, see note in 24 L.R.A.(N.S.) 1213, from which it appears, in accord with the cause above, that the general power to lay out, extend, and open streets, when authority to condemn property is also conferred, will permit the opening of a street across such a right of way.

Generally, on taking railroad lands for municipal purposes, see note in 2 L.R.A. (N.S.) 227.

On the right to take railroad property for street use, see note in 47 Am. St. Rep. 290.

of railroad companies, it is not to be assumed that it was intended to withhold from boards of trustees of villages the power to proceed by condemnation under §§ 8203 and 3985, Comp. Laws 1913, for the accomplishment of similar purposes.

Railroad tracks — public streets crossing — necessity for — municipalities — — may extend streets across railroad tracks — general powers.

3. Owing to the obvious necessity that public streets and highways should cross railroad tracks, municipalities may proceed to extend streets under a general power of appropriation.

Board of Railroad Commissioners — regulatory powers — village trustees — powers of — independent of Board of Railroad Commissioners.

4. The regulatory power conferred upon the Board of Railroad Commissioners is not inconsistent with and does not detract from the power given to boards of village trustees to extend streets across railroad rights of way.

Villages — streets of — extension of — necessity for — ordinance — competent proof of — legislative powers.

5. The question of the necessity for the extension of a street is legislative, rather than judicial, and its termination is vested with local municipal legislative bodies, and a village ordinance is competent proof of such necessity.

Village ordinances — passage of — formalities — governing body — will of — shall express.

6. Where the legislature has not required the observance of any formality in passage of village ordinances, it is sufficient that an ordinance shall be proved to be the will of the governing body.

Opinion filed June 7, 1917.

Appeal from District Court, McIntosh County, *F. P. Allen,* J.

Defendant appeals.

Affirmed.

Lee Combs & L. S. B. Ritchie and *John L. Erdall,* for appellant.

Villages in this state have no power to declare the necessity for the opening up or laying out of a street across an established railroad right of way. The statutes and the Constitution vest such jurisdiction in the Board of Railroad Commissioners, and when such board has heard and passed upon a petition therefor by the village, and refused same, and no appeal has been taken, the matter is closed. Comp. Laws, 1913, § 589; Beasley v. Texas & P. R. Co. 191 U. S. 492, 48 L. ed. 274, 24 Sup. Ct. Rep. 164; Jacquelin v. Erie R. Co. 69 N. J. Eq. 432, 61 Atl. 18; Horton v. Southern R. Co. 173 Ala. 231, 55 So. 531,

Ann. Cas. 1914A, 685; Grafton v. St. Paul, M. & M. R. Co. 16 N. D. 314, 22 L.R.A.(N.S.) 1, 113 N. W. 598, 15 Ann. Cas. 10; Winona & St. P. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. 1077.

In villages aye and nay votes must be taken upon the passage of ordinances, and a journal record kept of the vote of each member of the board of trustees in each case. To declare by motion that they intend to pass such an ordinance is not sufficient. Pickton v. Fargo, 10 N. D. 469, 88 N. W. 90; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Milbank v. Western Surety Co. 21 S. D. 261, 111 N. W. 561.

A village, in order to condemn property under the power of eminent domain, must proceed in court just the same as any other, aside from a city. Grafton v. St. Paul, M. & M. R. Co. 16 N. D. 314, 22 L.R.A. (N.S.) 1, 113 N. W. 598, 15 Ann. Cas. 10, and cases cited; 15 Cyc. 629–631.

The right to take property from one citizen and transfer it to another is conferred only when some existing public need is to be supplied or some public advantage is to be gained. Edgewood R. Co's Appeal, 79 Pa. 257, 5 Mor. Min. Rep. 406; 15 Cyc. 579, 580, 581, 586, 612–614; Lewis's Sutherland, Stat. Constr. 2d ed. 560; Mills, Em. Dom. 45–47; 1 Lewis, Em. Dom. 2d ed. 266, 269, 276.

The general power given to municipalities by legislative enactment to open new streets or change, widen, or extend old ones does not authorize them to appropriate for such purposes land already in use by a railroad company, when such use or appropriation would defeat or supersede the rights of the company. Pittsburgh, Ft. W. & C. R. Co. v. Sanitary Dist. 218 Ill. 286, 2 L.R.A.(N.S.) 227, 75 N. E. 892; Augusta v. Georgia R. & Bkg. Co. 98 Ga. 161, 26 S. E. 499; Winona & St. P. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. 1077; St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359, 15 N. W. 684; Richmond, F. & P. R. Co. v. Johnston, 103 Va. 456, 49 S. E. 496; Ft. Wayne v. Lake Shore & M. S. R. Co. 132 Ind. 558, 18 L.R.A. 367, 32 Am. St. Rep. 277, 32 N. E. 215; Cincinnati, W. & M. R. Co. v. Anderson, 139 Ind. 490, 47 Am. St. Rep. 285, 38 N. E. 167; Hannibal v. Hannibal & St. J. R. Co. 49 Mo. 480; Bridgeport v. New York & N. H. R. Co. 36 Conn. 255, 4 Am. Rep. 63; New Jersey Southern R. Co. v. Long Branch, 39 N. J. L. 28.

Hugo P. Remington, for respondent.

The regulatory power conferred upon the Board of Railway Commissioners is not inconsistent with, and does not detract from, the power given to boards of village trustees to extend streets across railroad rights of way. The duties of the Commission are supervisory as to railroads, and no power is given them as to the building and maintenance of highways or crossings over railroads. The Commission has no jurisdiction over the subject-matter here involved. Comp. Laws 1913, § 589; Minneapolis, St. P. & S. Ste. M. R. Co. v. Stutsman, 31 N. D. 597, 154 N. W. 654; Code of Civ. Proc. chap. 36.

The defense of *res judicata* must be pleaded if relied upon. 23 Cyc. 1523 et seq., XXI A, 1–5 and cases cited.

It is the law that when there is no constitutional or statutory provision as to the mode of procedure in passing ordinances by villages, then the municipal body may prescribe its own rules or pursue its own methods. Swift v. People, 162 Ill. 534, 33 L.R.A. 470, 44 N. E. 528; Swindell v. State, 143 Ind. 153, 35 L.R.A. 50, 42 N. E. 528; McGavock v. Omaha, 40 Neb. 64, 58 N. W. 543.

In passing ordinances, any form of words signifying clearly the will of the governing body will be sufficient. 28 Cyc. 352.

It is discretionary with the village board of trustees, and it is within their power, to declare upon the necessity of opening or extending a street within the corporate limits, and their action is conclusive. Minneapolis, St. P. & S. Ste. M. R. Co. v. Stutsman, 31 N. D. 601, 154 N. W. 654; Grafton v. St. Paul, M. & M. R. Co. 16 N. D. 314, 22 L.R.A.(N.S.) 1, 113 N. W. 598, 15 Ann. Cas. 10.

Land once subjected to a public use may be condemned and taken for another public use. There are only the questions of necessity and damages involved. Grafton v. St. Paul, M. & M. R. Co. supra; Minneapolis, St. P. & S. Ste. M. R. Co. v. Stutsman, 31 N. D. 597, 154 N. W. 654; Winona & St. P. R. Co. v. Watertown, 4 S. D. 323, 56 S. D. 1077; Pittsburgh, Ft. W. & C. R. Co. v. Sanitary Dist. 218 Ill. 288, 2 L.R.A.(N.S.) 227, 75 N. E. 892.

The terms "public necessity" and "public convenience" are synonymous when used in this relation. 8 Words & Phrases, 3781; Hunter v. Newport, 5 R. I. 325; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; Detroit v. Beecher, 75 Mich. 454, 4 L.R.A. 813, 42 N. W. 986; Minne-

apolis, St. P. & S. Ste. M. R. Co. v. Stutsman, 31 N. D. 597, 154 N. W. 654.

BIRDZELL, J. This action was brought by the village of Ashley, as plaintiff, to condemn for use as a street the property of the defendant railroad company. The village ordinance, which purports to open the street, declares a necessity for the extension of Minnesota street in said village, upon and over the right of way of the defendant company for the whole of the width of said street, or 66 feet. It then proceeds to extend the street across the right of way. The defendant answered, objecting to the extension of the street across its right of way, on the grounds that it had already established and was maintaining sufficient crossings over its railroad line in the plaintiff village for the accommodation of the public; that there was no necessity for the additional crossing provided for in the ordinance; and that the establishment of the contemplated crossing would hinder the defendant in the performance of its duties as a common carrier, and would subject the public to increased expense and danger in its relations with the defendant. The trial court found adversely to the defendants on the issue raised, and a judgment was entered, granting the relief prayed for and holding that the defendant was entitled to nominal damages. Upon this appeal from the judgment of the trial court the appellant relies for reversal on three main propositions: First, that the court was without jurisdiction to render the judgment because (a) the questions involved were within the exclusive jurisdiction of the Board of Railroad Commissioners, and (b) because the land was already dedicated to a higher public use. Second, that there is no competent proof of necessity for the extension of the street. Third, which is in reality a corollary of the second proposition, that there was and still is ample crossing facilities in the plaintiff village for the accommodation of the public.

In support of the first proposition advanced, the appellant relies upon the provisions of the statute which vest in the Railroad Commission general supervision over all railroads, and which define the powers of the Commission with respect to the care, control, and use of station grounds. Without quoting at length from the statutes cited, we shall merely state the substance of the provisions germane to the questions involved and which are deemed pertinent by appellant's counsel. Sec-

tion 589 of the Compiled Laws of 1913 vests in the Commissioners of Railroads general supervision of common carriers, and requires examination and inspection of railroads "with reference to the public safety and convenience." Article 21 of chapter 14 of the Civil Code contains the statutory provisions giving the Commission power "to regulate common carriers" and defining the duties of the Commissioners of Railroads.

We find nothing in the statutes vesting regulatory power in the Railroad Commission that in any way qualifies the authority vested in public corporations to extend and lay out streets and highways across the rights of way of railroad companies. The jurisdiction over streets, and the authority to lay out and extend the same, is, in this state, very clearly and properly vested by the legislature in the local municipal bodies. Subdivisions 7 and 68 of § 3599 of the Compiled Laws of 1913 expressly grant to city councils the power to lay out and extend streets across the rights of way of railroad companies. Subdivision 9 of § 3861 confers power upon boards of trustees of villages to lay out, open, grade, and otherwise improve streets, but there is no statute which, in express language, purports to authorize boards of trustees of villages to extend streets across the rights of way of railroad companies, as is the case with city councils under subdivision 68 of § 3599. From these differences in the statutes the appellant argues that the corporate authorities of villages cannot exercise the power sought to be exercised in the case at bar, but we are of the opinion that this argument is not tenable. The village charter statute conveys in general terms the authority to do what has been attempted in this case. Section 8203 of the chapter devoted to "eminent domain" extends the exercise of the right of eminent domain to villages for the purpose of acquiring property for use as a street, and § 3985 expressly authorizes villages to proceed under the eminent domain statute whenever such proceedings become necessary in connection with the exercise of the power to lay out or open streets. While it is true that these statutes nowhere specifically treat of the procedure that shall be followed where the exercise of the power to open a street will involve the crossing of the right of way of a railroad company, we cannot see that any particular significance attaches to such omission. It was no doubt assumed by the legislature that, in condemning a right of way for a public street across

the property of a railroad company, such proceeding would be controlled by the principles applicable to the taking of the property of individuals, with due regard, however, for the public use to which the right of way is already subject. Comp. Laws 1913, § 8206. In this connection it is significant that the section which expressly confers upon city councils the authority to extend streets across the right of way of railroad companies authorizes the extension by condemnation or *otherwise.*

The inclusion of such express subdivision in the city charter statute is consistent with a desire on the part of the legislature to vest an added authority in city councils, to proceed either by condemnation or in some other manner, and the omission of a similar subdivision in village charters does not evince a desire to withhold all authority from village trustees to exercise the ordinary power to condemn. This is especially true in view of general statutes applicable both to cities and villages. From these considerations it is apparent that the district court was not without authority to render a judgment in the condemnation proceedings brought by the village of Ashley, either because of the jurisdiction of the Board of Railroad Commissioners or because the land sought to be condemned was already dedicated to another public use. If, however, it should appear that the public use to which the land is already dedicated is a higher public use than that to which it would be subject as a street of the vollage of Ashley, and if its use as a street is incompatible with such higher use, the street cannot, with propriety, be extended.

Appellant's counsel have cited much authority substantiating the proposition that, where property has once been condemned for railroad purposes, it cannot be condemned for another public use which will totally destroy or materially impair its use for railroad purposes, except where the legislature has clearly manifested an intention to authorize such condemnation (Lewis's Sutherland Stat. Constr. 2d ed. 560; 1 Lewis, Em. Dom. 2d ed. 266, 269, 276; 15 Cyc. 612, 614), and also that the general power to open streets does not authorize a municipality to appropriate land already in use by a railroad company when such appropriation would defeat or supersede the rights of the company, citing Pittsburgh, Ft. W. & C. R. Co. v. Sanitary Dist. 218 Ill. 286, 2 L.R.A.(N.S.) 227, 75 N. E. 892; Augusta v. Georgia R. & Bkg. Co. 98 Ga. 161, 26 S. E. 499; Winona & St. P. R. Co. v. Watertown, 4

S. D. 323, 56 N. W. 1077; St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359, 15 N. W. 684; Richmond, F. & P. R. Co. v. Johnston, 103 Va. 456, 49 S. E. 496; Ft. Wayne v. Lake Shore & M. S. R. Co. 132 Ind. 558, 18 L.R.A. 367, 32 Am. St. Rep. 277, 32 N. E. 215; Cincinnati, W. & M. R. Co. v. Anderson, 139 Ind. 490, 47 Am. St. Rep. 285, 38 N. E. 167; Hannibal v. Hannibal & St. J. R. Co. 49 Mo. 480; Bridgeport v. New York & N. H. R. Co. 36 Conn. 255, 4 Am. Rep. 63; New Jersey Southern R. Co. v. Long Branch, 39 N. J. L. 28.

We do not question that this is a correct statement of the law, but it is quite apparent that there may be a condemnation within the limitation of the doctrine as stated. The law does not altogether negative the exercise of the power of eminent domain under a general power; it only precludes its exercise where the appropriation would defeat or supersede the prior use. This limitation is well stated in the case of Winona & St. P. R. Co. v. Watertown, 4 S. D. 323, 56 N. W. 1077, which is cited and much relied upon by appellant's counsel. The question is first resolved to one of statutory construction. In speaking of the principle that should control where statutes are passed conferring general powers of appropriation that might be exercised where the property is already devoted to some public use, which would in a measure be considered inconsistent, the court said: "As already stated, the rule is the result of statutory construction in the efforts by the courts to ascertain the true intent of the legislature in thus conferring the general power of appropriation upon municipal or other agencies. It is an obvious necessity that public streets and highways should cross railroad tracks. Such use for crossing does not, under ordinary circumstances, so interfere with the former use as to be inconsistent with it; and so it is uniformly held that the right to make such crossing may be exercised under a general grant of power, because the two uses not seriously interfering with each other, it will be presumed that the legislature intended by the general grant to confer such power. But when the conditions are such that it is apparent the two uses could not beneficially coexist, and that one would largely defeat the other, the presumption as to the intention of the legislature is the other way."

If the public use to which property is subjected is threatened with material impairment by the contemplated use, then and then only does the new use become inconsistent, but the use of a part of the railroad

right of way for a public street does not, under ordinary and proper conditions, threaten the impairment of another public use. A situation might readily be conceived where the condemnation of railroad property for a public street would impair its use for railroad purposes. In the case of St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359, 15 N. W. 684, for instance, there was an attempt to condemn for street purposes a strip of land 19 feet in width, which was used continually by vehicles conveying baggage to and from the depot. To have condemned the land for use as a street would necessarily have impaired its use as a part of the depot grounds. It was upon this principle that the decision in the case of Winona & St. P. R. Co. v. Watertown, supra, was based. See also Chicago G. W. R. Co. v. Mason City, 155 Iowa, 99, 135 N. W. 9; Alvord v. Great Northern R. Co. — Iowa, —, 161 N. W. 467.

It is next contended that there is no competent proof of necessity for the extension of the street. This is a legislative question rather than a judicial one, and the power has been vested by the legislature in village boards of trustees. This question has been fully considered and decided in the case of Grafton v. St. Paul, M. & M. R. Co. 16 N. D. 313, 22 L.R.A.(N.S.) 1, 113 N. W. 598, 15 Ann. Cas. 10, which case differs from this only in that in the Grafton Case the power was exercised by a city council, whereas here it was exercised by a board of trustees of a village. There is, however, as pointed out above, no material difference in this respect between the statutes which convey power to open streets upon the two classes of officials. See also Lewis on Eminent Domain, 3d ed. 370.

The necessity for the extension of the street in question having been determined by the proper authorities of the plaintiff village, we are not disposed to review such determination. If we were so disposed, there could be little doubt that the testimony and the exhibits are such as to amply warrant the findings of the trial court, who viewed the premises, that there was a necessity. It appears that the approach to the depot is over Main street and Second street. Main street is one block south of Minnesota street, the street in question, and is intersected by Second street directly south of the depot. A large part of Second street is within the right of way of a branch line, the tracks of which project into the street. It also appears that the approach from

Main street to the depot is over low ground between the main railroad track and the branch line, and that, owing to the low ground, the road from Main street to the depot is frequently not in a condition to be conveniently traveled.

Appellant's counsel also argue that the ordinance is not competent evidence of necessity because of the manner in which it was passed. It appears that the meeting was attended by the three members of the village board; that the ordinance was read, one member moved its passage, another seconded the motion; that the question was put by the chairman, and that two members voted for the passage of the ordinance, the chairman not voting; that the ordinance was declared passed and was published. Section 3592, Compiled Laws of 1913, which requires the taking of an aye and nay vote, is a part of the city charter, and is only applicable to cities. There is no statute requiring any particular formality in the passage of ordinances by village boards, and, in the absence of any other requirement, no particular formality need be observed. In the absence of other requirements, it is only necessary that there be sufficient proof of the will of the governing body. 28 Cyc. 352.

The judgment of the District Court is affirmed.

ROBINSON, J. I concur in result.

MICHAEL MURPHY, Receiver of the Medina State Bank, v. L. B. HANNA, E. J. Weiser, and First National Bank of Fargo, a Corporation.

(164 N. W. 32.)

Executory contract — for loan of money — breach of — damages — action to recover — pleading — facts.

1. In an action to recover damages for breach of an alleged executory con-

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Note.—On damages recoverable for breach of contract to lend money, see notes in 37 L.R.A. 233; 29 L.R.A.(N.S.) 194; and L.R.A.1916F, 506,—from which it appears that, although cases are rare in which damages are recoverable for breach of an agreement to lend money, since $1 of legal tender is worth no more than

tract to loan money, where the complaint alleges no facts from which it can reasonably be inferred that the borrower had agreed to borrow any sum of money, or, if borrowed, to retain the same for any period of time, paying interest therefor, the complaint states no cause of action for breach of a bilateral executory contract.

Complaint — loan of money — contract for — failure to keep — obligations — detriment caused.

2. A complaint which alleges the understanding with which, and the circumstances in which, parties were negotiating for a loan of money from one to the other; and where it further alleges acts done in pursuance of such understanding, which acts involve a detriment sustained by the one desiring to borrow money, which detriment is incurred in reliance upon the promise of the other to loan, the complaint states a cause of action for a breach of a unilateral contract obligation.

Complaint — allegation of facts — showing agreement — bills receivable — collateral security — good will — cause of action — damages.

3. Where a complaint alleges that it was agreed between plaintiff and defendants that plaintiff should turn over to the defendants bills receivable approved by them, which they were to hold as security for a loan of money to plaintiff to enable plaintiff to continue its business, thus preventing the sacrifice of its assets and the loss of its good will, and that, in pursuance of this agreement, plaintiff turned over to the defendants its bills receivable selected by them, of the alleged value of about $20,000, which bills receivable are alleged to have constituted the assets of the plaintiff that could be speedily converted into cash; and where it is alleged that defendants thereupon repudiated their agreement and refused to advance any money to plaintiff,—such complaint states a cause of action for breach of contract.

Contractual obligations — conduct of parties — resulting from — agreement — bilateral contract — not amounting to — construction — conditions — circumstances.

4. Where a contractual obligation results from the conduct of parties in pursuance of an understanding or agreement, which understanding or agreement by reason of lack of mutuality of obligation does not amount to a mutually binding bilateral contract, it is not essential that the obligation shall be capable of precise measurement in advance. Its extent is controlled by the standard of reasonableness under the existing circumstances.

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another, and the price of money is the principal and the legal or contract rate of interest. Where special circumstances are shown, substantial damages for breach of a contract to lend money are recoverable, and profits may be recovered if proved with reasonable certainty.

Loan of money — contract for — breach of — damages to borrower — measure of — nominal damages — not confined to — special damages — resulting from failure — contemplated.

5. The measure of damages for the breach of a contract obligation to loan money is not necessarily restricted to nominal damages; and where it appears that special circumstances were known by both parties, from which it must have been apparent that special damages would be suffered in case of failure to fulfil the obligation, such special damages as may appear to have been reasonably contemplated by the parties are recoverable.

National bank — loan of money — obligation of assured — effect of keeping — on another bank — ultra vires — contract is not.

6. Where a national bank assumes an obligation to loan money, which loan, if made, may result incidentally in keeping another bank open for business, such obligation is not *ultra vires* the power of the national bank by reason of the incidental effect of its performance.

Loan of money — purpose of — use of money — contemplated at time — borrower to pay debts — lender not guarantor — Statute of Frauds.

7. Where a defendant, in undertaking an obligation to loan money, contemplates that the money will be used to pay debts of the borrower owing to third parties, the defendant is not a guarantor or party undertaking to answer for the debt, default, or miscarriage of another within the Statute of Frauds.

Opinion filed May 12, 1917.

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

Plaintiff appeals.

Reversed.

Purcell, Divet, & Perkins, John W. Carr, and *Oscar J. Seiler,* for appellants.

A receiver has authority in this state to maintain an action in his own name and recover for the benefit of the corporation for which he is receiver. Comp. Laws 1913, §§ 5183, 7591, 7993.

An improper joinder of parties is not ground for demurrer. Comp. Laws 1913, § 7442; Mader v. Plano Mfg. Co. 17 S. D. 553, 97 N. W. 843.

The complaint does not contain a statement of facts showing that defendant agreed to answer for the debts of plaintiff, and therefore the cause of action is not within the Statute of Frauds, nor was any writing necessary. 9 Enc. Pl. & Pr. 700, 701; Jenkinson v. Vermillion, 3 S.

D. 238, 52 N. W. 1066; Hanson v. Svarverud, 18 N. D. 550, 120 N. W. 550.

Further, any contract which is beneficial to the promisor need not be in writing. The contract here was of that class. Comp. Laws 1913, § 6655, subd. 3.

The question of the power and authority of the defendant bank to make the loan agreed upon is not here involved. The bank clearly had such power. It was not an *ultra vires* contract. It was merely a question of judgment of business policy. Bixby-Theirson Lumber Co. v. Evans, 29 L.R.A.(N.S.) 194, and note, 167 Ala. 431, 140 Am. St. Rep. 47, 52 So. 843.

As against a demurrer the liberal rule of construction has been adopted in this state. Weber v. Lewis, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105.

Where one part of a contract is within the power of the parties to make, and another part is without the power, and they are separable, as in this case, that part which is within the power is enforceable. This rule applies to *ultra vires* contracts, Clark, Corp. p. 175; Illinois Trust & Sav. Bank v. Arkansas, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Illinois Trust & Sav. Bank v. Pacific R. Co. 117 Cal. 332, 49 Pac. 197; Philadelphia & S. R. Co. v. Lewis, 33 Pa. 33, 75 Am. Dec. 574; Pittsburgh C. & St. L. R. Co. v. Keokuk & Hamilton Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770.

National banks may not deal in or become the owner of stock in other corporations, excepting that when the acquirement of such stock becomes an incident of the legitimate banking business, or necessary to the protection of the interests of the bank. Such business transactions are not *ultra vires*. Tourtelot v. Whithed, 9 N. D. 467, 84 N. W. 8.

"The object of a contract must be lawful when the contract is made and possible and ascertainable by the time the contract is to be performed. Comp. Laws 1913, § 5868.

A contract to furnish what may be needed or required is sufficiently definite because it is capable of being made definite at the time of performance. Page, Contr. p. 50, § 28; Wells v. Alexander, 130 N. Y. 642, 15 L.R.A. 218, 29 N. E. 142; Hickey v. O'Brien, 123 Mich. 611, 49 L.R.A. 594, 81 Am. St. Rep. 227, 82 N. W. 241; E. G. Dailey

Co. v. Clark, 128 Mich. 591, 87 N. W. 761; Minnesota Lumber Co. v. Whitebreast Coal Co. 160 Ill. 85, 31 L.R.A. 529, 43 N. E. 774; Sutliff v. Seidenberg, 132 Cal. 63, 64 Pac. 131, 469.

A loan of money is presumed to be upon an agreement to pay interest. Comp. Laws 1913, §§ 6069, 6072.

Consequential damages may be recovered because of the parties contracting with special reference thereto, when they could not be recovered but for that fact. The law is well settled sustaining this proposition. Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Reprint, 145, 23 L. J. Exch. N. S. 179, 2 C. L. R. 517, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; Sedgw. Lead. Cas. on Damages, 8th ed. pp. 126, 156.

Circumstances attendant upon the making of a contract need not appear in the contract. They may be communicated. Messmore v. New York Shot & Lead Co. 40 N. Y. 427; Central Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 293; Sedgw. Lead. Cas. on Damages, §§ 161–163, 166–169.

Defendant bank well knew the use and purpose to which the money was to be put, and its failure to fulfil its contract to loan the money was a great damage to plaintiff, and a recovery can be had. Townsend v. Nickerson Wharf Co. 117 Mass. 501; Messmore v. New York Shot & Lead Co. 40 N. Y. 422; Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; Starbird v. Barrons, 38 N. Y. 230; Howard v. Stillwell & B. Mfg. Co. 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 503; Boutin v. Rudd, 27 C. C. A. 526, 53 U. S. App. 525, 82 Fed. 685; Wolcott v. Mount, 38 N. J. L. 496, 20 Am. Rep. 425.

Those damages are recoverable which are the natural and probable result of a breach of a contract, those which the parties may reasonably anticipate as the effect of a breach under the conditions and circumstances of each case. Central Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 293; Bixby-Theirson Lumber Co. v. Evans, 29 L.R.A.(N.S.) 194, and note, 167 Ala. 431, 140 Am. St. Rep. 47, 52 So. 843; Lowe v. Turpie, 37 L.R.A. 233, and note, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150.

Watson & Young and *E. T. Conmy,* for respondents E. J. Weiser and First National Bank of Fargo, and *Lawrence & Murphy,* for respondent L. B. Hanna.

"Whenever it is purely problematical whether any profits would have

been made or realized by reason of contingencies which might never happen, or where the profits have reference to dependent and collateral engagements entered into on the faith of the performance of the principal contract, probable profits cannot be recovered, because too remote, speculative, and indefinite." Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Reprint, 145, 23 L. J. Exch. N. S. 179, 2 C. L. R. 517, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; Lanahan v. Heaver, 79 Md. 419, 29 Atl. 1036.

The special damages sought in this case are so uncertain and incapable of reasonable ascertainment that they cannot be recovered. Winslow Elevator & Mach. Co. v. Hoffman, 107 Md. 621, 17 L.R.A.(N.S.) 1134, 69 Atl. 394.

A judgment must rest upon some basis of fact in order to stand. Johnson v. Cherokee Land & Iron Co. 82 Tex. 338, 18 S. W. 476; Louisville Bridge Co. v. Louisville & N. R. Co. 116 Ky. 258, 75 S. W. 285; Anderson v. Hilton & D. Lumber Co. 121 Ga. 688, 49 S. E. 725.

The measure of damages for breach of contract to loan money is the amount of the difference between the interest agreed upon and that which the borrower would have to pay for same amount of loan at some time in the market. Hedden v. Schneblin, 126 Mo. App. 478, 104 S. W. 887; Western U. Teleg. Co. v. Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478; New York L. Ins. Co. v. Pope, 139 Ky. 567, 68 S. W. 851; McGee v. Wineholt, 23 Wash. 748, 63 Pac. 571; Bixby-Theirson Lumber Co. v. Evans, 167 Ala. 431, 29 L.R.A.(N.S.) 194, 140 Am. St. Rep. 47, 52 So. 843; Levinski v. Middlesex Bkg. Co. 34 C. C. A. 452, 92 Fed. 449.

A complaint in an action for damages for breach of a contract to loan money is wholly insufficient in the absence of an allegation showing that the borrower had endeavored to obtain a like loan of money elsewhere, and the exact nature and kind of damages sustained should also be specifically pleaded. C. B. Coles & Sons Co. v. Standard Lumber Co. 150 N. C. 183, 63 S. E. 736; Kelly v. Fahrney, 38 C. C. A. 103, 97 Fed. 176; Carsey v. Farmer, 117 Ky. 826, 79 S. W. 245.

And where the agreement is that the money loaned is to be paid back immediately, there can be no damage. Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co. 123 N. Y. 316, 11 L.R.A. 116, 25 N. E. 499; Goldsmith v. Holland Trust Co. 5 App. Div. 104, 38 N. Y. Supp.

1032; Kelly v. Fahrney, 38 C. C. A. 103, 97 Fed. 176; Bixby-Theirson Lumber Co. v. Evans, 167 Ala. 431, 29 L.R.A.(N.S.) 195, 140 Am. St. Rep. 47, 52 So. 843.

Money is payable immediately under a contract for its payment which does not specify any time for payment. Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co. 123 N. Y. 316, 11 L.R.A. 116, 25 N. E. 499; Goodell v. Bluff City Lumber Co. 57 Ark. 203, 21 S. W. 104; Wallace v. Ah Sam, 71 Cal. 197, 60 Am. Rep. 534, 12 Pac. 46; Washington & G. R. Co. v. American Car Co. 5 App. D. C. 524.

"Where, upon the trial, plaintiff fails to prove any actual damages, a demurrer to the evidence should be sustained." Bergen v. New Orleans, 35 La. Ann. 523; Mansur-Tebbetts Implement Co. v. Willet, 10 Okla. 383, 61 Pac. 1066; Bohemian-American Workingmen's Gymnastic Asso. v. Northern Bank, 120 N. Y. Supp. 134; Leftkovitz v. First Nat. Bank, 152 Ala. 521, 44 So. 613; San Antonio Gas Co. v. Harber, 1 Tex. App. Civ. Cas. (White & W.) 633; Lamb v. Buker, 34 Neb. 485, 52 N. W. 285; New York Academy of Music v. Hackett, 2 Hilt. 217; Harrison v. Berkley, 1 Strobh. L. 525, 47 Am. Dec. 578; Gerson v. Slemens, 30 Ark. 50; Masterton v. Brooklyn, 7 Hill, 61, 42 Am. Dec. 38; Central of Georgia R. Co. v. Dorsey, 116 Ga. 719, 42 S. E. 1024; Central Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 293; Smith v. Curran, 138 Fed. 150; Carsey v. Farmer, 117 Ky. 826, 79 S. E. 245; Kelly v. Fahrney, 38 C. C. A. 103, 97 Fed. 176.

Damages which are traceable in some measure to some tortious act, but resulting chiefly from other and contingent circumstances, and not the legal and natural consequences of the act, are too remote to be the basis of a recovery. Central of Georgia R. Co. v. Dorsey, 116 Ga. 719, 42 S. E. 1024; Central Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 293; Rockefeller v. Merritt, 22 C. C. A. 617, 40 U. S. App. 666, 76 Fed. 909, and cases there cited; Howard v. Stillwell & B. Mfg. Co. 139 U. S. 199, 205, 210, 35 L. ed. 147, 149, 151, 11 Sup. Ct. Rep. 500, and cases there cited; Cahn v. Western U. Teleg. Co. 46 Fed. 40.

The contract relied upon is too indefinite and uncertain in its terms that it is unenforceable. Hickey v. O'Brien, 123 Mich. 611, 49 L.R.A. 594, 81 Am. St. Rep. 227, 82 N. W. 241.

Such an agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be used to supply the defect. Jones v. Vance Shoe Co. 115 Fed. 707.

Neither the court nor the jury can make a contract for the parties, nor can they supply defects in one. Sellers v. Greer, 172 Ill. 549, 40 L.R.A. 589, 50 N. E. 246; Durkee v. People, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626; Jones v. Vance Shoe Co. 115 Fed. 707; Price v. Wiesner, 83 Kan. 343, 31 L.R.A.(N.S.)927, 111 Pac. 439; Price v. Atkinson, 117 Mo. App. 52, 94 S. W. 816; Price v. Stipek, 39 Mont. 426, 104 Pac. 195; 7 Am. & Eng. Enc. Law, 2d ed. 116; Page, Contr. § 728.

The offer of the plaintiff was so indefinite and uncertain in its terms that no court could ascertain its meaning, or fix the exact liability of the parties, and its acceptance could not result in an enforceable contract. Price v. Wiesner, 83 Kan. 343, 31 L.R.A.(N.S.) 927, 111 Pac. 439; Adams v. Adams, 26 Ala. 272; Bumpus v. Bumpus, 53 Mich. 346, 19 N. W. 29; United Press v. New York Press Co. 164 N. Y. 406, 53 L.R.A. 298, 58 N. E. 527.

The contract is also void in law for want of mutuality. Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. 57 L.R.A. 696, 52 C. C. A. 25, 114 Fed. 77; A. Santaella & Co. v. Otto F. Lange Co. 85 C. C. A. 145, 155 Fed. 719; Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co. 166 Fed. 192; Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906; 1 Elliott, Contr. p. 296.

Where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties may later on agree upon. Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906; Morrow v. Southern Exp. Co. 101 Ga. 810, 28 S. E. 998; American Refrigerator Transit Co. v. Chilton, 94 Ill. App. 6; Savannah Ice Delivery Co. v. American Refrigerator Transit Co. 110 Ga. 142, 35 S. E. 280; Louisville & N. R. Co. v. Coyle, 123 Ky. 854, 8 L.R.A.(N.S.) 435, 124 Am. St. Rep. 384, 97 S. W. 772; 1 Elliott, Contr. p. 287.

BIEDZELL, J. This is an appeal from an order of the district court of Cass county sustaining demurrers of the various defendants to a complaint. Omitting the formal allegations, the complaint is as follows:

"That, on or about the 21st day of June, 1915, the said district court duly authorized plaintiff, as such receiver, to bring this action.

"That, on or about the 10th day of January, 1914, said bank was a going concern, but indebted, in large amounts, to divers persons; and its ability to meet and discharge its obligations to its depositors and other creditors was questioned by the public, and grave danger existed that the depositors and other creditors would institute a run upon said bank and demand payment of deposits in such unusual amounts that it would be unable to realize upon its assets expeditiously enough to enable it to meet such calls; and, in truth and in fact, the assets of said bank were of such character they could not be realized upon in sufficient amounts to meet calls being made and about to be made by its depositors and other creditors; and there was grave danger that it would be compelled to suspend payment, and go into liquidation, and have its affairs closed up by a receiver.

"That the assets of said bank were actually worth and of the value of $85,000, to be used, realized upon, collected, and handled in the continuation of the business of said bank in the due and ordinary course of its banking business, and said bank was possessed of a business good will of large value; but a large part of such assets were in the form of second and third securities upon property, securing the obligations of persons against whom immediate collection could not be enforced and the collection of which would require a considerable period of time, extensions, renewals, and in many cases, the advancement of money, by said bank, for the protection of said securities; and, as a whole, the character of said assets were such that, unless held, handled, used, and collected in the regular and continued conduct of the banking business of said bank, or if attempted to be handled, collected, or used by a receiver or assignee, or otherwise than in the continuation of the regular business of said bank, they would become immediately greatly depreciated in value, and, in many cases, practically worthless.

"That, at said time, the defendants and financial concerns in which they were interested were creditors of said bank to the amount of several thousand dollars, and holders of its stock as collateral security, and it was the mutual desire, and to the mutual interest of said bank and the defendants, that the bank continued as a going concern and preserve its good will until its assets could be realized upon to their full value in the regular course of its banking business; and it was then endeavoring to convert into cash all its assets immediately available for that purpose

for the express and only purpose of meeting the demands of its depositors and immediately maturing obligations, which endeavors and purpose were then and there communicated by it to defendants, who had full and complete knowledge thereof.

"That it was then and there discussed, between said bank and said defendants, and fully understood by all thereof, that, to avoid an immediate suspension of business by said bank, its assets must be converted into cash as expeditiously as possible to meet the claims of depositors and immediately maturing demands; and that a failure to so realize upon and convert such assets as were available into cash would inevitably lead to an early suspension of business by said bank, which would in turn lead to an immediate and large depreciation in the value of its assets and the total loss of the good will of the business as a going concern.

"That, on or about the said 10th day of January, 1914, the defendants, jointly and severally, did contract and agree with said bank as follows, to wit: That said bank should turn out and deliver to the defendants such of its unpledged bills receivable as they, the defendants, should elect to receive as collateral security, and, in consideration thereof, and of the promise to repay the same, and the legal liability arising to repay the same, they, the defendants, would advance to said bank, and place at its disposal, sufficient cash to meet all its obligations and enable it to continue the regular course of its banking business; and, while it was then impossible to ascertain the exact amount necessary for the accomplishment of such purpose, it was contemplated and understood that such amount would be upward of $20,000. That, in carrying out the terms of such agreement, the defendants did select, and said bank did turn over and deliver to them, bills receivable to the value of about $20,000, to be held by the defendants as collateral to such advances, and which made up and constituted the assets of such bank that were of the character that could be speedily converted into cash or made available to enable said bank to continue in business.

"VI.

"That at the time of making such agreement the said bank and the defendants had full knowledge of all the facts and circumstances set

forth in subdivision number five hereof, and contracted with special reference thereto and with a full understanding that the moneys agreed to be advanced by them were to be used by the bank for the special purpose of meeting the demands of depositors and holders of immediately maturing claims; that, after devesting itself of the assets pledged to them as aforesaid, said bank would have no means of raising money to meet such claims; that the inevitable result of a failure to advance such money would be the suspension of business by said bank, its insolvency, and the consequent depreciation of the value of its assets; and the entire loss of the value of the business good will.

"That thereupon the defendants repudiated their said agreement and refused to advance any money to said bank to enable it to continue in business.

"VII.

"That, by reason of the default of defendants in failing and refusing to advance and furnish to said bank the cash necessary to enable it to continue in business, it was forced to close its doors and discontinue its banking business; and, as direct results thereof, the proceedings were commenced as hereinbefore mentioned, resulting in the appointment of this plaintiff as receiver; and, by reason of the premises, the assets of said bank, which were of the value of $85,000, were reduced to the value of only $40,000, and the value of its good will was entirely destroyed, to the damage of said bank, its stockholders, and creditors of $50,000.

"Wherefore, plaintiff demands judgments against the defendants and each of them for the sum of $50,000, with interest from and since January 15, 1914."

To the above complaint a demurrer was interposed on behalf of defendant Hanna, and separate demurrers were filed by the defendants the First National Bank and E. J. Weiser. The demurrers raise the following questions: (1) The sufficiency of the facts alleged to constitute a cause of action; (2) the misjoinder of causes of action and parties defendant; and (3) the legal capacity of plaintiff to sue.

In support of the order of the trial court sustaining the demurrers, the counsel for respondents contend:

(a) That the contract or agreement set forth in the complaint is so uncertain and indefinite as to render it void;

(b) That, assuming the contract to be valid, the damages resulting from its breach would necessarily be so uncertain and speculative as to afford no basis for recovery;

(c) That the contract, if such there be, is *ultra vires* and void as to the defendant First National Bank; and

(d) That the contract or agreement relied upon is within the Statute of Frauds.

The complaint alleges an agreement between the Medina State Bank, on the one side, and the defendants, jointly and severally, on the other, whereby the bank should deliver such of its unpaid bills receivable as the defendant should elect to receive as collateral security, in consideration of which and of the promise to repay, the defendants would advance to the plaintiff bank sufficient cash to meet all its obligations and enable it to continue its banking business. It is further alleged as the understanding of the parties at the time that the amount needed would be upward of $20,000. While the complaint is replete with allegations setting forth the inducement of the contract and circumstances which, if proved, might be proper to consider in determining the amount of damages recoverable,—allegations in aggravation of damages,—the foregoing statement comprises all the allegations touching the terms of the contract entered into. Immediately following the foregoing is an allegation of at least a partial performance of the agreement set forth. It is alleged that, in carrying out the terms of the agreement, the defendant selected and the plaintiff delivered to them bills receivable of the approximate value of $20,000, for the purpose of furnishing collateral to such advances, which bills made up and constituted the assets of the bank that were of such character as to be readily convertible into cash. A careful examination of the allegations of the contract, construed in the light of the inducing matter, but separate and apart from the allegations as to what was done under it, leads us to conclude that, as a wholly executory, bilateral contract it was not enforceable, by reason of a lack of mutuality of obligations. Viewed as an executory contract, it is clear that the State Bank of Medina bound itself to borrow no money from the defendants, either absolutely or conditionally. If the plaintiff bank had, after making the agreement above referred to, found another bank or an individual that would have been willing to advance the necessary cash upon more favorable terms than those alleged, or rea-

sonably implied from those alleged, it could not, with reason, be contended that they would have been in any way liable to the defendants had they borrowed money from such third party. Austin Real Estate & Abstract Co. v. Bahn, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430; Mcmanus v. Bark, L. R. 5 Exch. 65, 39 L. J. Exch. N. S. 65, 21 L. T. N. S. 676. In the Texas case referred to, the creditor agreed to an extension of one week, in consideration of the promise of the debtor to pay within that time, and it was held that the promise of the creditor was without any consideration for the reason that the debtor was not obliged to retain the money or to pay interest for any period. The complaint in the case at bar states no fact from which it can reasonably be inferred that the State Bank of Medina became bound to borrow any money from the defendants, and in so far as it is sought to hold the defendants liable for the repudiation of an obligation to loan money, resting upon a counter obligation to borrow, we find no such corresponding promise or obligation on the part of the plaintiff; nor is there any allegation from which it can be reasonably inferred that any other detriment was suffered or consideration furnished by the defendants. In the case of Wells v. Alexander, 130 N. Y. 642, 15 L.R.A. 218, 29 N. E. 142, so much relied upon by appellant in the case at bar, there was a proposal to furnish certain steamers with such coal as would be required for a stated period. The acceptance of the proposal bound the owners to purchase such coal as would be required in the operation of the vessels. Mutuality of obligation was present in that the purchasers were bound by their acceptance to purchase the coal required from the sellers. The contract thus formed was thus mutually obligatory from the beginning, and while prospectively indefinite as to subject-matter it nevertheless contained its own measure of definiteness as to quantity. The court applied the maxim, *"Certum est quod, certum reddi potest,"* and held that damages were recoverable for breach of the contract.

There are many cases in the books in which it is held that damages may be recovered for breach of contract, where the measure of performance is indefinite in the sense that exact quantities cannot be determined in advance; as where, for instance, the quantity is to be determined by the necessities of a business or the reasonable requirements of a factory. Hickey v. O'Brien, 123 Mich. 611, 49 L.R.A. 594, 81 Am. St. Rep. 227, 82 N. W. 241; E. G. Dailey Co. v. Clark Can Co. 128 Mich. 591,

87 N. W. 761; Minnesota Lumber Co. v. Whitebreast Coal Co. 160 Ill. 85, 31 L.R.A. 529, 43 N. E. 774; (But see T. W. Jenkins & Co. v. Anaheim Sugar Co. 237 Fed. 278). But in all such cases upon analysis it will be found that the contracts involved mutuality of obligation in that both parties had restricted their contractual freedom by binding themselves mutually to the terms of an agreement involving a limitation of legal rights,—the purchasers being as much bound to look to the particular source for the goods required as were the vendors to supply them. In this there was consideration and mutuality of obligation. In our opinion there is a clear distinction between a case where a merchant agrees to buy from a certain seller such a quantity of a certain kind of goods as he may require in the operation of his business, and an agreement by a borrower to borrow sufficient money to meet his existing obligations, the whole of which sum he could return at once without sustaining any liability whatsoever. The contract set forth in the complaint is of this character, and it is consequently lacking in the essentials necessary to make it a binding obligation for the loaning and borrowing of money.

In so far as the complaint purports to state a cause of action for the breach of a wholly executory contract to loan money, and in so far as the special damages are predicated upon the breach of such a contract, the complaint is demurrable and the special damages are not recoverable.

But the foregoing considerations do not wholly dispose of the questions raised on this appeal. The complaint alleges more than a purely executory contract. It alleges, as hereinbefore stated, the circumstances in which the parties were negotiating, their purposes, and the objects which they had in view, as well as the doing of certain things by way of conforming to those purposes and realizing the objects. These allegations give rise to an additional inquiry to determine whether a cause of action in contract is stated.

A contract may fail wholly as an executory agreement carrying mutual obligations of the parties from the time it is made, and yet result in contractual obligations depending upon what is done in pursuance of it. Says Baron Park in the case of Kennaway v. Treleavan, 5 Mees. & W. 498, 151 Eng. Reprint, 211: *"But a great number of cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with one of the contract-*

ing parties. A guaranty falls under that class; when a persons says: 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you,'—the party indemnified is not therefore bound to employ the person designated by the guaranty; but if he do employ him, then the guaranty attaches and becomes binding on the party who gave it." See also Offord v. Davies, 12 C. B. N. S. 748, 142 Eng. Reprint, 1336, 31 L. J. C. P. N. S. 319, 9 Jur. N. S. 22, 6 L. T. N. S. 579, 10 Week. Rep. 758. The principle stated by Baron Park is elementary and without question is applied universally to offers of guaranty. In a later English case (Great Northern R. Co. v. Witham, L. R. 9 C. P. 16, 43 L. J. C. P. N. S. 11, 29 L. T. N. S. 471, 22 Week. Rep. 48) which has been frequently cited with approval and followed in this country, we find a very apt illustration of the operation of the same principle. In this case a tender was made for the supply of certain materials, including iron, as the railway company's storekeeper "may order from time to time." This tender was formally accepted by the directors of the railroad company and under it several orders for iron were filled. Ultimately the defendant refused to supply more iron, and an action was brought for a breach of contract, consisting in the failure to fill an order which had been sent in before the arrangement was repudiated by the defendant. The action was held to be maintainable, the court being of the opinion that the defendant was bound to deliver goods when an order was given, and intimating that the defendant might have absolved himself from the further performance by giving notice. See also Reg. v. Demers [1900] A. C. 103, 69 L. J. P. C. N. S. 5, 81 L. T. N. S. 795; 9 Cyc. 327; Willetts v. Sun Mut. Ins. Co. 45 N. Y. 45–47, 6 Am. Rep. 31. In this connection some of the cases are worthy of special mention.

Where an agreement is largely executed, and where its apparent obligations have been carried out in expectation of the making of a contract in the future, it has been held by highly respectable authority that even the agreement to make such a contract in the future is not a nullity. Slade v. Lexington, 141 Ky. 214, 32 L.R.A.(N.S.) 201, 132 S. W. 404. In this case there was an agreement between plaintiff and defendant to the effect that the plaintiff should supply water to the defendant city for twenty-five years, the defendant having an option

to purchase the plant at a price to be fixed by valuers. The contract contained the further stipulation that, if the city should not purchase, "it shall renew the contract with said company for twenty-five years longer, upon terms as mutually agreed upon at that time." The foregoing provision was held by the court to create an obligation on the part of the city to renew the contract on reasonable terms. It is quite apparent that the considerations which lead the courts to hold purely executory agreements valid on grounds of uncertainty of subject-matter and indefiniteness of obligation are largely, if not wholly, inapplicable where circumstances are present warranting the existence of a contract obligation resulting from reliance upon a promise of the obligor. Instances of obligations of such character, which in effect remain indefinite and uncertain until measured, either by the subsequent adjustment of the parties or the determination of a court or jury, are numerous and of too frequent occurrence to require citation. Suffice it to say that they form a most numerous group in that large class of obligations enforced at the common law through the medium of the common counts in assumpsit.

In the case of Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240, the defendant wrote a letter agreeing to receive and transport not exceeding 600 tons of freight, on account of the Chicago & Great Eastern Railroad Company, the addressee of the letter. The plaintiff Railway Company, promptly answered the letter as follows: "In behalf of this company I assent to your agreement, and will be bound by its terms." The court held that the word "agree" in the defendant's letter was equivalent to "offer," and that the plaintiff offeree had manifested an unqualified assent to the terms of the offer. No contract resulted, for the reason that the plaintiff had in no way bound itself by its acceptance. The court, in speaking of the effect of the purported acceptance, said (page 242): "This amounted to nothing more than the acceptance of an option by the plaintiff for the transportation of such quantity of iron by the defendants as it chose; and had there been a consideration given to the defendants for such option, the defendants would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of any. . . . There being no consideration for the promise of the defendants, except this acceptance by the plaintiff, and

that not binding it to furnish any iron for transportation unless it chose, it follows that there was no consideration for any promise of the defendants, and that the breach of such promise furnishes no foundation for an action." The court further held that though the offer and purported acceptance created no contractual obligation, the defendant would have been bound had the plaintiff accepted defendant's proposition for any specific quantity not beyond that limited.

In the case of Thayer v. Burchard, 99 Mass. 508, the alleged contract upon which the action was founded was quite similar to that in the case of Chicago & G. E. R. Co. v. Dane, supra. Plaintiffs, who expected to buy grain in the West, obtained from defendants a statement of the rates at which it was willing to receive and transport such grain. Defendants had written to the effect that they would take flour and grain from plaintiffs and ship at certain rates. This proposition was accepted by plaintiffs. In speaking of the effect of the acceptance, the court said (page 518): "The plaintiffs did not, by their acceptance of the terms, engage to furnish goods for transportation. Although they should purchase goods for that purpose, they might, at any time before their delivery at Schenectady and notice to the defendants to transport them, divert them to another route. Until such delivery and notice, there was no mutuality of obligation. The matter stood, in this respect, as upon an open proposition by the defendants, which the plaintiffs might make operative as a contract by delivering goods and calling for their transportation. To extend the obligation of the defendants beyond that limit would leave it, as it seems to us, without limit and without mutuality."

In Minnesota Lumber Co. v. Whitebreast Coal Co. supra, 160 Ill. 85, 31 L.R.A. 529, 43 N. E. 774, a lumber company had bound itself in a "memorandum of contract" to "buy its requirements of anthracite coal" for a certain season from the coal company. It was urged that the contract was void for uncertainty and for want of mutuality. In holding the contract valid the court uses the following language: "Contracts should be construed in the light of the circumstances surrounding the parties, and of the objects which they evidently had in view. The circumstances, which both parties had in view at the time of making the contract, may be referred to for the purpose of determining the meaning of doubtful expressions. Courts will seek to discover and give effect

to the intention of the parties, so that performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made; and greater regard is to be had to their clear intent than to any particular words which they may have used to express it." In interpreting the contract in the light of the above principle, the court held the word "requirements" equivalent to the word "needs," and applied it in the light of ordinary needs of the business for the particular season. Being so construed, it was held that damages could be recovered for the breach.

In the case of Jones v. Vance Shoe Co. 115 Fed. 707 (cited by respondents), the contract sued on was a contract to pay into the treasury of the Smith-Jones Company $20,000 cash, to guarantee certain notes to the amount of $25,000, "and to provide, as a loan to the said Smith-Jones Company, whatever additional capital is needed to provide for a working fund." The breach assigned was the failure to perform the obligation of the clause quoted above. The contract was held too indefinite to afford a basis for recovery. It should be noted that the action was brought by one stockholder against another,—it appearing that the defendant owned two thirds of the stock, while the plaintiff owned less than one third, and that, in addition to paying the $20,000 in cash into the treasury of the company when the contract was made, defendant had supplied the company with money to carry on its business for six months. It was charged in the declaration that the defendant, through its officers, controlled the Smith-Jones Company. The court thought that the question of the reasonableness of the time during which defendant should supply the working capital was properly determined by the directors of the Smith-Jones Company. Furthermore, inasmuch as the details concerning the loans were left to be controlled by the directors of the Smith-Jones Company, and inasmuch as defendant, on account of its stock ownership, properly controlled the board of directors and had the largest interest at stake in the Smith-Jones Company, there was no foundation for a recovery by the plaintiff.

The court did say that it was content to place the judgment on the vagueness of the stipulations in the contract; but it must be borne in mind that the defendant furnished all the money that was demanded by the board of directors of the Smith-Jones Company, and that plain-

tiff's real grievance was alleged improper management of the Smith-Jones Company by the defendants.

In United Press v. New York Press Co. 164 N. Y. 406, 53 L.R.A. 288, 58 N. E. 527 (also cited by respondents), suit was brought for breach of an executory contract under which plaintiff was to deliver to defendant a news report and defendant to pay "not exceeding $300 during each and every week." The contract was made in 1892 and it was to continue until 1900. The court laid down the rule that the agreement must be neither vague nor indefinite; and they held that the contract in question, which provided for no rate of compensation and no fixed price at which the defendant was bound to take and pay for the news report, was lacking in the element of mutuality. It must be remembered that the damages were predicated upon the provisions of the contract, which were wholly executory; that is, upon the obligation to continue to take the news report in the future. In passing it might be noted that this case has been thought open to criticism on the ground that the contract realy bound the defendant to pay at regular rates for news up to $300 per week. See 14 Harvard L. Rev. 463.

In the case at bar it is alleged that the defendants selected and the plaintiff turned over to them bills receivable to the value of about $20,000; and that this was done in pursuance of the agreement whereby the defendants had undertaken to loan money to the plaintiff bank. Even though the defendants' promise was not binding at the time it was made, by reason of a lack of a corresponding obligation on the part of the plaintiff to borrow money, yet they are in the position, as a result of the agreement (using this term in the sense common understanding, rather than as referring to a legally binding contract) entered into, of offering to loan to the plaintiff money in exchange for collateral to be selected by the defendants and turned over by plaintiff. The plaintiff alleges a full compliance with the terms upon which the defendants were willing and offered to loan money, and it further alleges that the defendants repudiated their agreement and "refused to advance any money to said bank to enable it to continue in business."

We are of the opinion that a contractual relation between the Medina State Bank and the defendants sprang into existence by reason of the selection and acceptance by the defendants of the collateral security. In the absence of any express agreement or understanding, the defend-

ants thereby became obligated to loan to the Medina State Bank such a sum of money as would ordinarily be loaned by one bank or individual to another upon such collateral security, under all the circumstances then existing and contemplated by the parties. It will be competent to show, however, with what mutual understanding, if any, the plaintiff bank parted with the securities which, it is alleged, were turned over to the defendants. It is, of course, self-evident that the defendants could, in no event, be held to have agreed to loan a sum in excess of that for which the $20,000 of collateral selected by them was, under the arrangement alleged, considered by the parties to be adequate security, and the only damages which defendants could be holden for are those shown to have resulted from their failure to loan such amount of money. As this case is before us on a demurrer, we are, of course, wholly in the dark with respect to the actual facts in the case, and must accept the facts stated in the complaint as true, with reasonable inferences in their favor.

It is true that the complaint sets forth no specific promise to loan a definite sum of money, but we are satisfied that, if the evidence should clearly establish the facts alleged with reference to the understanding of the parties at the time, the jury would have a right to infer from such facts an agreement to advance what would be considered a reasonable sum, in view of all the circumstances, including the value of the securities turned over. This matter, however, must depend wholly upon the evidence to be adduced at the trial. It must be borne in mind that the transaction alleged is unusual; that it was made for a special purpose; and that defendants had an apparent interest in the accomplishment of the objects sought to be attained, chief of which was the continued existence of the bank. It is not only alleged that the assets turned over to the defendants were of the value of about $20,000, but it is also alleged that they constituted "the assets of (the) bank that were of the character that could be speedily converted into cash or made available to enable such bank to continue in business." A contract may be somewhat ambiguous and indefinite, not merely as a result of words employed by the parties, but as a consequence of more or less equivocal acts as well. In such cases it is fundamental that, in measuring the obligation which one assumes by reason of his words or conduct, it is competent to consider the surrounding circumstances, in order that the

intention of the parties may be applied and the obligation measured by the standard employed by the parties during their negotiations. Merriam v. United States, 107 U. S. 437, 27 L. ed. 531, 2 Sup. Ct. Rep. 536; 9 Cyc. 587, 588. The allegations quoted above, if established, would, in our judgment, amount to what is termed by the supreme court of Massachusetts in the case of the First Nat. Bank v. Watkins, 154 Mass. 385, 28 N. E. 275, "an ordinary case of a unilateral contract growing out of the offer of one party to do something if the other will do or refrain from doing something else;" and where it was held that "if the party to whom such an offer is made acts upon it in the manner contemplated, either to the advantage of the offerer or to his own disadvantage, such action makes the contract complete."

Assuming for the purpose of this discussion that the plaintiff will be able upon the trial to establish facts rendering the defendants obligated to loan a sum of money to the plaintiff which would have been sufficient to have enabled it to continue its business, it must yet be determined whether the damages resulting from the breach of this obligation would necessarily be so speculative and uncertain as to afford no basis for recovery. It is true that the complaint alleges special facts as a basis for the recovery of damages which it might be difficult to establish with sufficient certainty as to cause and effect, to afford a legal basis for the recovery of special or even substantial damages in any amount; but we are of the opinion that the allegations are sufficient to support a recovery of substantial damages if the difficulties of making proof are successfully met. Plaintiff alleges "that, by reason of the default of defendants in failing and refusing to advance and furnish to said bank the cash necessary to enable it to continue in business, it was forced to close its doors and discontinue its banking business; and, as direct results thereof, the proceedings (receivership) were commenced as hereinbefore mentioned." If the plaintiff can prove this allegation with sufficient directness and certainty as to render improbable all other causes of the result alleged than that attributable to these defendants, we have no doubt that the law will be satisfied in its requirement of certainty of causation. As to the recovery of the special damages which the plaintiff asks, he may safely rely upon the rule announced in the case of Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Reprint, 145, 23 L. J. Exch. N. S. 179, 2 C. L. R. 517, 18 Jur. 358, 2 Week. Rep. 302,

5 Eng. Rul. Cas. 502. In passing, however, it should be said that an examination of the authorities cited to the effect that only nominal damages are recoverable for breach of a contract to loan money is not applicable to the situation described in this complaint. There is no reason why substantial damages may not be allowed for the breach of a contract to loan money, within the rule of Hadley v. Baxendale, supra, where special circumstances were known by both parties to exist at the time the contract was made, from which it must have been apparent that special damages would be suffered in case of the failure to fulfil the obligation. We find a very satisfactory discussion of the legal principles involved in the case of Holt v. United Security L. Ins. & T. Co. 76 N. J. L. 585, 21 L.R.A.(N.S.) 691, 72 Atl. 301. In this case the action was brought to recover damages for a breach of contract to loan money. The contract for the loan embodied a special arrangement whereby one Chapman was to have from the defendant $32,500 to reimburse him for the cost of a new building, the repayment of which amount was to be secured by endowment policies upon the lives of Chapman and the plaintiff Holt. It was argued that only nominal damages could be recovered for the failure of the defendant to loan the money; but the court held, in view of the special circumstances, that substantial damages covering losses directly accruing, as well as gains prevented, might furnish a legitimate basis for compensation to the injured party. It was held, further, that expenditures fairly incurred in preparation for performance or part performance, where such expenditures are not otherwise reimbursed, would be proper subjects for consideration in estimating the damages. The court quotes with approval from the opinion of Mr. Justice Bradley, in United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81, as follows: "It does not lie, however, in the mouth of the party who has voluntarily and wrongfully put an end to the contract to say that the party injured has not been damaged, at least, to the amount of what he has been induced fairly and in good faith to lay out and expend." We do not feel it incumbent upon us at this time to enter into a consideration of the question as to what damages may be brought within the rule of these cases. It will be time enough to consider that question when the court has the evidence before it.

It is claimed that the contract is *ultra vires* and void as to the de-

fendant the First National Bank. The lower court construed the contract as involving an assumption on the part of the defendant national bank, with the other defendants, of an obligation "to float and keep alive" another bank. We do not so construe the contract in question, as appears from our holding that the contract is not enforceable as an executory arrangement for the future loaning of money, and that an obligation to loan money only resulted from the fact that the offer from defendants to loan has been accepted by plaintiffs. The defendants were under no obligation to keep the institution going. We cannot see that the contract embraced an obligation to "float and keep alive another bank," merely because the making of the contemplated loan might have enabled the institution to keep open. It is not at all unusual that banks, by loaning money, enable business institutions to "float and keep alive" in this indirect way,—in fact, that is one of their chief functions. We see nothing in the transaction indicating that the officers of the bank stepped beyond legitimate legal bounds in determining the policy to be pursued as to the loan in question.

The further contention that the contract is within the Statute of Frauds is practically disposed of in the previous discussion. The allegations are held sufficient to charge the defendants with an obligation to loan money. The contract is not brought within the Statute of Frauds by reason of the incidental effect it might have. Had the alleged agreement been performed, it is true that the obligations of the plaintiff owing to third persons would have been discharged, but this would not bring the contract within the statute. The statute is generally construed to be applicable to that situation in which the defendant promisor undertakes to pay a debt that a third person owes to the promisee and to whose obligation the defendant's promise is collateral. Furthermore, the complaint nowhere alleges the contract to be verbal, and it is elementary that when such is the case the complaint is not objectionable on demurrer.

The order appealed from is reversed and the cause remanded for further proceedings according to law.

H. S. KLINE and J. Minkiewitz v. HATTIE HARRIS, A. C. Harris, G. A. Ebbert, and J. H. Mantz.

(163 N. W. 268.)

Judgment roll — action on — complaint in — verified — sham answer — general denial — stricken out — on motion.

In an action when the complaint is duly verified and is based on a judgment roll or matter of record which cannot be denied in good faith, the defendant has no right to interpose a false and sham answer in the form of a general denial; and, on proper motion, such an answer should be stricken out as sham.

Opinion filed June 2, 1917.

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

Affirmed.

Palda & Aaker and *I. M. Oseth,* for appellants.

Campbell & Jongewaard, for respondents.

ROBINSON, J. The complaint and the records show that on September 12, 1908, M. H. Zeer commenced an action in McHenry county against the defendants Hattie Harris and A. C. Harris to recover $675, and interest, 7 per cent, from August 2, 1906, for work and labor.

A writ of attachment was issued and levied, and on April 20, 1909, the defendants gave a bond to discharge the attachment. And on May 29, 1909, the court made an order discharging the attachment on the bond. On January 19th, 1910, it was duly adjudged that the plaintiff recover against the defendants Hattie and A. C. Harris, $792 and costs, making $835.50. On January 21, 1910, M. H. Zeer duly made to the plaintiffs a written assignment of the judgment. It was signed by M. H. Zeer and two witnesses, and duly acknowledged and filed with the judgment record in the office of the clerk of court.

To the verified complaint stating those facts, which appear of record, the answer is merely a general denial. It was stricken out, and, on an appeal to this court, Judge Kneeshaw wrote an opinion reversing the order, holding in effect that a general denial of the court records may

not be stricken out as sham and not made in good faith. 30 N. D. 421, 152 N. W. 687. In June, 1915, the case was on the court calendar for trial, and a motion was made to strike it from the calendar. A motion was made to require the plaintiffs to come to the state and submit to examination as parties before trial, claiming that the defendants had a good and meritorious defense in a matter relating to the validity and good faith of the pretended assignment of the judgment, as if the defendants were in any position to question the sufficiency of the assignment. On July 8, 1915, the case was brought to trial before the court and a jury, and at the close of the testimony each party moved for a directed verdict, and the case was submitted to the court. Then the court, by Judge Burr, made and filed proper findings of fact and conclusions of law. On July 19, 1915, judgment was duly entered in favor of the plaintiff and against the defendants for $1,155.94 and costs. In October, 1915, the defendant again appealed to this court, and on January 27, 1916, the appeal record was filed.

There is no specification of error worthy of any consideration. The proof submitted by the plaintiff was not disputed, and it was in no way disputable. The defendants had no defense, and they did not attempt to make a defense. The appeal was in keeping with the answer, and it was taken in bad faith and for delay. In that way this very simple action has been held up and delayed for seven years. Such a procedure should not be tolerated. The judgment is affirmed, with costs.

Mr. Justice CHRISTIANSON, being disqualified, did not participate.

MACK HENDRICKS v. FRED HUGHES and A. S. Anderson.

(163 N. W. 268.)

Automobile collision — injury from — damages — action for — street — defendant's failure to properly use.

In this case the plaintiff sues to recover damages from an automobile collisior

Note.—On rules of the road governing vehicles proceeding in opposite directions see note in 41 L.R.A.(N.S.) 322. As to rule of the road governing vehicles proceeding in the same direction, see note in 41 L.R.A.(N.S.) 337. As to rules of the roa

resulting from the fact that the defendants did not keep on the right-hand side of the street. The verdict is well sustained by the evidence.

Opinion filed June 2, 1917.

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

Affirmed.

C. E. Brace, for appellants.

A person cannot recover for personal injuries unless he was in the exercise of ordinary care for his own safety, and the injury resulted from the negligence of the defendant. Le Baron v. Joslin, 41 Mich. 313, 2 N. W. 36, 44 Mich. 160, 6 N. W. 214; Lake Shore & M. S. R. Co. v. Bangs, 47 Mich. 470, 11 N. W. 276, 4 Am. Neg. Cas. 29; Brady v. Chicago, St. P. M. & O. R. Co. 59 Neb. 233, 80 N. W. 809.

If plaintiff's own negligence contributes to the injury, he is not entitled to recover. Portman v. Decorah, 89 Iowa, 336, 56 N. W. 512; Griggs v. Fleckenstein, 14 Minn. 81, Gil. 62, 100 Am. Dec. 199, 1 Am. Neg. Cas. 311.

Where an injury is due to the negligence of both parties, no recovery can be had. Sherlock v. Minneapolis, St. P. & S. Ste. M. R. Co. 24 N. D. 40, 138 N. W. 976.

Our courts will take judicial notice of such matters of common knowledge and science as may be known to all men of ordinary understanding and intelligence. Comp. Laws 1913, § 7938 (68).

Contributory negligence is an act or omission of plaintiff amounting to a want of ordinary care and prudence. Plaintiff was guilty of this negligence in this case. Guthrie v. Missouri P. R. Co. 51 Neb. 746, 71 N. W. 722; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225.

The granting of a new trial for insufficiency of the evidence is largely within the judicial discretion of the trial court, and its decision will not generally be reversed unless there is a clear case of abuse. The lower

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governing vehicles at intersection of street and when turning across street, see note in 41 L.R.A.(N.S.) 346.

On liability for collision between automobile or automobile and another vehicle at or near corner of street or highway, see note in L.R.A.1916A, 745.

court here did abuse its discretion, for the record shows a clear case of contributory negligence that a new trial should be granted. Galvin v. Tibbs, H. & Co. 17 N. D. 600, 119 N. W. 39; Bristol & S. Co. v. Skapple, 17 N. D. 271, 115 N. W. 841; Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011; Skaar v. Eppeland, 35 N. D. 116, 159 N. W. 707.

Fisk, Murphy, & Linde and Francis J. Murphy, for respondent.

Argument on the facts and the law of the case. No authorities cited.

ROBINSON, J. The plaintiff sues to recover damages resulting from an automobile collision. The verdict was for $625. Defendants appeal from the judgment and from an order denying a new trial, and insist that the evidence is insufficient to sustain the verdict.

The plaintiff was in a car of 1,000 pounds and kept close to the right of a highway; the defendants were in a car of 3,000 pounds, a 48-horse power Case, and did not keep to the right of the highway. They went to the left and ran into the small car. The result of the impact was to destroy the small car and to knock the plaintiff senseless; to throw him out and in front of the car. It must be that the small car was carried backwards some distance, because, on recovering their senses, a witness who was with the plaintiff seems to have thought that he had been thrown forward some 30 or 50 feet, while the testimony is that the small car was moving about 8 miles an hour. But it is argued that the small car must have been moving with great velocity to throw the plaintiff and his witness so far, and hence that they were guilty of contributory negligence. It is manifest the parties knew nothing of the distance they were thrown. If the car had been moving at a mile a minute the velocity would not have carried them more than about 21 feet, and if the big car had kept on its side of the street, there would have been no collision. The plaintiff had no good reason to fear that the big car would cross onto his side of the street and run into his car. Hence, there was no showing of contributory negligence; and there is no claim that the damages awarded is excessive. It is said the testimony indicates that both cars came to an immediate stop at the time of the collision, and that hence the velocity of the small car must have been three times as great as that of the large car. The reasoning is correct, but the whole evidence gives a strong impression that the small

car was carried backwards so as to give the plaintiff an impression that they had been thrown forward. However, the collision did not result from the velocity of either car. It resulted from the fact that the big car got on the wrong side of the street. The testimony of the plaintiff is that at the time of the collision he was within 3 feet of the right-hand side of the street, which was 44 feet wide, and that the big car was going at a speed of 25 miles an hour, and that the small car was completely ruined, and that he was knocked senseless and thrown out in front of the car and injured so he was not able to do his regular work for two or three months. He says: It felt to me as if everything inside of me was broken, and that my breast was smashed in.

Of course there is some conflict of testimony, but the verdict is well sustained by a preponderance of the evidence. Judgment affirmed.

HANS NELSON v. T. F. McCUE.

(163 N. W. 724.)

Specific performance — party seeking — must have fully and fairly performed — on conditions — immaterial parts — good faith.

Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions of the contract on his part, except when his failure to perform is only partial and either entirely immaterial or capable of being fully compensated. A party seeking specific performance of a contract must make some showing of good faith and fairness on his part.

Opinion filed March 7, 1917. Rehearing denied June 22, 1917.

Appeal from the District Court of Wells County, Honorable *J. A. Coffey*, J.

Affirmed.

T. F. McCue, for appellant.

An abortive notice for the cancelation of a land contract cannot be extended by construction so as to forfeit the contract. The statute must must be complied with. Comp. Laws 1913, § 8119.

The grounds upon which a contract may be forfeited must be contained in the contract, and none others can be considered. Cughan v.

Larson, 13 N. D. 373, 100 N. W. 1088; 2 Warvelle, Vend. & P. p. 951; Bennett v. Glaspell, 15 N. D. 239, 107 N. W. 45; Davis v. Jewett, 3 G. Greene, 226.

The notice should not only contain the grounds, but it should give the party the length of time in which to comply with the contract mentioned therein, or provided by statute, and in no case a less time than that provided by statute. Bowen v. Detroit City R. Co. 54 Mich. 496, 52 Am. Rep. 822, 20 N. W. 562; Basse v. Gallegger, 7 Wis. 448, 76 Am. Dec. 225; Gaughen v. Kerr, 99 Iowa, 214, 68 N. W. 694; Pier v. Lee, 14 S. D. 600, 86 N. W. 644.

When an abandonment of real estate is alleged, the burden of proof is upon the party who alleges it; he must also show by evidence that such abandonment is positive and unequivocal and inconsistent with the continuance of the contract. 30 Cyc. 1353; Boone v. Drake, 109 N. C. 79, 13 S. E. 724; Leach v. Rowley, 138 Cal. 709, 72 Pac. 403; Huffman v. Hummer, 18 N. J. Eq. 83, 2 Mor. Min. Rep. 242; Holden v. Purefoy, 108 N. C. 163, 12 S. E. 848; Lasher v. Loeffler, 190 Ill. 150, 60 N. E. 85; Evans v. Gerry, 174 Ill. 595, 51 N. E. 615; Plummer v. Kelly, 7 N. D. 88, 73 N. W. 70; Mullin v. Bloomer, 11 Iowa, 360.

Where the statute fixes the specific method of enforcing the contract, such procedure is exclusive and must be strictly followed. 26 Am. & Eng. Enc. Law, p. 671, and cases cited; Evans v. Gerry, 174 Ill. 595, 51 N. E. 615; Bucholz v. Leadbetter, 11 N. D. 473, 92 N. W. 830.

A purchaser of real property will not be presumed on appeal to have purchased in good faith for value and without notice of a prior unrecorded conveyance from his grantor, in the absence of any finding in regard thereto. Parrish v. Mahany, 12 S. D. 278, 76 Am. St. Rep. 604, 81 N. W. 295.

"The term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises which confer on one party the right to recover a personal chattel or a sum of money from another by action." Sheldon v. Sill, 8 How. 441, 12 L. ed. 1147.

An executory contract for the purchase of land is a chose in action. Cook v. Bell, 18 Mich. 387.

A chose in action may be assigned by parol. Roberts v. First Nat.

Bank, 8 N. D. 474, 79 N. W. 993; Van Cise v. Merchants' Nat. Bank, 4 Dak. 485, 33 N. W. 897.

Equitable titles frequently rest entirely in parol, and the contract or agreement in many cases can only be proved by parol. Hardin v. Hardin, 26 S. D. 601, 129 N. W. 108; 2 Am. & Eng. Enc. Law, p. 1053; Currier v. Howard, 14 Gray, 513; Durst v. Swift, 11 Tex. 273; Bullion v. Campbell, 27 Tex. 653; Doniphan v. Street, 17 Iowa, 317; Dickey v. Lyon, 19 Iowa, 544; Henniges v.Paschke, 9 N. D. 495, 81 Am. St. Rep. 588, 84 N. W. 350.

Where one paper refers to another for terms, it is the same as though the words of the one referred to were inserted in the former; and the same is true as to papers annexed to the principal one. Clapp v. Forster, 67 Iowa, 49, 24 N. W. 587; 9 Cyc. 582; Gerdes v. Moody, 41 Cal. 335; Goodwin v. Nickerson, 51 Cal. 166; Miller v. Edgerton, 38 Kan. 36, 15 Pac. 894; Elmore v. Higgins, 20 Iowa, 250; Short v. Van Dyke, 50 Minn. 286, 52 N. W. 643.

"The word 'the' designates one particular thing from a class or number, dissociating it from others of the same class." United States v. Hudson, 65 Fed. 68; Wastl v. Montana Union R. Co. 24 Mont. 159, 61 Pac. 9; Gale v. Shillock, 4 Dak. 182, 29 N. W. 661; Smith v. Gale, 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct. Rep. 674; Comp. Laws 1913, § 7846.

Land contracts are terminated by notice, and "such notice must be given notwithstanding any provisions in the contract to the contrary. It is the only mode of eliminating the rights of the vendee." Chapman v. Propp, 125 Minn. 447, 147 N. W. 442; Sylvester v. Holasek, 83 Minn. 362, 86 N. W. 336; Lamprey v. St. Paul & C. R. Co. 89 Minn. 187, 94 N. W. 555; Finnes v. Selover, B. & Co. 102 Minn. 334, 113 N. W. 883; Barnes v. Hulet, 34 N. D. 576, 159 N. W. 25.

John O. Hanchett and *Gilbert C. Rode,* for respondent.

A deed executed and acknowledged by the grantor, with the name of the grantee left blank, to be inserted by an agent, is invalid for any purpose until the name of the grantee is inserted therein. Burns v. Lynde, 6 Allen, 305; Curtis v. Cutler, 37 L.R.A. 737, 22 C. C. A. 16, 40 U. S. App. 233, 76 Fed. 16; Newton v. McKay, 29 Mich. 1; Allen v. Allen, 48 Minn. 462, 51 N. W. 473; Allen v. Withrow, 110 U. S. 119, 28 L. ed. 90, 3 Sup. Ct. Rep. 517.

The finding of the trial court, that the defendant abandoned the land and the contract, is sustained by the evidence, and will not be disturbed. Abandonment is a ground for cancelation of the contract. Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088.

"The mutual rights and obligations of the parties to a written contract for the purchase and sale of real estate may be waived and the contract annulled and extinguished by parol." Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Ferris v. Jensen, 16 N. D. 466, 114 N. W. 372; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245.

"A contract for the sale of real estate may be waived by abandonment of the land and of the contract by the vendee, and his rights thereunder extinguished thereby." Ottow v. Friese, 20 N. D. 86, 126 N. W. 503; Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856.

Robinson, J. The plaintiff brings this action to quiet his title to 160 acres of land in Wells county. The defendant claims specific performance as the assignee of a cropping land contract of sale, and under a special contract, dated June 3, 1911, whereby he agreed to pay to the plaintiff $450 on the 15th day of October, 1915, and to summer fallow the lands under cultivation during the season of 1911. But the defendant did not pay the $450; he did not summer fallow the land; he has never paid any taxes on it; he never did a thing towards complying with the contract for the purchase of the land. The original purchaser agreed to pay for the land $3,840, with interest from November, 1906, and to pay all taxes. His payments were less than the interest. He had no real equity in the land. In February, 1912, the plaintiff served on defendant a written notice to cancel the contract by reason of the failure to pay the $450 and to summer fallow the land. Defendant claims the notice was void, but that is of little consequence, as the defendant makes no showing to appeal to a court of law or equity.

Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions of the contract on his part, except when his failure to perform is only partial and either entirely immaterial or capable of being fully compensated. A party seeking specific performance must make some showing of good faith and

fairness on his part. There is no such showing in this case. Judgment affirmed.

On Petition for Rehearing (Filed June 22, 1917).

ROBINSON, J. The motion for a rehearing is grossly erroneous in assuming that the court is under obligations to consider and decide every point or any point, except the turning points in the case. Regardless of any question concerning the statutory cancelation of the contract, the decision clearly shows that the defendant has done nothing to comply with the contract, and he has no equity on which to claim specific performance. On that point the decision is against the defendant, and it is a cancelation of his contract as effectually as if it declared the contract null and void. The law respects form less than substance. The court has always had power to cancel contracts for the sale of land, and the method of cancelation provided by statute is merely cumulative and concurrent; and in this case, to make assurance doubly sure, the plaintiff has effectually resorted to both methods. While the written notice of cancelation appears to have been in compliance with the statute, yet in this case there was no occasion for any such notice. Rehearing denied.

A. Y. BAYNE, Doing Business as A. Y. Bayne & Company, v. P. J. THORSON, J. P. Jones, and Oscar Heide, County Commissioners and the Board of County Commissioners, and the County of Bowman.

(163 N. W. 822.)

County commissioners — boards of — bridges — contracts for — emergency cases — powers of boards — plans and specifications — sealed bids — advertising for.

Sections 3275, 3296, 1951, and 1953 of the Compiled Laws of 1913 con-

Note.—On sufficiency of specifications for guidance of bidder for public contract, see note in 30 L.R.A.(N.S.) 214.

strued in reference to the power of boards of county commissioners to construct bridges; *held* that, except in the emergency cases provided for in § 1953. boards of county commissioners may not contract for the construction of bridges costing more than $100, without obtaining plans and specifications of the proposed bridge and advertising for sealed bids thereon, as provided in § 1951 of the Compiled Laws of 1913.

Opinion filed June 30, 1917.

Appeal from Bowman County, Honorable *W. C. Crawford,* Judge.
Plaintiff appeals.
Affirmed.

Statement of facts by BIRDZELL, J.

This is an appeal from a judgment for costs entered in favor of the defendants in an action brought to recover the contract price of bridge materials in place supplied to the county of Bowman, during the year 1912, in the construction of a certain bridge. The facts are stipulated and are in substance as follows:

The county commissioners of Bowman county duly advertised for sealed bids for furnishing materials in place for all bridge work required in the county for one year from date, the bids to be opened on April 2, 1912. Pursuant to this notice the plaintiff submitted a bid as follows:

STEEL BRIDGE MATERIAL DELIVERED F. O. B. A Y STATION IN COUNTY.

I beam bridges, 8 lines 6" joists, per foot of bridge	$6.50
" " " 8 " 7" " " " " "	7.40
" " " 8 " 8" " " " " "	8.30
" " " 8 " 9" " " " " "	9.30
" " " 8 " 10" " " " " "	11.00
" " " 8 " 12" " " " " "	14.00
" " " 8 " 15" " " " " "	19.00

6" I beam legs or piles, per lineal foot	$1.50
7" " " " " " " " "	1.70
8" " " " " " " " "	1.90
9" " " " " " " " "	2.10

6" channel caps, per foot	$1.25
7" " " " "	1.45
8" " " " "	1.65
Steel angle railing, 2 lines, with posts, per foot	$2.00
" lattice " 2 " " " " "	4.00
Extra metal, per pound	8¢

BRIDGE WORK ERECTED IN PLACE.

I beam bridges, 8 lines 6" joists, per foot of bridge	$12.50
" " " 8 " 7" " " " " "	14.00
" " " 8 " 8" " " " " "	15.50
" " " 8 " 9" " " " " "	16.50
" " " 8 " 10" " " " " "	17.50
" " " 8 " 12" " " " " "	19.50
" " " 8 " 13" " " " " "	24.00
6" I beam legs or piles, per lineal foot	$3.00
7" " " " " " " " "	3.25
8" " " " " " " " "	3.50
9" " " " " " " " "	3.75
10" " " " " " " " "	4.00
6" Channel caps, per foot	$2.75
7" " " " "	3.00
8" " " " "	3.25
24 inch steel tubular piers, per foot rise	$33.00
30 " " " " " " "	37.00
36 " " " " " " "	44.00
42 " " " " " " "	48.00
48 " " " " " " "	55.00
60 " " " " " " "	70.00
Steel angle railing, 2 lines, with posts, per foot	$2.25
" lattice " 2 " " " " "	4.50
Lumber in place furnished by contractor, per thousand ft. B. M.	$50.00
Placing lumber furnished by county, per thousand ft. B. M.	9.00
Furnishing and placing concrete per cu. yd.	20.00
Extra metal in place, per pound	12¢

30 ft. to	39 ft.	steel	truss	bridges,	per	lineal	foot	$13.25
40 ft. to	49 ft.	"	"	"	"	"	"	13.75
50 ft. to	59 ft.	"	"	"	"	"	"	16.50
60 ft. to	69 ft.	"	"	"	"	"	"	17.50
70 ft. to	79 ft.	"	"	"	"	"	"	20.50
80 ft. to	89 ft.	"	"	"	"	"	"	21.50
90 ft. to	99 ft.	"	"	"	"	"	"	25.00
100 ft. to	119 ft.	"	"	"	"	"	"	28.00
120 ft. to	129 ft.	"	"	"	"	"	"	32.00
150 ft. to	199 ft.	"	"	"	"	"	"	36.00
200 ft. to	250 ft.	"	"	"	"	"	"	40.00

Add 20% for trusses for concrete floor.

Above prices are figured on carload orders. For less than carload orders, 5% to be added to all prices.

For shipment in less than ninety days, add 10% to all prices.

All metal work to be painted one coat mineral paint in the shop before shipment, and an additional coat to be given in the field on all erected work.

Respectfully submitted,

A. Y. Bayne & Co.

By P. L. Elliott.

The foregoing bid was accepted by the board of county commissioners, and the contract awarded to the plaintiff "for all bridge work required in the county for one year from date." After the letting of the foregoing contract, a petition was presented to the board of county commissioners asking for the construction of a bridge over Spring creek on the section line between sections 20 and 21 in Boyeson township. Under date of January 2, 1913, the county commissioners passed a resolution declaring a necessity for the construction of the bridge, and directed one of its members, P. J. Thorson, to proceed to cause a bridge to be constructed. So far as appears from the record, the only specifications for the bridge are such as might be contained in the bid of the plaintiff and appellant and a letter of Thorson's, directing the plaintiff to proceed with the work, which letter is as follows:

Bowman, N. D. Dec. 28, 1912.

A. Y. Bayne & Co.,
Minneapolis, Minn.

Gentlemen:

Please furnish and build for our county one 50 ft. steel truss bridge,

16 ft. roadway, with steel joists and rail, wood floor and wheel guard, on steel pile foundations and wings, located over Spring creek on section line between sections 20 and 21 in Boyeson twp. 10 rods more or less north of the D. N. McPhee residence, about 10 miles from Bowman, as per contract of April 2, 1912.

Bowman County, North Dakota.
By P. J. Thorson.

After the completion of the work, plaintiff presented an itemized bill to the county as follows:

"To erecting metal in place in one (1) 50′ x 16′ riveted span, in the township of Boyeson, on section line between sections 20 and 21, over Spring creek, in the county of Bowman, N. D., as follows:

50′ span, at $16.50 per foot, erect in place	$825.00
50′ angle railing, at $2.25 per foot, erected in place	112.00
50′ of 7″ joists at $14 per foot, erected in place	700.00
2,600 ft. floor lumber at $50 per M erected in place	130.00
4–7 channel caps 68′ at $3 per foot, erected in place	204.00
327′ of 7″ I piles at $3.25 per foot, erected in place	1,062.75
30 yards concrete at $20 per yard, in place	600.00
Extra metal in tin and reinforcing rods, 670 lbs. at 12¢	80.40
	$3,714.15
Plus 5% for less than carload shipment, Wt. shipped, 22,621 lbs.	$185.70
Plus 10% for shipment in less than 90 days, Date ordered 12/28/12—Date shipped 3/8/13	$260.30
Total	$4,160.15"

Scow & Young (*G. A. Will,* of counsel), for appellant.

The statute relating to the right of foreign corporations to do business in this state before filing its certificate and appointing a resident agent and otherwise complying with such statute does not abridge the right of such a corporation to sue in this state. This statute only extends to the exercise of the powers by which it may be said to ordinarily transact and carry on its business in this state. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739;

Utley v. Clark-Gardner Lode Min. Co. 4 Colo. 369, 4 Mor. Min. Rep. 39.

It is also clear that statutes cannot be construed to impose upon foreign corporations limitations of their rights to make contracts in the state for the carrying on of commerce between the states, for that would be an invasion of the right of Congress to regulate commerce among such states. Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357.

The statute means simply that no foreign corporation shall begin any business in the state with the purpose of pursuing or carrying it on, until it has filed the required certificate and otherwise complied with the law. It does not refer to the doing of a mere single act. Potter v. Bank of Ithaca, 5 Hill, 490; Suydam v. Morris Canal & Bkg. Co. 6 Hill, 217.

The bids submitted by the appellant were sent from Minneapolis, Minnesota, and all its business was transacted from the city of Minneapolis. A. Booth & Co. v. Weigand, 30 Utah, 135, 10 L.R.A.(N.S.) 693, 83 Pac. 734; Sucker State Drill Co. v. Wirtz, 17 N. D. 313, 18 L.R.A.(N.S.) 134, 115 N. W. 844.

The transaction here in question was none other than interstate commerce. Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1, and cases cited; S. F. Bowser & Co. v. Savidusky, 154 Wis. 76, 142 N. W. 182; National Cash Register Co. v. Wilson, 9 N. D. 112, 81 N. W. 285; Davis & R. Bldg. & Mfg. Co. v. Caigle, — Tenn. —, 53 S. W. 240; Beard v. Union & American Pub. Co. 71 Ala. 60.

The mere fact that a foreign corporation entered into a contract with some of their stockholders, residing in the state, to buy certain articles, would not constitute a "doing of business" within the meaning of the statute. Kilgore v. Smith, 122 Pa. 48, 15 Atl. 698; Colorado Iron Works v. Sierra Grand Min. Co. 15 Colo. 499, 22 Am. St. Rep. 433, 25 Pac. 325; State v. American Book Co. 69 Kan. 1, 1 L.R.A.(N.S.) 1041, 76 Pac. 411, 2 Ann. Cas. 56; Watson Fireproof Window Co. v. Rysdon, 189 Ill. App. 134; Fuller v. Allen, — Okla. —, 148 Pac. 1008; West Coast Timber Co. v. Hughitt, 185 Ill. App. 500; Mergenthaler Linotype Co. v. Hays, 182 Mo. App. 113, 168 S. W. 239; Brennan v. Pardridge, 67 Mich. 449, 35 N. W. 85; Robinson v. Magarity, 28 Ill. 423.

Where a corporation enters into an unauthorized contract for school supplies or other materials, and uses the same, the party who furnished the goods may recover. Union School Furniture Co. v. School Dist. 50 Kan. 727, 20 L.R.A. 136, 32 Pac. 368; Gillette-Herzog Mfg. Co. v. Aitkin County, 69 Minn. 297, 72 N. W. 123.

But the burden of proof is on defendant to show the illegality of the contract. Walker v. Vermilion County, 143 Ill. App. 235; Henry County v. Gillies, 138 Ind. 667, 38 N. E. 40; Lee v. Monroe County, 52 C. C. A. 376, 114 Fed. 744; Chapman v. Douglas County, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62; Wrought Iron Bridge Co. v. Utica, 17 Fed. 316.

The county board had the right to enter into the contract for the materials to be used in the repair of bridges in their county. Bayne v. Wright County, 90 Minn. 2, 95 N. W. 456; Collom v. Bixby, 33 Minn. 50, 21 N. W. 855.

Public officials are presumed to act in accordance with the law. Webb v. School Dist. 83 Minn. 111, 85 N. W. 932; Clark v. Lancaster County, 69 Neb. 717, 96 N. W. 593; Bloomquist v. Washington County, 101 Minn. 163, 112 N. W. 253; Reed v. Anoka, 85 Minn. 294, 88 N. W. 981.

The illegality of the contract was not pleaded, was not an issue, and hence cannot be raised. Heegaard v. Dakota Loan & T. Co. 3 S. D. 569, 54 N. W. 656.

W. A. Fleming, State's Attorney (and *Theo. B. Torkelson,* of counsel), for respondent.

Plaintiff by contracting with defendant, the county of Bowman, in the name of A. Y. Bayne & Company, violated the statute of this state and cannot seek relief in the courts of this state. Comp. Laws 1913, § 9710; Levinson v. Boas, 150 Cal. 185, 12 L.R.A.(N.S.) 575, 88 Pac. 825, 11 Ann. Cas. 661; Swords v. Owen, 43 How. Pr. 176, 2 Jones & S. 277; Donlon v. English, 89 Hun, 67, 35 N. Y. Supp. 82, and Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533.

There is no record of any action of the county board approving any plans and specifications, and there was no call for proposals to build the bridge ever published. The public was never notified that bids would be received for the building of a bridge. Comp. Laws, 1913, § 1951.

A party dealing with a municipal body is bound to see to it that all the mandatory provisions of law are complied with, and if he neglects such precaution he becomes a mere volunteer and must suffer the consequences. 15 Am. & Eng. Enc. Law, p. 1086, and long list of cases cited in note 1, p. 1087; Zottman v. San Francisco, 81 Am. Dec. 96, and note, p. 107, 20 Cal. 96; Treadway v. Schnauber, 1 Dak. 236, 46 N. W. 464; Capital Bank v. School Dist. 1 N. D. 479, 48 N. W. 363; State ex rel. Diebold Safe & Lock Co. v. Getchell, 3 N. D. 243, 55 N. W. 585; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; Roberts v. Fargo, 10 N. D. 230, 86 N. W. 726; Baker v. La Moure, 21 N. D. 140, 129 N. W. 464; Price v. Fargo, 24 N. D. 440, 139 N. W. 1054; McKinnon v. Robinson, 24 N. D. 367, 139 N. W. 580; McKenzie v. Mandan, 27 N. D. 546, 147 N. W. 808; Anderson v. International School Dist. 32 N. D. 413, L.R.A.1917E, 428, 156 N. W. 54.

To authorize the county board to enter into a contract to build a bridge such as the one here involved, a petition must be signed and presented by a majority of the freeholders residing within 3 miles of the proposed bridge. This was not done. Comp. Laws 1913, § 1951; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66.

The board must secure plans and specifications, and advertise for sealed bids for the building of the bridge, to be submitted to them at their next meeting. These provisions are all mandatory. Comp. Laws 1913, § 1951; Price v. Fargo, 24 N. D. 440, 139 N. W. 1054; Hannan v. Board of Education, 30 L.R.A.(N.S.) 214, and cases cited in note, 25 Okla. 372, 107 Pac. 646; Diamond v. Mankato, 61 L.R.A. 448 and cases cited in note, 89 Minn. 48, 93 N. W. 912; Fones Bros. Hardware Co. v. Erb, 13 L.R.A. 353 and cases cited in note, 54 Ark. 645, 17 S. W. 7; Mueller v. Eau Claire County, 108 Wis. 304, 84 N. W. 430.

No contract for the particular bridge in question was ever entered into as by law provided, or at all. Price v. Fargo, 24 N. D. 440, 139 N. W. 1054; McKenzie v. Mandan, 27 N. D. 546, 147 N. W. 808; Hannan v. Board of Education, 30 L.R.A.(N.S.) 214, and note, 25 Okla. 372, 107 Pac. 646; Diamond v. Mankato, 61 L.R.A. 448, and notes, 89 Minn. 48, 93 N. W. 912; Addis v. Pittsburgh, 85 Pa. 379; Dill. Mun. Corp. 388; Re Fager, 46 N. Y. 100; Wells v. Burnham, 20 Wis. 113; People ex rel. Putnam v. Buffalo County, 4 Neb. 150; Boren

v. Darke County, 21 Ohio St. 311; State ex rel. Dunn v. Barlow, 48 Mo. 17.

The alleged contract has not been ratified by the county of Bowman through the acceptance of the bridge by the public, nor is the county liable therefor upon the principle of *quantum meruit*. Capital Bank v. School Dist. 1 N. D. 479, 48 N. W. 363; State ex rel. Diebold Safe & Lock Co. v. Getchell, 3 N. D. 243, 55 N. W. 585; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; Fox v. Walley, 13 N. D. 610, 102 N. W. 161; 15 Am. & Eng. Enc. Law, pp. 1104, 1105 and note citing cases; Zottman v. San Francisco, 81 Am. Dec. 96, and cases cited in note, 20 Cal. 96.

BIRDZELL, J. (after stating the facts). This action having been brought upon the contract for the nonpayment of the foregoing bill, and not for the reasonable worth of the materials and labor, the only question necessary to be considered on this appeal is that of the validity of the contract under which the materials were supplied and the work done.

The appellant bases the argument for the validity of the contract upon the powers vested in boards of county commissioners by subdivision 3 of § 3275. Comp. Laws 1913, which authorizes them "to construct and repair bridges, and to open, lay out, vacate, and change highways in the cases provided by law." The argument is that, except as may be elsewhere limited by express statutory enactment, the power conferred by the foregoing subdivision may be exercised in any manner that the county commissioners elect, and that all contracts made in exercising the powers so conferred are valid, in the absence of fraud. Section 3296, Comp. Laws 1913, provides that the board of county commissioners shall let contracts only on competitive bids. The chief subject of this section requiring competitive bidding is building projects, but it is also provided that "the provisions of this section shall apply to all contracts for fuel, stationery and all other articles for the use of the county, or labor to be performed therefor, when the amount to be paid for the same during any year exceeds the sum of $100; provided, that in all cases advertisements for bids therefor need not be for more than three consecutive weeks in some weekly newspaper published in such county; and provided, also, that all contracts for the

furnishing of stationery, blank books, and supplies generally for all county officers, shall be let at the first regular meeting in April to run for the period of one year."

No doubt the county commissioners in the case at bar acted in pursuance of the authority of that part of the statute quoted above in advertising and contracting for the bridge materials supplied in the instant case. Section 1951, Comp. Laws 1913, provides for the construction of bridges, upon petition of the freeholders of a civil township or of those living within a certain radius of a proposed location. In this section it is made the duty of the county commissioners to investigate the necessity of a proposed bridge, and, after the location is approved, the board is required to "advertise in the official paper in the county, for a period of thirty days, the plans and specifications of the proposed bridge, asking for sealed bids for the building of such bridge, to be submitted to them at their next regular or special meeting . . . ," and to let the contract to the lowest responsible bidder. Section 1953, Comp. Laws 1913, makes bridge building under the provision of the foregoing section subject to the supervision of the board of county commissioners, and it is expressly provided "that should any emergency arise, requiring the immediate rebuilding or repairing of any bridges, the board of county commissioners are hereby authorized to rebuild or repair, as the circumstances require, and without advertising for bids, in case said work can be performed by a responsible party, at a price not to exceed the last bid accepted by said board of county commissioners for like work." The appellants argue that, since boards of county commissioners have power under § 3275 to construct and repair bridges, such power is in no way limited by the provisions of § 1851, and that the latter section only applied where freeholders initiate, by petition, the steps looking toward the construction of a bridge. In our opinion the statutes are not subject to the broad construction contended for. It is clearly the purpose of § 3275 to group the powers of the boards of county commissioners that are elsewhere dealt with more particularly and in greater detail. For instance, the section provides that the board shall have power to levy taxes not exceeding the amount authorized by law; to equalize assessments in the manner provided by law; to establish election precincts and appoint judges in cases provided by law. When the contents of the entire section is considered, it

becomes quite clear that the section is not designed to confer broad powers of government upon the county board, but rather as a convenient expression in summary form of the powers to act concerning certain matters as elsewhere provided by law. To give the statute the interpretation contended for would be to vest in the board of county commissioners such power to construct bridges at their own discretion and will as would preclude entirely the exercise of a similar power upon petition. The bridges required to be built in response to petitions are to be paid for out of the county bridge fund; and if the commissioners are free to exhaust this fund by building bridges upon their own motion, they can render ineffectual all petitions of freeholders. It would be strange that, in proceeding in response to a petition of freeholders, the legislature should require thirty days' advertisement in the official paper of the plans and specifications of the proposed bridge, and that sealed bids be submitted therefor, while no such requirement would exist with reference to those bridges that might be constructed by the board of county commissioners acting upon their own initiative. It seems that the legislature did not contemplate the exercise of so broad a power by boards of county commissioners; for, in § 1953, it is expressly provided that in emergency cases the board of county commissioners may rebuild and repair any bridges, "without advertising for bids, but at a price not to exceed the last bid accepted by the board of county commissioners for like work." If the board had been thought to have a general authority to build and repair bridges, without advertising for bids, there was no occasion to make this provision for emergency cases. The bridge in question is a new bridge, and was not constructed under the authority of § 1953. It appears conclusively that the requirements of § 1951 have not been complied with, consequently the contract between the defendant and plaintiff, in so far as it affects the construction of the bridge in question, is illegal and void, and there can be no recovery thereunder. The judgment of the District Court is affirmed.

ROBINSON, J. I dissent.

E. R. DAVIDSON v. EMMA N. KEPNER, M. F. Kepner, H. Peoples, and O. E. Distad.

(163 N. W. 831.)

Lands — redemption of — from tax sales — notice of — contents of — expiration of time of redemption — statute — strict compliance required — tax deed.

1. Section 2223 of the Compiled Laws of 1913, which requires that the notice of the expiration of the time for redemption from tax sale shall contain a description of the lands sold, shall specify the amount for which the same were sold and the amount required to redeem, exclusive of costs to accrue, and the time when the redemption period will expire, construed and *held* that a valid deed cannot be issued except upon compliance therewith.

Redemption — expiration of time — notice of — several tracts of land — separately assessed — amount for which each sold — amount to redeem — each parcel — notice must show.

2. *Held*, further, that where a notice of the expiration of redemption under the above section embraces several lots or tracts of land separately assessed, and fails to state the amount for which each parcel has been sold, and the amount required to redeem each parcel, the notice is fatally defective.

Separate notices — not required for each tract — notice — information required — as to each tract.

3. *Held*, further that while separate notices are not required for each tract, it is essential that the notice given shall contain the required information with reference to each tract embraced in the notice.

Opinion filed June 30, 1917.

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

Plaintiff appeals.

Affirmed.

J. S. Cameron and *C. S. Buck,* for appellant.

A tax deed is always based upon the certificate of sale for taxes previously issued. Comp. Laws 1913, §§ 2192, 2206; 37 Cyc. 1443.

"Where separate parcels of land are separately sold at the same tax sale to the same purchaser, there is no legal objection to their being united in one conveyance." 37 Cyc. 1430.

In drawing the tax deed, the auditor is not presumed to need to go

beyond the certificate. Rector & W. Co. v. Maloney, 15 S. D. 271, 88 N. W. 575; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322.

It would seem to be conclusive that the fact that "tract, piece, or parcel," stated in the singular, has no bearing upon the situation. Bennett v. Darling, 15 S. D. 1, 86 N. W. 751.

In this case all the land referred to in the deed was included in one certificate. Waddingham v. Dickson, 17 Colo. 223, 29 Pac. 177; Towle v. Holt, 14 Neb. 221, 15 N. W. 203.

"Where the grantee in a tax deed receives a void instrument he is entitled, upon proper application, to the issuance to him of a valid tax deed providing the proceedings leading up to the same are in all things valid." State ex rel. White v. Winn, 19 Wis. 305, 88 Am. Dec. 689; State ex rel. Ebbert v. Fouts, 26 N. D. 599, 50 L.R.A.(N.S.) 316, 145 N. W. 97.

The auditor is authorized to correct errors found in the assessments upon transcribing them, and it will be presumed that the substitution of the name of an owner was rightly made. Adams v. Snow, 21 Iowa, 435, 21 N. W. 765; 37 Cyc. 1397.

While the statute recites that the notice shall be directed to the person in whose name the land is assessed, yet the law expressly declares that the taxes imposed upon real estate shall not create a personal obligation against the owner, but is merely a charge against the land. Laws 1897, chap. 126; Hertzler v. Freeman, 12 N. D. 187, 96 N. W. 294.

The property was sold fairly, and there was no attempt to prevent competitive bidding. Graham v. Mutual Realty Co. 22 N. D. 423, 134 N. W. 43.

Rinker & Duell, for respondents.

"If there is any proceeding in which a purchaser is affected with the principle of *caveat emptor* it is a tax sale. He must take notice of all the jurisdictional defects in the proceedings and as against them he cannot be said to be a purchaser in good faith." Watson v. Hagen, 65 Or. 569, 133 Pac. 67.

A tax deed void on its face from the fact that it shows that the lots or parcels of land therein described were sold together for one gross consideration, such lots having been advertised and assessed separately, is of no force. Comp. Laws, 1913, § 2206; Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 573; Cooley, Taxn. 493; Black, Tax Titles, 26,

and numerous cases cited; Hintrager v. McElhinny, 112 Iowa, 325, 82 N. W. 1008.

To make a statement of an illegal and void sale evidence of a legal and valid sale is a contradiction not to be imputed to the legislative intent. Reckitt v. Knight, 16 S. D. 395, 92 N. W. 1078; King v. Lane, 21 S. D. 101, 110 N. W. 39.

No proper notice of the expiration of the time for redemption from the tax sale of these lands was ever given, in that no notice was ever served upon or addressed to the assessee as required by statute. Comp. Laws 1913, § 2223; Rector & W. Co. v. Maloney, 15 S. D. 271, 88 N. W. 576; Black, Tax Titles, § 333.

All such statutory provisions are mandatory. Sweigle v. Gates, 9 N. D. 538, 84 N. W. 483.

The amount necessary to redeem each separate lot or piece of land must be stated in the notice. This was here omitted, and it is fatal. 37 Cyc. 1400, 1401; G. F. Sanborn Co. v. Johnson, 148 Mich. 405, 111 N. W. 1091; Haden v. Closser, 153 Mich. 182, 116 N. W. 1001; Jackson v. Mason, 143 Mich. 355, 106 N. W. 1112; John Duncan Land & Min. Co. v. Rusch, 145 Mich. 1, 108 N. W. 494.

Where there are various descriptions separately sold, the amount paid for each should be given in the notice. 37 Cyc. 1402, 1403, and cases cited; Blessett v. Turcotte, 20 N. D. 159, 127 N. W. 505; Black, Tax Titles, § 337.

Where the statutory requirements have not been strictly followed, the sale has not been made in good faith at public auction, and especially where the persons have refrained from bidding against each other, but have taken turns in bidding, under an agreement to that effect, and also to eliminate all competition. Youker v. Hobart, 17 N. D. 296, 115 N. W. 839.

Birdzell, J. This is an action to quiet title to lots 3, 4, and 5 of block 15 in the city of New Rockford. The plaintiff and appellant claims title under a tax deed. It appears that the property was sold for the delinquent taxes of 1908, and the certificate of sale issued to one D. F. Ellsworth, who later assigned the same to the plaintiff. The trial court found that the lots in question, together with lots 6 and 7 in block 15, had been separately assessed, but that they were sold

in masse for a gross consideration of $23.65; that the certificate showed that the sale had been conducted as stated, and that by reason of collusion competition was eliminated at the sale. The appellant challenges the correctness of the foregoing findings of fact made by the trial court, and assails the legal conclusions on the ground that they are unsupported by the facts.

A careful perusal of the record in this case leads us to conclude that it is unnecessary to consider the correctness of the findings of fact of the trial court which are challenged by the appellant on this appeal for the reason that there is a manifest fatal defect in the proceedings leading up to the tax deed. The redemption notice, exhibit 7, purports to give notice of the sale held on the 14th of December, 1909, and that "the amount of delinquent taxes due on the real estate aforesaid at the date of sale was $23.65, including penalties, costs, and interest, to make which amount, the said lots (was) then and there sold as provided by law. . . ." It further contains this statement: "You are therefore notified that $45.35, exclusive of accruing costs, is necessary to redeem said lots from said sale."

Section 2223, Comp. Laws 1913, requires that the notice of expiration of the time for redemption shall contain a description of the lands, and specify the amount for which the same were sold, the amount required to redeem such lands from sale exclusive of the costs to accrue upon such notice, and the time when the redemption period will expire. No valid deed can be issued in pursuance of a sheriff's certificate of tax sale, unless this notice is given, and the notice must contain the facts required by the statute to be stated therein. A notice which embraces several lots or tracts of land separately assessed, and which fails to state the amount for which each parcel has been sold and the amount required to redeem each parcel, is fatally defective. 27 Cyc. 1403. Such a notice does not apprise the recipient of the amount that it will be necessary for him to pay to redeem any particular tract, and does not contain, with respect to any one tract, the information which the statute contemplates that it should convey. It is not essential that separate notice be given to an owner of various tracts (Snyder v. Ingalls, 70 Minn. 16, 72 N. W. 807) but it is essential that the notice given shall contain the necessary information to enable him to exercise his right of redemption with respect to any tract he might desire to redeem.

Jackson v. Mason, 143 Mich. 355, 106 N. W. 1112; G. F. Sanborn Co. v. Johnson, 148 Mich. 405, 111 N. W. 1091.

While, under § 2191, Comp. Laws 1913, the county auditor is required to sell each tract or lot separately, and while § 2192 authorizes the auditor to include in one certificate all the land sold to one purchaser, it by no means follows that a redemption notice which includes a number of lots separately sold and states only the aggregate amount of the interest, penalty, and costs, the payment of which is required to redeem all of the parcels from the tax sale, is notice of the amount required to redeem any particular tract. The object of requiring that the notice shall specify the amount required to redeem was doubtless to enable the person entitled to redeem to effect a redemption of any tract or parcel he might desire to redeem, without assuming the risk of ascertaining for himself the amount he would be required to pay. If the notice does not contain this information with respect to such tract, the purpose in requiring the notice is at least partially defeated, and the notice is consequently void. A valid notice is required prior to the issuance of the tax deed, and there can be no valid deed based upon a blanket notice such as the one given in this case. It is unnecessary for us to express an opinion on the correctness of the findings of fact made by the trial court which are assigned as error upon this appeal.

The judgment is affirmed.

Robinson, J. (specially concurring). The plaintiff brings this action to quiet title to three lots in New Rockford under a tax deed, based on a sale of the lots in December, 1909, for the taxes of 1908. The answer is in effect that the defendant has title to the lots and that the tax deed is void. The court gave judgment for the defendant, and the plaintiff appeals. The tax-sale record in evidence shows that in December, 1909, three lots and two other lots were sold by the county auditor for the taxes of the year 1908, amounted to $23.63; that the rate of interest bid was 24 per cent and the sale certificate was assigned to E. R. Davidson.

The certificate of sale shows a sale of the five lots for the lump sum of $23.63 and the rate of interest 24 per cent. The redemption notice addressed to E. N. Kepner recites a sale of the lots for $23.63,

and that the sum necessary to redeem is $45.31, exclusive of costs. The tax deed also recites a sale of the five lots for the lump sum of $23.63, and shows a redemption of lots 6 and 7, which were included in the sale.

It is enough to say of the sale certificate, the redemption notice, and the tax deed, that each document is void on its face because it shows a sale of five lots for the gross sum of $23.63; and the redemption notice is clearly void for another reason. It shows that the sum necessary to redeem the three lots is $45.31, and that is excessive. There was no allowance made for the two lots which had been redeemed.

When a party attempts to purchase land at a tax sale and to get interest at the rate of 24 per cent, with a penalty of 5 per cent, he has no reason to complain if he gets back only his principal with 6 per cent interest. Shylock did not fare so well when he insisted on the pound of flesh. He forfeited his principal sum of 3,000 ducats, and had to become a Christian and to convey half his property to his daughter Jessica, who had wed a Christian.

JOSEPH M. DONAHUE, Administrator of the Estate of Mary E. Donahue, Deceased, v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

(L.R.A.1918A, 300, 164 N. W. 50.)

Insurance — life — contract for — stipulations of receipt for premium — effect of — conclusive evidence — of the fact — policy binding — upon delivery.

1. Section 6515 of the Compiled Laws of 1913 provides as follows: "An ac-

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Note.—On effect of stipulation in application or policy of life insurance that it shall not become binding unless delivered to assured while in good health, see notes in 17 L.R.A.(N.S.) 1144; 43 L.R.A.(N.S.) 725; and L.R.A.1916F, 171.

As to effect of honest mistake in answers as to health of insured, warranted by him to be true, see notes in 53 L.R.A. 193, and 15 L.R.A.(N.S.) 1277, from which it appears that, if the premium in fact is not paid, the acknowledgment of payment in the policy, so far as it is a receipt for money, is only prima facie, and the amount can be recovered, but, so far as the acknowledgment is contractual, it cannot be contradicted so as to invalidate the contract.

knowledgment in a policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid." The policy contract of insurance under consideration contains an acknowledgment of receipt of premium as of date April 30th, 1913. *Held* that the policy having, after the date thereof, been delivered, became effective and binding so far as the payment of premium is concerned, on and after the 30th day of April, 1913, notwithstanding the actual payment of premium was at a later date.

Insurance policy — contract — application — policy issued — delivered — status of insured at time of application — based on — insurance company — — risk assumed by.

2. Where insurance is applied for and afterwards the policy is issued and delivered, it is based upon the status of the insured at the time of the application, and the company assumes the risk after the date of the policy. The receipt for the premium in the policy itself and the subsequent delivery of the policy makes the policy an effective and binding obligation from its date.

Insurance — application for — contract — misrepresentations — oral — written — made by insured — material — intent to deceive — risk increased.

3. No oral or written misrepresentations made in the negotiations of a contract or policy of insurance by the insured or in his behalf shall be deemed material, or defeat or avoid the policy, or prevent its attaching, unless such misrepresentations are made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss. Such is the language in § 6502 of the Compiled Laws of 1913.

Life insurance — contract for — construction of — application — answers in — given reasonable interpretation.

4. A contract of life insurance must receive a reasonable interpretation, and this is true of the answers of the applicant in his application for insurance. His answers must not be so construed as to compel him to be his own insurer.

Opinion filed July 9, 1917.

Appeal from the District Court of Williams County, *Frank E. Fisk*, Judge.

Affirmed.

On when may statement be regarded as representations, although expressly denominated in the policy as warranties, see note in 11 L.R.A.(N.S.) 981.

On duty to notify insurer of facts which develop after submission of application, but before delivery of policy or certificate, see notes in 8 L.R.A.(N.S.) 983; and 39 L.R.A.(N.S.) 951.

On recital of payment of premium in policy of insurance, see note in 70 Am. St. Rep. 597.

On stipulation in life insurance policy as to payment of premium, see note in 60 Am. Rep. 708.

Lawrence & Murphy and *Frederick L. Allen,* for appellant.

A preponderance of the evidence means that which satisfies the conscience and carries conviction to an intelligent mind. Foulke v. Tahlmessinger, 8 Misc. 445, 28 N. Y. Supp. 684; North Chicago Street R. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 483.

Courts are not bound by the testimony of interested parties, but may look beyond it to the surrounding facts and circumstances to ascertain the true character of the transaction. Dows v. Glaspel, 4 N. D. 251, 60 N. W. 60.

Where a number of witnesses testify positively to seeing a person intoxicated frequently, their testimony will not be rejected because a like number testify that they never saw such person intoxicated. In the one case it is positive, and in the other negative, evidence. Brockway v. Mutual Ben. L. Ins. Co. 9 Fed. 249; Richards v. Richards, 19 Ill. App. 465; Walton v. Walton, 34 Kan. 195, 8 Pac. 110; Dunlap v. Snyder, 17 Barb. 561; Boylan v. Meeker, 28 N. J. L. 274.

Ordinarily a witness who testifies affirmatively to a given fact is to be preferred to one who testifies in a negative manner. 2 Moore, Facts, §§ 1192, 1193; Wickham v. Chicago & N. W. R. Co. 95 Wis. 25, 69 N. W. 982, 1 Am. Neg. Rep. 198; Ryan v. La Cross City R. Co. 108 Wis. 122, 83 N. W. 710; Patterson v. Gaines, 6 How. 550, 12 L. ed. 553.

The contract for insurance was executory, and the liability of the insured depended upon the actual, and not the mere apparent, good health of the insured when the first premium was paid. Thompson v. Travelers' Ins. Co. 11 N. D. 274, 91 N. W. 75, 13 N. D. 444, 101 N. W. 900; Metropolitan L. Ins. Co. v. Howle, 62 Ohio St. 204, 56 N. E. 908; Plumb v. Penn Mut. L. Ins. Co. 108 Mich. 94, 65 N. W. 611; Powers v. North Eastern Mut. L. Asso. 50 Vt. 630.

In an application for insurance it is wholly immaterial whether the applicant knew of the existence of the disease, because he agreed that it did not exist. Tobin v. Modern Woodmen, 126 Mich. 161, 85 N. W. 47; Baumgart v. Modern Woodmen, 85 Wis. 546, 55 N. W. 713; Boyle v. North Western Mut. Relief Asso. 95 Wis. 312, 70 N. W. 351; Connecticut Mut. L. Ins. Co. v. Pyle, 44 Ohio St. 19, 58 Am. Rep. 781, 4 N. E. 465; Volker v. Metropolitan L. Ins. Co. 1 Misc. 374, 21 N. Y. Supp. 456; Miles v. Connecticut Mut. L. Ins. Co. 3 Gray,

580; Ætna L. Ins. Co. v. France, 91 U. S. 510, 23 L. ed. 401; Jeffries v. Economical Mut. Ins. Co. 22 Wall. 47, 22 L. ed. 833; Fidelity Mut. Life Asso. v. Jeffords, 53 L.R.A. 193, 46 C. C. A. 377, 107 Fed. 402; Barker v. Metropolitan L. Ins. Co. 188 Mass. 542, 74 N. E. 945; Gallant v. Metropolitan L. Ins. Co. 167 Mass. 79, 44 N. E. 1073; Woodmen of World v. Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331; Metropolitan L. Ins. Co. v. Willis, 37 Ind. App. 48, 76 N. E. 560; Brooks v. Munice & P. Traction Co. 176 Ind. 298, 95 N. E. 1006; 25 Cyc. 719, 725, notes 26, 62; Metropolitan L. Ins. Co. v. Howle, 62 Ohio St. 204, 56 N. E. 908, 68 Ohio St. 614, 68 N. E. 4; Packard v. Metropolitan L. Ins. Co. 72 N. H. 1, 54 Atl. 287; Roe v. National L. Ins. Co. 137 Iowa, 696, 17 L.R.A.(N.S.) 1148, 115 N. W. 500; Cable v. United States L. Ins. Co. 49 C. C. A. 216, 111 Fed. 19; Reese v. Fidelity Mut. Life Asso. 111 Ga. 482, 36 S. E. 637.

A charge to the effect that no recovery can be had if, on the date of the policy, or when it was delivered, assured was not in good sound health, states the law. Metropolitan L. Ins. Co. v. Howle, 68 Ohio St. 614, 68 N. E. 4; Roe v. National L. Ins. Asso. 137 Iowa, 696, 17 L.R.A.(N.S.) 1151, 115 N. W. 500; Packard v. Metropolitan L. Ins. Co. 72 N. H. 1, 54 Atl. 287; Cable v. United States L. Ins. Co. 49 C. C. A. 216, 111 Fed. 19; Powell v. Prudential Ins. Co. 153 Ala. 611, 45 So. 208; Thompson v. Metropolitan L. Ins. Co. 99 N. Y. Supp. 1006; British Equitable Ins. Co. v. Great Western R. Co. 38 L. J. Ch. N. S. 314, 20 L. T. N. S. 422, 17 Week. Rep. 561; Reese v. Fidelity Mut. L. Asso. 111 Ga. 482, 36 S. E. 637; Maloney v. Northwestern Masonic Aid Asso. 8 App. Div. 575, 40 N. Y. Supp. 918; Thompson v. Travelers' Ins. Co. 13 N. D. 444, 101 N. W. 900; North Western L. Asso. v. Findley, 29 Tex. Civ. App. 494, 68 S. W. 695.

Stipulations in the policy to the effect that the policy shall not take effect unless delivered to the insured while he is in good health, and similar provisions, are valid. Bell v. Missouri State L. Ins. Co. 166 Mo. App. 390, 149 S. W. 33; Perry v. Security Life & Annuity Co. 150 N. C. 143, 63 S. E. 679; Murphy v. Metropolitan L. Ins. Co. 106 Minn. 112, 118 N. W. 355; Connecticut General L. Ins. Co. v. Mullen, 43 L.R.A.(N.S.) 725, 118 C. C. A. 345, 197 Fed. 299; Mohr v. Prudential Ins. Co. 32 R. I. 177, 78 Atl. 554.

An insurance company computes its liability from the statements and

showing made in the application. Gallant v. Metropolitan L. Ins. Co. 167 Mass. 79, 44 N. E. 1073; British Equitable Ins. Co. v. Great Western R. Co. 38 L. J. Ch. N. S. 314, 20 L. T. N. S. 422, 17 Week. Rep. 561; Thompson v. Travelers' Ins. Co. 13 N. D. 444, 101 N. W. 900.

If there is any change in the condition of health of the applicant pending negotiations for insurance, such fact should be made known, and its concealment is fraud. Satterlee v. Modern Brotherhood, 15 N. D. 92, 106 N. W. 561; Cable v. United States L. Ins. Co. 49 C. C. A. 216, 111 Fed. 19; M'Lanahan v. Universal Ins. Co. 1 Pet. 170, 7 L. ed. 98; Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610; Equitable Life Assur. Soc. v. McElroy, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631; Traill v. Baring, 4 De G. J. & S. 318, 46 Eng. Reprint, 941, 33 L. J. Ch. N. S. 521, 10 Jur. N. S. 377, 4 Giff. 485, 66 Eng. Reprint, 797, 12 Week. Rep. 678, 10 L. T. N. S. 215; Watson v. Delafield, 2 Caines, 224, 1 Johns. 150, 2 Johns. 526.

Palmer, Craven & Burns, John E. Greene and *Chas. J. Fisk,* for respondent.

"This policy and the application herefor, a copy of which is indorsed hereon, and attached hereto, constitute the entire contract between the parties hereto." Such is the provision of the policy in this case, and therefore the report of the medical examiner forms no part of the insurance contract. 25 Cyc. 754, and cases cited.

The above clause was put into the policy by defendant, originated with and was dictated by defendant, and should be most strongly construed against defendant. 25 Cyc. 739, 799; Harrington v. Mutual L. Ins. Co. 21 N. D. 447, 34 L.R.A.(N.S.) 373, 131 N. W. 246.

He who seeks to avoid the effect of a solemn written obligation on the ground of fraud has the burden of proof as to such issue. Pope v. Bailey-Marsh Co. 29 N. D. 355, 151 N. W. 18, 8 N. C. C. A. 516, and cases cited; Schofield v. Metropolitan L. Ins. Co. 79 Vt. 161, 64 Atl. 1107, 8 Ann. Cas. 1152.

Good-faith statements, although warranties, will not avoid the policy. Schofield v. Metropolitan L. Ins. Co. 79 Vt. 161, 64 Atl. 1107, 8 Ann. Cas. 1152; Moulor v. American Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; Globe Mut. L. Ins. Asso. v. Wagner, 188 Ill. 133, 52 L.R.A. 649, 80 Am. St. Rep. 169, 58 N. E. 970; Fidelity Mut. L. Ins. Asso. v. Jeffords, 53 L.R.A. 193, 46 C. C. A. 377, 107 Fed.

402; Rasicot v. Royal Neighbors, 18 Idaho, 85, 29 L.R.A.(N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048; Modern Woodmen Acci. Asso. v. Shryock, 54 Neb. 250, 39 L.R.A. 826, 74 N. W. 607; Dimick v. Metropolitan L. Ins. Co. 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291; Suravitz v. Prudential Ins. Co. 244 Pa. 582, L.R.A.1915A, 273, 91 Atl. 495; Ætna L. Ins. Co. v. Rehlaender, 68 Neb. 284, 94 N. W. 129, 4 Ann. Cas. 251.

A policy of insurance takes effect upon its date, if delivered. Harrington v. Mutual L. Ins. Co. 21 N. D. 447, 34 L.R.A.(N.S.) 373, 131 N. W. 246; 25 Cyc. 742; Union Ins. Co. v. American F. Ins. Co. 107 Cal. 328, 28 L.R.A. 692, 48 Am. St. Rep. 140, 40 Pac. 431; Rayburn v. Pennsylvania Casualty Co. 138 N. C. 379, 107 Am. St. Rep. 548, 50 S. E. 762; Anderson v. Mutual L. Ins. Co. 164 Cal. 712, 130 Pac. 726, Ann. Cas. 1914B, 103.

Defendant is estopped to assert that its solemn contract is void. The delivery of the policy, in the absence of fraud, is conclusive that the contract is completed. Griffith v. New York Life Ins. Co. 101 Cal. 627, 40 Am. St. Rep. 96, 36 Pac. 113; Berliner v. Travelers Ins. Co. 121 Cal. 451, 53 Pac. 922; Globe Mut. L. Ins. Asso. v. Meyer, 118 Ill. App. 155; Sheldon v. Atlantic F. & M. Ins. Co. 26 N. Y. 460, 84 Am. Dec. 213; Hartford F. Ins. Co. v. Whitman, 9 Ann. Cas. 224, note and cases cited.

Defendant claiming fraud has the burden of proving same. Sprott v. Ross, 16 Sc. Sess. Cas. 1st series, 1145; Thompson v. Travelers Ins. Co. 11 N. D. 274, 91 N. W. 75, 13 N. D. 444, 101 N. W. 900; Fidelity Mut. L. Ins. Asso. v. Jeffords, 53 L.R.A. 197, 46 C. C. A. 377, 107 Fed. 402.

"An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid." Harrington v. Mutual L. Ins. Co. 21 N. D. 447, 34 L.R.A.(N.S.) 373, 131 N. W. 246; Hartford F. Ins. Co. v. Whitman, 9 Ann. Cas. 224, note.

The certificate of death furnished by the doctor, and the statement therein as to the cause of death, are not conclusively binding. They are mere preliminary steps in proof of a fact, and when offered are hearsay and of no value as evidence. Comp. Laws 1913, § 6542;

Messersmith v. Supreme Lodge, K. of P. 31 N. D. 163, 153 N. W. 989; John Hancock Mut. L. Ins. Co. v. Dick, 44 L.R.A. 853, note.

"Pregnancy in the case of a female applicant is not a breach of warranty of sound health." Satterlee v. Modern Brotherhood, 15 N. D. 92, 106 N. W. 561; 14 R. C. L. 1069, and cases cited; Rasciot v. Royal Neighbors, 18 Idaho, 85, 29 L.R.A.(N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048; Merriman v. Grand Lodge, D. H. A. O. U. W. 77 Neb. 544, 8 L.R.A.(N.S.) 983, 124 Am. St. Rep. 867, 110 N. W. 302, 15 Ann. Cas. 124.

GRACE, J. The action is one brought to recover upon an insurance policy upon the life of Mary E. Donahue. The complaint, after alleging that the defendant is a foreign corporation duly authorized to transact business in the state of North Dakota, further states in substance that on the 30th day of April, A. D. 1913, in consideration of the payment of the annual premium of $75.78, and of the payment of a like amount upon each 30th day of April thereafter until twenty full premiums shall have been paid, or until the death of Mary E. Donahue, said defendant made, executed, and delivered its certain policy of insurance in writing to said Mary E. Donahue on her life, a true and correct copy of which said policy is hereto attached marked "exhibit A" and made a part of this complaint; said defendants therein duly admitted the receipt of the said first annual premium, and by the terms of said policy further promised and agreed to pay, at the home office of the said company in the city of New York, upon receipt at said home office of due proof of death of said Mary E. Donahue, the sum of $2,500, less any indebtedness on said policy to said company, and any unpaid portion of the premium for the then current policy year, upon the surrender of said policy properly receipted,—to her, said Mary E. Donahue's executor, administrator, or assigns.

That on the 24th day of July, 1913, the said Mary E. Donahue died intestate in the city of Williston, Williams county, North Dakota, and was resident in said county, and leaving estate therein. On the 28th day of July, 1913, letters of administration of the estate of Mary E. Donahue, deceased, were duly issued to Joseph M. Donahue, who duly qualified as such administrator. That on or about the 10th day of

August, 1913, plaintiff furnished and delivered to said defendant at its home office, due proofs of the death of said Mary E. Donahue; and further alleges the performance of all the conditions of said policy of insurance on their part.

The amended answer interposes a general denial of the allegations in the complaint, except certain admissions. Defendant further, in its answer, by way of defense, admits the making of the application for the insurance on the 30th day of April, 1913, and further alleges that such application contained the following paragraph, alleging that the same was expressly stipulated and agreed to by the said Mary E. Donahue.

"This application is made to the Mutual Life Insurance Company of New York. All the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are true, and are offered to the company as inducement to issue the proposed policy, which shall not take effect unless and until the first premium shall have been paid during my continuance in good health; except in the case a binding receipt shall have been issued as hereinafter provided."

"The defendant, further answering plaintiff's said complaint, alleges that in consideration of the said application signed by the said Mary E. Donahue, a copy of which is hereto attached and annexed and marked "exhibit A" and hereby referred to and hereby made a part hereof, and in consideration of the terms and conditions thereof, the said defendant wrote the policy of insurance number 2,068,902, which was dated the 30th day of April, 1913, and which said policy of insurance stated that, 'in consideration of the annual premium of seventy-five and 78–100 dollars, the receipt of which is hereby acknowledged, and the payment of a like amount upon each 30th day of April hereafter until twenty full years' premiums shall have been paid or until the prior death of the insured, promises to pay at the home office of the company in the city of New York upon receipt at said home office of due proof of the death of Mary E. Donahue, of Williston, county of Williams, state of North Dakota, herein called the insured, $2,500, less any indebtedness hereon to the company and any unpaid portion of the premium for the then current policy year, upon surrender of this policy properly receipted, to her executors, administrators, or assigns.

the beneficiaries, with the right to the insured to change the beneficiary.'

"And defendant further alleges that when the said policy was written there was attached thereto and delivered therewith a copy of said application, and that said application became and was a part of said written policy. "Defendant answering said complaint alleges that said policy was delivered to Joseph H. Donahue, the husband of the said Mary E. Donahue, and a check for the amount of the first premium was then delivered to the defendant by the said Joseph H. Donahue and signed by him, and that at the time of the delivery of said policy to said Joseph H. Donahue, and of the payment of the premium on said policy, the said Mary E. Donahue was not in good health, and said defendant did not know that said Mary E. Donahue was not in good health at said time; that said policy of insurance never took effect as a binding contract of insurance.

"That the said defendant relied upon the stipulations and terms of said application, and that said policy of insurance would not have been delivered or the first premium thereon accepted if it had been known that the said insured was not at said times in good health."

The facts in the case are substantially as follows: On the 30th day of April, 1913, the defendant made, executed, and issued its certain policy of insurance to Mary E. Donahue in consideration of the payment of the premium of $75.78, and the payment of a like amount on the 30th day of April of each year until the full premium had been paid or until the death of Mary E. Donahue. The defendant in its policy admitted the receipt of the first annual premium provided for by the terms of the said policy. Said policy provided by its terms that said defendant insurance company agreed to pay on receipt of due proofs of death of Mary E. Donahue the sum of $2,500, less any indebtedness on said policy to said defendant, and any unpaid portion of the premium for the then current policy year, upon the surrender of said policy properly receipted. Said policy of insurance was delivered to said Mary E. Donahue on the 6th day of June, 1913. Mary E. Donahue showed no signs of ill health, and made no complaint thereof until the 7th day of June, 1913. From April 30 to June 7, 1913, she continued to perform her regular daily duties, assisting her husband in his shop and business in the city of Williston. That on April

30, 1913, Mary E. Donahue was in good health, and all statements made by her in her application for insurance, which was made a part of the policy, were and are true, or in good faith believed to be true and correct, by Mary E. Donahue at the time they were made. On the 7th day of June, 1913, Mary E. Donahue complained of feeling ill, and on the morning of the 8th day of June, 1913, a physician was called to attend her for the first time. On the 24th day of July, 1913, as a result of such illness Mary E. Donahue died intestate in the city of Williston, state of North Dakota, where she was then and there a resident. On the 28th day of July, 1913, letters of administration upon the estate of Mary E. Donahue were duly issued to Joseph Donahue, plaintiff herein, by the county court of Williams county. Plaintiff duly qualified and entered upon his duties as such administrator, and ever since acted as such administrator of such estate. On the 10th day of August, 1913, plaintiff furnished to the defendant due proofs of the death of Mary E. Donahue. The first premium was actually paid to the defendant on the 6th day of June, 1913, by check, which was held by the defendant until the 14th day of June, 1913, when the same was cashed.

In this action plaintiff is seeking to recover on a life insurance policy issued by the defendant to one Mary E. Donahue, covering her life, which policy contained covenants that the estate of Mary E. Donahue would be paid the sum of $2,500 upon due proof of her death being received at the home office in the city of New York. One of the principal and most important questions to be decided in this case is, When did such policy of insurance take effect? The application for such insurance is dated April 30, 1913, and the policy is of the same date. The policy was issued in the sum of $2,500, the annual premium being $75.78. A receipt for the first premium was contained in the policy itself, and such policy in its very inception uses the following language: "The Mutual Life Insurance Company of New York, in consideration of the annual premium of $75.78, the receipt of which is hereby acknowledged, and of the payment of a like amount upon each 30th day of April hereafter until twenty full years' premiums shall have been paid, or until the prior death of the insured, promises to pay at the home office of the company in the city of New York, upon receipt at said home office of due proofs of the death of Mary E. Dona-

hue of Williston, county of Williams, state of North Dakota, herein called the insured, $2,500, less any indebtedness hereon to the company, and any unpaid portion of the premium for the then current policy year, upon surrender of this policy properly receipted, to her executors, administrators, or assigns."

Section 6515 of the Compiled Laws of 1913 reads as follows: "Receipt for premium, effect of. An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment *so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.*"

The policy under consideration contains such a receipt as is described in said § 6515. It follows, therefore, that the exact point of time when such policy went into effect and became binding as a contract is determined by the acknowledgment in the policy itself of the first premium, the policy having thereafter been delivered. Whether the premium was actually paid in money at such time is immaterial, and where it was shown to have actually been paid at a later time is immaterial so far as determining the point of time when the policy actually became effective as a contract. Keeping in mind the date of the policy, to wit, April 30, 1913, the receipt in the policy acknowledging receipt of the first premium on such day, and the statute, § 6515, which provides that such an acknowledgment of the premium in the policy is conclusive evidence of the payment of such premium so far as making the policy binding, we cannot otherwise hold than that the policy of insurance under consideration, having been after the date thereof delivered, became effective and binding upon all parties to the contract on the 30th of April, 1913. Section 6515 is plain. Its provisions and the meaning thereof cannot be misunderstood. It says in plain and unmistakable language, *"An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding,* notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid." Section 6515 was interpreted in the case of Harrington v. Mutual L. Ins. Co. 21 N. D. 447, 34 L.R.A.(N.S.) 373, 131 N. W. 246, wherein the court held that "the company cannot be permitted to show that *the actual date of the issuance of a policy of life insurance was of a later date than the date recited in the contract, where the policy contains an acknowledgment*

of the receipt of the premium." The policy under consideration was therefore binding in its entirety on the 30th day of April, 1913, having been delivered. No other conclusion could in reason be reached if we give effect to the words of the policy itself as to receiving the first premium, considering the date of the policy, and the plain and unmistakable language of § 6515.

Having disposed of this question in the manner stated, considering the state of the testimony and the record, there really remains but little to discuss. All of the testimony relating to the health and physical condition of the insured on or about the 6th, 7th, or 8th day of June, 1913, would almost appear to be irrelevant and immaterial, being so far distant and subsequent to the date when the policy actually took effect, the policy having become binding and effective as a contract of insurance between the parties on the 30th day of April, 1913. It appearing, therefore, that there is no testimony to show the insured was not in good health on the 30th day of April, 1913, and no proof of any fraud on her part in obtaining such contract of insurance, and having been delivered, the contract became at that date binding upon all parties to the contract, and the company became liable to the beneficiaries of such policy for the full amount thereof upon the death of Mary E. Donahue, her death having been from a natural cause and not by suicide, and while the policy was in full force and effect.

In order to dispose of all questions concerning the health of the insured at the time the policy was issued on April 30, 1913, we conclude that the testimony clearly shows that on the 30th day of April, 1913, the insured was not suffering from typhoid fever. There is no positive testimony anywhere that she ever actually had typhoid fever. There are opinions based either upon subjective or objective examinations, or the Wydle test, but the testimony is not of such conclusive nature as to convince one that the insured ever was afflicted with typhoid fever. But even if it be conceded for the sake of argument that she was, it was, if at all, not to exceed eight or ten days prior to the 7th day of June, or thereabouts. In other words, if she ever became infected with typhoid fever, it was many weeks—a long time in fact—after the policy became effective on the 30th day of April, 1913, and therefore has no bearing upon the determination of the liability of the defendant.

There remains one other question concerning the health of the insured which should be discussed. It is claimed by the defendant and testimony was offered by it through Dr. La Berge to show that at the time of the application in question, to wit, on the 30th day of April, 1913, the insured at such time was not in good health by reason of being at the date of the application and issuance of the policy in a state of pregnancy. This phase of the case leads us to a discussion of the effect of the questions and answers contained in the application. The clause most relied on by the defendant, to which particular attention is drawn, is the following: "All the following statements and answers, and all those I make to the company's medical examiner in continuance of this application, are true and are offered to the company as inducement to issue the proposed policy, which shall not take effect unless and until the first premium shall have been paid, and during my continuation in good health, and unless also the policy shall have been issued during my continuance in good health." There is also another clause in the policy which may be considered in connection with the one just quoted, which is as follows: "This policy and the application herefor, copy of which is indorsed hereon, or attached thereto, constitute the entire contract between the parties hereto. *All statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statements of the insured shall avoid or be used in defense to a claim under this policy,* unless contained in the written application herefor, and a copy of the application is indorsed on or attached to this policy when issued." It must be conceded that there is no fraud in this case on the part of the insured. At least there is no competent testimony adduced to at all substantiate any charge of fraud, the burden of proof being on the party alleging fraud to prove it by clear and convincing evidence. No such proof or convincing evidence is presented in this case, and in fact, none concerning the question of fraud which can really be said to be of any effect or force, and we hold that no charge of fraud has at all been proved in this case, and that the defense of fraud, if it is relied upon in this case to avoid the liability of this policy, must fail for want of competent evidence, none having been adduced at the trial. Having disposed of the question of fraud, we hold that all statements made by the insured in her application were merely representations, and

not warranties. The policy itself stipulates that all such statements shall be considered representations, and not warranties. In some forms of application for life insurance many questions are asked concerning the health of the applicant, and applicants are required to answer categorically numerous questions as to whether or not they are suffering, or ever have suffered, from any of a long list of diseases, and if they have consulted a physician within a certain number of years regarding any such diseases. The answers to such questions are, by the language of the application in the case at bar, made representations, and not warranties; but in some forms of applications it is expressly provided that such statements shall be considered as warranties. In cases arising under the latter forms, it has been held in a number of jurisdictions that, where immaterial statements concerning immaterial matters are warranted to be true, and they are later found to be false, they will void the contract by reason of their being warranties, even though the risk is not increased by reason of such false statements. Such a construction follows and enforces literally the letter of the contract of the parties, rather than its spirit or its general intent. Such a rule is one which, on account of its rigor and its tendency to defeat the general intention of the contracting parties, should not, in our judgment, be followed in any case farther than is necessary in order to avoid doing violence to the expressed intention of the parties. In this state the legislature has seen fit to lay down a rule which wisely modifies the extreme rule referred to. Section 6501 of the Compiled Laws of 1913 provides that "no oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss." The foregoing statute, as construed by this court in the case of Soules v. Brotherhood of American Yeomen, 19 N. D. 23, 120 N. W. 760, brings within its scope statements in insurance applications which are expressly agreed to be warranties, so that in this jurisdiction even false warranties will not avoid the policy of insurance where it appears that the matters warranted were warranted without actual intent to deceive or were such as not to increase the risk of loss. In the case at bar, there being no evidence of bad faith or of an intent

to deceive, and it having been expressly agreed that the statements made by the insured are representations merely, the policy is not avoided even though the representation be not true in fact.

The human body is a complicated structure, and its many parts are most delicately adjusted and related, and it is subject to many hundreds of different ills. The ordinary person of average intelligence has but slight knowledge of their own body, and know but very little about any kind of disease that may affect the human body, and as a rule cannot tell if they are afflicted with any disease unless they are conscious of actual pain or there be some external manifestation which will excite their suspicions, and in many different kinds of diseases in their incipiency it is difficult to know of their presence. The disease may be in the body for days, sometimes weeks, even months, before a person may know its actual existence; so that a person in an insurance application, answering any question concerning any matter regarding their health or the condition of the body, merely expresses an opinion as to the matter about which he is asked, and such opinion is merely a representation that his statement is true to the best of his knowledge. On the other hand, the physician is trained and skilled in the detection and treatment of diseases; and where, as in this case, he makes the examination of an applicant for insurance, he is acting as the agent of the company, and his examination of the applicant is for the benefit and use of the company. He is afforded every opportunity to determine whether or not the applicant is in a state of good health. As such physician he uses the thermometer to determine the temperature, the stethoscope to determine the heart action, and determines the condition of the respiratory organs. He makes the blood test. He has other instruments by which he may determine arterial pressure or arterial sclerosis. He has other instruments by which he determines the range of vision, not only to test the eyesight, but possibly to discover whether or not a tumor of the brain may be making an insidious approach, and in a hundred other ways may use methods, instrumentalities, and his technical knowlege to determine whether or not diseases may be present in one's body at the time of examination. Of how much value, then, can be the statements of the persons themselves, they having little or no knowledge of disease or the functions of the body, of the heart, lungs,

etc. They know they are living, they know they are feeling well or unwell, but this is about the extent of their knowledge, and it is insignificant as compared with the broad technical knowledge of the physician who makes the examination; and the best that can be said of it is that it is simply and merely an expression of opinion, and whether in the form of a warranty or not, is merely a representation and expression of an opinion,—nothing more.

If there is any testimony in this case which may be claimed to show to some slight extent that the insured in this case, at the time of the signing of such application for insurance and at the time that she answered the questions in such application, was or might have been in a delicate condition, her answer that she was not in such condition is merely the expression of opinion, and if made in good faith, believing that she was not in such condition, even if such answer was not true, it would not avoid the policy or the liability of the company if the applicant in good faith believed her answer to be true. The contract of insurance must receive a reasonable interpretation, and this is true of the answers of the applicant in his application for insurance. His answers must not be so construed as to compel him to be his own insurer. The liberal rule, and we believe the sound rule, which we have been discussing with reference to the application and the answers to the questions therein, that all such questions and answers should whenever possible be considered representations, and not warranties; that the answers are but expressions of opinion,—finds much support in a very respectable line of authorities, among which may be mentioned the Globe Mut. L. Ins. Asso. v. Wagner, 188 Ill. 133, 52 L.R.A. 649, 80 Am. St. Rep. 169, 58 N. E. 970; Fidelity Mut. L. Ins. Asso. v. Jeffords, 53 L.R.A. 193, 46 C. C. A. 377, 107 Fed. 402; Rasicot v. Royal Neighbors, 18 Idaho, 85, 29 L.R.A.(N.S.) 433, 138 Am. St. Rep. 180, 108 Pac. 1048; Modern Woodman Acci. Asso. v. Shryock, 54 Neb. 250, 39 L.R.A. 826, 74 N. W. 607; Ætna L. Ins. Co. v. Rehlaender, 68 Neb. 284, 94 N. W. 129, 4 Ann. Cas. 251. It has been held in the following cases that such statements by the assured were at best but expressions of opinion, and deemed to be representations rather than warranties, and in the absence of fraud, gross negligence, or bad faith, would not avoid the policy, though the statements were expressly de-

clared to be warranties on the part of the insured. Fisher v. Crescent Ins. Co. 33 Fed. 549; Owen v. Metropolitan L. Ins. Co. 74 N. J. L. 770, 122 Am. St. Rep. 413, 67 Atl. 25. In this case it appeared that the insured warranted that he had never had heart disease, which was in fact untrue though he had no knowledge that he did have heart disease. Ames v. Manhattan L. Ins. Co. 40 App. Div. 465, 58 N. Y. Supp. 244, affirmed in 167 N. Y. 584, 60 N. E. 1106. It appeared in this case that the insured had answered many questions concerning his physical condition which only an experienced physician could have answered correctly.

Adverting to the appellant's contention that the policy was executory, and that the liability of the insurer depended upon the actual condition, and not merely the appearance of the insured when the first premium was paid, it is held that the contract ceased to be executory on the 30th day of April, 1913, and became, upon its delivery, a binding contract upon all parties to it from April 30, 1913; and most of the testimony concerning good health being in a very remote period from April 30, 1913, it is irrelevant and immaterial, only one element of such testimony having any force or effect, and that related to the possibly delicate condition of the insured at the time of the application, which contention has been disposed of.

The case of Thompson v. Travelers' Ins. Co. 11 N. D. 274, 91 N. W. 75; second appeal in 13 N. D. 444, 101 N. W. 900, is not in point in some very material matters. In that case there apparently was no receipt in the policy itself of the first premium, which receipt under our statute, as we have seen, makes the policy upon its delivery a binding contract from its date, and makes the policy binding notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid, so that it must be considered in the case at bar that the sickness of the insured commenced more than two months after the policy became a binding obligation on all parties, and more than two months after the time when, by the receipt in the policy and the law governing the same, the premium was considered to have been paid, at least for the purpose of making the policy binding, notwithstanding that the actual payment of the premium might have been at a later date.

In the case at bar the contract of insurance consists of a policy and the application for the insurance. In the caption of the application the

statements to the medical examiner are also made a part of the application; but there is no question either in the application proper, or in that part of the application which is denominated "statements to the medical examiner," which inquires from the applicant whether or not at that time she was in a delicate condition. This constitutes the entire contract. That part printed on the back of the application which is denominated "medical examiners report" is no part of the application so far as the insured is concerned, but is simply a confidential report by the medical examiner to the company. It is a report of the medical examiner's own observations and knowledge, and is not the answers of the insured, but the answers of the medical examiner alone; and under the terms of the policy the application and policy are the whole contract, which, if true, excludes the medical examiner's report from being a part of the contract, and may be termed merely a confidential report by the medical examiner as agent to his principal, the insurance company.

The judgment appealed from is affirmed, with costs.

CHRISTIANSON, J. (concurring specially). I concur fully in an affirmance of the judgment and in the principles of law enunciated in the syllabus in this case, for the following reasons: The application for the insurance policy involved herein expressly provided that "all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties."

The sole defense is predicated upon the proposition that the insured made a false affirmative answer to the following question: "Are you now in good health?"

It is of course elementary that a party who asserts fraud has the burden of establishing the same by clear and satisfactory proof. The defendant, therefore, had the burden of proving the false and fraudulent character of the answer of the insured to the question under consideration. It wholly failed to sustain this burden.

The evidence shows that the insured at the time of the medical examination was in the best of health. The evidence further shows that the insured had never been pregnant before. Her mother (who lived with her), and her husband, both testified that they had no hint or suspicion

that the insured was pregnant at the time she made application for insurance. No question was propounded to her in the application with respect to pregnancy, and she made no warranty or representation of any kind with respect thereto. The term "in good health" is a comparative term, and should be held to mean what is ordinarily understood by the term. When the insured was asked whether she was in good health, in the insurance application, it conveyed to her no different meaning than if the question had been submitted to her in an ordinary conversation. I do not believe that pregnancy, in case of a female applicant, is a breach of representation or warranty of good health. It is quite possible that a female applicant for insurance may be pregnant and in good health, as that term is ordinarily understood, at the same time. A wholly different situation exists where a female applicant for insurance warrants that she is not pregnant. In that case a false answer will avoid the policy. Satterlee v. Modern Brotherhood, 15 N. D. 92–98, 106 N. W. 561.

BRUCE, Ch. J. I concur in the opinion written by Mr. Justice CHRISTIANSON.

GEORGE YUSKO and Anna Yusko v. OTTO STUDT and E. H. Kettler.

(163 N. W. 1066.)

Homestead — married person — conveyance of — encumbered — husband and wife — executed and acknowledged — by both.

1. The homestead of a married person cannot be conveyed or encumbered

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Note.—On effect of conveyance of the homestead by one of the spouses only, see note in 95 Am. St. Rep. 909.

On the general rule that a conveyance of a homestead by the husband without his wife joining in the deed is a nullity, see note in 107 Am. St. Rep. 291.

On necessity of joinder of husband and wife in release of homestead, see note in 65 Am. Dec. 484.

On power of husband without wife's consent to convey premises by his sole deed after abandonment, see note in 37 L.R.A.(N.S.) 807.

unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.

Homestead — mortgage on — executed by husband — wife's name — fraudulently signed by another person — mortgage void — not lien upon homestead — innocent purchaser — without notice — not protected.

2. Where the husband executes a mortgage upon the homestead without the wife joining in such execution or acknowledging such mortgage, and another person fraudulently signs her name to such mortgage, and her purported acknowledgment of the mortgage is also a fraud, such mortgage is void and of no effect, and is not a lien upon the homestead even in the hands of an innocent purchaser for value and without notice, and even though the mortgage and the execution thereof in every way appeared regular upon the face of such instrument.

Notary public — certificate of — acknowledgment — regular on its face — presumption of due execution — not conclusive — may be overcome.

3. A certificate of acknowledgment of a notary public, regular on its face, raises a strong presumption of due and proper execution; the same, however, may be impeached by clear and conclusive testimony of a positive character.

Officers — notaries — certificate — genuineness of — fraudulently made — void.

4. Evidence concerning the genuineness of the notary's certificate attached to the mortgages and instruments in question examined and *held* to clearly, conclusively, and positively show that such notarial certificate was conceived in fraud and executed in a fraudulent manner, and that the same was void.

Opinion filed July 9, 1917.

Appeal from the District Court of Morton County, *J. M. Hanley,* J. Affirmed.

B. W. Shaw and *P. S. Jungers,* for appellants.

The certificate of acknowledgment of a notary public, regular upon its face, raises a presumption of due execution which must be overthrown. This can only be done by clear, positive, and convincing proof of fraud, or that the certificate is false from some other reason. Uvalde Asphalt Paving Co. v. New York, 90 App. Div. 327, 91 N. Y. Supp. 131.

A high degree of proof is required to impeach such a certificate. Patnode v. Deschenes, 15 N. D. 108, 106 N. W. 573; Northwestern Loan & Bkg. Co. v. Jonasen, 79 N. W. 843; Pierce v. Feagans, 39 Fed. 592; Smith v. McGuire, 67 Ala. 34; Griffin v. Griffin, 125 Ill. 436, 17 N. E. 785; Marston v. Brittenham, 76 Ill. 611, 40 Am. Rep. 193;

Strauch v. Hathaway, 101 Ill. 11; Calumet & C. Canal & Dock Co. v. Russell, 68 Ill. 438; Bearss v. Ford, 108 Ill. 26; Warrick v. Hull, 102 Ill. 283; Hughes v. Coleman, 10 Bush, 246; Blackman v. Hawks, 89 Ill. 512; Heeter v. Glasgow, 79 Pa. 80, 21 Am. Rep. 46; Russell v. Baptist Theological Union, 73 Ill. 337; 1 Thomas, Mortg. § 500; Whart. Ev. § 1052; Devlin, Deeds, p. 540, § 534; Albany County Sav. Bank v. McCarty, 149 N. Y. 71, 43 N. E. 427.

Denial by the grantors of the signatures or acknowledgment to a conveyance, although supported by handwriting experts to the effect that the signatures are not those of the grantors, is not sufficient to rebut the presumption of genuineness which the notary's certificate imports. Tunison v. Chamblin, 88 Ill. 378; Ramsburg v. Campbell, 55 Md. 227; Blackman v. Hawks, 89 Ill. 512.

Plaintiffs' silence and their paying of the interest are sufficient to estop them to deny this mortgage. Continental Nat. Bank v. National Bank, 50 N. Y. 575; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Emerson-Newton Implement Co. v. Cupps, 15 N. D. 606, 108 N. W. 796; Rothschild v. Title Guarantee & T. Co. 204 N. Y. 458, 41 L.R.A. (N.S.) 740, 97 N. E. 879.

But even that which amounts to a forgery may be ratified. Ofenstein v. Bryan, 20 App. D. C. 1; Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Goodspeed v. Cutler, 75 Ill. 534; Paul v. Berry, 78 Ill. 158; Murtaugh v. Colligan, 28 Ill. App. 433; Casco Bank v. Keene, 53 Me. 103; Greenfield Bank v. Crafts, 4 Allen, 447; Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240; Wellington v. Jackson, 121 Mass. 157; Central Nat. Bank v. Copp, 184 Mass. 328, 68 N. E. 334; Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753; Howard v. Duncan, 3 Lans. 174; Shroyer v. Smeltzer, 38 Pa. Super. Ct. 400; Shannon v. Castner, 21 Pa. Super. Ct. 294.

Halpern & Moses and *J. K. Murray,* for respondents.

"To constitute an acknowledgment, the grantor must appear before the officer, and such grantor must in some manner, with a view of giving it authenticity, make an admission to such officer of the fact that he had executed such instrument." Severtson v. Peoples, 28 N. D. 372, 148 N. W. 1054.

An equitable estoppel arises when one party by his faulty conduct has induced his adversary to omit some act, which but for said fault and

negligence he would have performed and which if done might have prevented loss. Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 108, 29 L. ed. 816, 6 Sup. Ct. Rep. 657.

Estoppel *in pais* arises where one has induced another to occupy a position he would not have taken but for the acts of the former and his declaration. Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; Steed v. Petty, 65 Tex. 490; Hodge v. Ludlum, 45 Minn. 290, 47 N. W. 805.

A representation to create and amount to an estoppel must have been acted upon. Stuart v. Lowry, 42 Minn. 473, 44 N. W. 532; Doctrine of Estoppel in Pais, Stevens v. Ludlum, 13 L.R.A. 270, note; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35.

The conduct of the husband cannot operate as an estoppel against the wife, she being a stranger to such conduct. Gober v. Smither, — Tex. Civ. App. —, 36 S. W. 910; Law v. Butler, 44 Minn. 482, 9 L.R.A. 856, 47 N. W. 53; Cumps v. Kiyo, 104 Wis. 656, 80 N. W. 937; Somers v. Somers, 27 S. D. 500, 36 L.R.A.(N.S.) 1024, 131 N. W. 1091.

The mortgages here in question are void instruments, and as such cannot be ratified. And even if ratification were possible, there is no evidence thereof in this case. Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544; Gaar, S. & Co. v. Collin, 15 N. D. 622, 110 N. W. 81; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Mandan Mercantile Co. v. Sexton, 29 N. D. 602, 151 N. W. 780, Ann. Cas. 1917A, 67; Rasmussen v. Stone, 30 N. D. 451, 152 N. W. 809; Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684.

Nor can damages be recovered against the husband upon a contract to convey the homestead of himself and wife. Waples, Homestead & Exemption, p. 384; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817; Hodges v. Farnham, 49 Kan. 777, 31 Pac. 606; Cowgell v. Warrington, 66 Iowa, 666, 24 N. W. 266; Donner v. Redenbaugh, 61 Iowa, 269, 16 N. W. 127; Justive v. Souder, 19 N. D. 613, 125 N. W. 1029.

The recital in a subsequent valid mortgage, of the existence of the former fraudulent mortgage, is not conclusive on the part of the wife, as to the validity of such mortgage to which such recital relates. It is not a ratification. Franklin Land Co. v. Wea Gas, Coal & Oil Co. 43 Kan. 518, 23 Pac. 630; Hart v. Church, 126 Cal. 471, 77 Am. St. Rep.

195, 58 Pac. 910, 59 Pac. 296; Hancock v. Herrick, 3 Ariz. 247, 29 Pac. 13; Howell v. McCrie, 36 Kan. 636, 59 Am. Rep. 584, 14 Pac. 257; Jerdee v. Furbush, 95 Am. St. Rep. 914, note; Rothschild v. Title Guarantee & T. Co. 204 N. Y. 458, 41 L.R.A.(N.S.) 740, 97 N. E. 879; Comp. Laws 1913, § 9887.

Without some element of estoppel or some new consideration, ratification in such cases cannot be had. Shinew v. First Nat. Bank, 84 Ohio St. 297, 36 L.R.A.(N.S.) 1006, 95 N. E. 881, Ann. Cas. 1912C, 587; Harris v. Simpson, 14 Am. Rep. 106, note, and cases cited; Cornerstone Bank v. Rhodes, 5 Ind. Terr. 250, 67 L.R.A. 812, 82 S. W. 739; Fall River Nat. Bank v. Buffinton, 97 Mass. 498; Continental Nat. Bank v. National Bank, 50 N. Y. 575; Owsley v. Philips, 78 Ky. 517, 39 Am. Rep. 358; Warren v. Fant, 79 Ky. 1; Garrott v. Ratliff, 83 Ky. 384; Young v. Hildreth, 1 Ky. L. Rep. 401; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Hood v. Nichols, 7 Ohio Dec. Reprint, 157; McHugh v. Schuylkill County, 67 Pa. 391, 5 Am. Rep. 445; Second Nat. Bank v. Wentzel, 151 Pa. 142, 24 Atl. 1087; Henry Christian Bldg. & L. Asso. v. Walton, 181 Pa. 201, 59 Am. St. Rep. 635, 37 Atl. 261; Bucher v. Meixell, 5 Pa. Dist. R. 375.

GRACE, J. The action is a statutory one brought by George Yusko and Anna Yusko, husband and wife, to determine adverse claims and quiet the title in the plaintiffs to the following described real estate situated in Morton county, North Dakota, to wit, the north half of the northwest quarter, the southwest quarter of the northwest quarter, and the northwest quarter of the northeast quarter, all in section 26, township 137, range 90, and containing 160 acres more or less.

The complaint is in the statutory form.

The defendants by their separate answers and counterclaims allege the existence of their respective liens upon the property involved by reason of two alleged mortgages,—one to Otto Studt for $1,000, and the other to E. H. Kettler for $150,—and defendants by their separate answers demanded the foreclosure of such mortgages.

Plaintiffs by their amended reply denied that Anna Yusko, wife of the plaintiff George Yusko, ever executed or acknowledged the mortgage in question, or the notes secured by said mortgages, and that Anna Yusko, wife of George Yusko, never authorized the execution

of said notes and mortgages by any other person whatsoever. And further allege that, long prior to said purported execution of said notes and mortgages, and at the time of the said execution of the notes and mortgages, the said plaintiffs were husband and wife and were living together with their family upon the land involved herein, and were occupying the same as a homestead under the laws of the state of North Dakota, and have at all times since the said date continuously lived upon and occupied and still do live upon the land involved, and occupy the same as a homestead under the laws of the state of North Dakota. That the said purported mortgages are not liens against the said real estate, and that the same are void.

The facts appear to be as follows: On the 20th day of December, 1909, the plaintiff George Yusko, together with a daughter, Annie Yusko, executed and delivered to the defendant Otto Studt a real estate mortgage for the sum of $1,000, with interest at 10 per cent per annum, which mortgage covered and described the said land. The mortgage was filed on the 23d day of December, 1909, in the office of the register of deeds of Morton county, North Dakota. On the 20th day of December, 1909, the plaintiff George Yusko, and his daughter Annie Yusko, executed and delivered to the defendant E. H. Kettler a real estate mortgage covering the premises in question, securing the sum of $150, with interest at 10 per cent, which mortgage was filed for record on the 23d day of December, 1909, in the office of the register of deeds of Morton county, North Dakota. That the plaintiff Anna Yusko, wife of the plaintiff George Yusko, did not execute, deliver, or acknowledge either of the said mortgages; that she had no knowledge of their execution and delivery at the time they were executed and delivered, and received none of the proceeds of such mortgages. The premises in question did not exceed in value $5,000, nor in extent more than 160 acres, and was the legal homestead under the laws of the State of North Dakota of George Yusko and Anna Yusko, his wife.

On the 16th day of December, 1912, George Yusko and Anna Yusko, his wife, executed a mortgage to Joe Worrnecki for $337, covering the land in question, which sum of $337 was used by George Yusko in paying interest on the $1,000 mortgage. At the time the plaintiffs borrowed the money from Worrnecki the first mortgage was about to be foreclosed, and Anna Yusko, the wife, at the time she signed the

mortgage for $337 with which the interest on the $1,000 mortgage was paid, did so under the belief that the $1,000 mortgage was a valid mortgage, according to her testimony as shown on pages 77 and 78 of the transcript.

The law is well settled in this state as to the manner in which a homestead may be conveyed, transferred, or encumbered both by statutory law and the decisions of this court. Section 5608, Compiled Laws of 1913, provides: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." Rasmussen v. Stone, 30 N. D. 451, 152 N. W. 809; Severtson v. Peoples, 28 N. D. 382, 148 N. W. 1054; Swingle v. Swingle, 36 N. D. 611, 162 N. W. 912; Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544; Gaar, S. & Co. v. Collin, 15 N. D. 622, 110 N. W. 81; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Mandan Mercantile Co. v. Sexton, 29 N. D. 602, 151 N. W. 780, Ann. Cas. 1917A, 67; Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684.

The testimony in the case at bar conclusively shows that neither the mortgage to Studt nor the mortgage to Kettler was signed by the wife, but was signed by the husband and his daughter Annie. The $1,000 mortgage and the $150 mortgage, and the notes accompanying them, were shown to the witness Annie Yusko, Junior, while she was testifying, and she positively identified her signature thereon, and stated that it was her handwriting, and she said she signed the name of Anna Yusko to the instrument. She said that all the papers were signed in a lumber yard before Mr. Gintzler, and were all done at one time. She denied that her mother had ever told her to sign the mortgage for her. In answer to the question, "Did you think you were signing her name or yours?" she said, "My name." She further testified that Gintzler, the notary public, told her to sign her own name. The testimony of Mrs. Anna Yusko, Senior, the wife, after the examination of the mortgages, is positively that she did not sign such instruments. She identified the writing thereon as that of her daughter's. She positively denies giving her daughter any authority to sign her name, and denies ever appearing before a notary public.

The testimony of George Yusko, the husband, is of the same positive character, that the notary public, Gintzler, who took the acknowledg-

ments, knew that the person signing the mortgages with George Yusko was his daughter, and not his wife. His testimony further shows that the papers in question were signed by the daughter at the suggestion of Mr. Gintzler, the notary public, instead of the wife, who was sick.

The state of the testimony is conclusive that the daughter signed the papers, and not the wife; and that Gintzler, the notary public, knew this fact, and having knowledge thereof took the acknowledgments. Such testimony proves conclusively that the wife, Anna Yusko, never executed, delivered, or acknowledged any of the instruments involved in this case, and in no manner conveyed, encumbered, or transferred her homestead right so far as the actual execution and acknowledgment of any instruments are concerned.

Considering the certificate of acknowledgment of the notary public, it is a well-established rule that such certificates cannot be impeached unless the testimony bearing on the impeachment is clear and convincing. The certificate of acknowledgment of a notary public, regular on its face, raises a strong presumption of due and proper execution, and cannot be impeached except by clear and conclusive testimony of a positive character. In this case the testimony clearly and conclusively shows that the certificate of the notary is false. The testimony as a whole so clearly, strongly, and convincingly proves this that there remains no element of uncertainty and doubt. The testimony not only conclusively proves that the certificate of the notary public is untrue and false, but that the notary public Gintzler knew, of his own knowledge, that the certificate was untrue and false at the time that he made the same. It follows, therefore, as far as the wife is concerned, she never executed and acknowledged any of the instruments in question; and no notarial certificate which purports to certify that she did, is untrue, false, and fraudulent, and of no effect whatever, as affecting her interest.

The only other point necessary to consider is whether the wife by executing the mortgage to Worrnecki together with her husband, with which to procure money to pay the interest on the mortgage which was about to be foreclosed, amounts to a ratification of such mortgage, where such mortgage for $337 recites that it is subject to a mortgage of $1,000 to Otto Studt. The testimony shows that the $1,000 mortgage was about to be foreclosed. It further shows that at the time that the wife executed the $337 mortgage with which to procure money for the

husband to pay interest on the $1,000 mortgage, she at that time believed the $1,000 mortgage a valid mortgage, and did not know of her rights, and did not know that the $1,000 mortgage was void for the reason that she had not executed and acknowledged it in the manner prescribed by law. The testimony also shows that the wife was greatly concerned about losing her home, and that she was laboring under much stress of mind in this regard.

In order that the act of the wife in this case by joining in the execution of the valid mortgage for $337 to Worrnecki should amount to a ratification of the void mortgages, such debt and all of her acts relative thereto would have to be done with full knowledge of all her rights, and full knowledge of all material facts affecting her homestead right, and if, after having such full knowledge of all her rights and of all material facts, she should then freely, willingly, and knowingly do the acts which tended toward ratification of the void instrument, she might in all probability thus waive her homestead right. At the time of the execution of the $337 mortgage with which money was procured by which the husband paid the interest on the $1,000 mortgage, the wife had no knowledge, according to her testimony, that the mortgages were void. Her testimony is to this effect. The wife's testimony conclusively shows that she did not know but that the $1,000 mortgage was a valid mortgage, and did not know of her homestead right at the time she executed the $337 mortgage.

She was asked the following questions:

Did you know at that time what the law was about mortgages in this state?

Answer. No, I did not know what the law was. I thought the mortgage was good, and it makes me nervous. I thought we lose our home.

Question. Did you know at that time that you would have to sign the mortgage in order to make it good?

Answer. No, I thought the mortgage was all right.

Question. Did you know at that time that in order to make the mortgage good you had to sign it?

Answer. No, I thought the mortgage was good.

Question. You at that time knew that you did not sign it?

Answer. I knew I did not sign my name, but I thought it was good.

Question. When did you first find out that the mortgage which you did not sign was no good?

Answer. The first time I came to Mr. Halpern.

Question. When was that?

Answer. The 4th of June this year.

At the time, therefore, that she signed the $337 mortgage she did not have full knowledge of her rights and of all material facts which it is necessary she should have at the time of signing such mortgage in order that her signing may have had the effect of a ratification of such mortgage or mortgages. See in this connection § 9987, Compiled Laws of 1913. As to the recital in the subsequent valid instrument not being a ratification, see Hancock v. Herrick, 3 Ariz. 247, 29 Pac. 13; Howell v. McCrie, 36 Kan. 636, 59 Am. Rep. 584, 14 Pac. 257; 95 Am. St. Rep. 911, note.

In this case the $1,000 mortgage and the $150 mortgage were void because of the premises covered by such mortgage being a homestead; and such mortgages not having been executed and acknowledged by the wife as required by law, and the execution of the subsequent valid mortgage for $337 being with no knowledge or notice by the wife at that time of her rights concerning the homestead, a recital in such valid mortgage stating that it was subject to such void mortgage or mortgages constituted no ratification of the void mortgages. Seiffert & W. Lumber Co. v. Hartwell, 94 Iowa, 576, 58 Am. St. Rep. 413, 63 N. W. 333.

The judgment of the lower court is in all things affirmed, with costs.

TRUSTEE LOAN COMPANY, a Foreign Corporation, v. MILLIE BOTZ et al.

(164 N. W. 14.)

Tax sales — statutes — relating to — strictly construed.

1. Statutes relating to tax sales are construed strictly.

Taxes — special assessments — statutes — tax sales — general tax — certificate — including special assessments — void.

2. Section 3733, Compiled Laws of 1913, provides that special assessments may be sold at the same time as general taxes and upon like notice, but such special assessments shall be sold separately and a separate certificate issued therefor, and certificates for special assessments shall so state,—*held* that in a sale of such special assessments at the same time and place as the sale for general taxes, where said special assessments were sold together with the general tax in one sum to the same person, and no separate certificate was issued for the sale of such special assessments, but the sale for such special assessments were included in the same certificate as the general tax, the whole of such tax sale is void, being in direct conflict with said § 3733, Compiled Laws of 1913.

Taxes — tax sales — excessive amount — special assessments — general taxes — sale for both — included in one certificate — sale void — Constitution.

3. Where the property taxed is sold for special assessments and general tax, offered together in one sum,—*held* that in effect it is equivalent to selling the property for the general tax for a substantial and excessive sum over the actual taxes assessed and levied on such property. Such sale is void, and is contrary to the provisions of § 22 of the state Constitution, and constitutes an infringement of property rights without due process of law.

Tax sale — notice of redemption from — several tracts included — separately described — separate amounts — notice giving gross amount — void.

4. The notice of expiration of redemption in tax sales may describe several tracts in the same notice where sold to the same person, but each tract must be separately described, and the amount required to redeem each tract must be specifically and separately set forth. *Held* in the case at bar, the amount necessary to redeem the several tracts being stated in one gross sum, and not specifically and separately, such notice of expiration of redemption is bad, and conveys no notice of the time of the expiration of redemption, and such tax sale is for that reason wholly void.

Taxes — tax deed — notice of tax sale — statute — noncompliance with — deed void.

5. The tax deed in question is invalid and void, there being an improper notice of tax sale, improper tax certificates, improper notice of the expiration of redemption, and an excessive amount of money demanded for redemption. The validity of the tax deed does not depend on the recitals therein, but upon the full and complete compliance with the provisions and requirements of law relative to the sale of property for taxes.

Opinion filed July 9, 1917.

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

Palda & Aaker and *I. M. Oseth,* for appellant.

Where there is jurisdiction to sell the land for taxes, the fact that an erroneous item was included which rendered the amount excessive will not defeat the whole sale. Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Smith v. Auditor General, 138 Mich. 582, 101 N. W. 807; Hall v. Moore, 3 Neb. (Unof.) 574, 92 N. W. 294; Shuttuck v. Smith, 6 N. D. 73, 69 N. W. 5; Darling v. Purcell, 13 N. D. 288, 100 N. W. 726.

Parties in interest are given relief from such errors without disturbing the sale. Laws 1897, chap. 67, p. 85; Comp. Laws 1913, § 2193; Shuttuck v. Smith, 6 N. D. 73, 69 N. W. 5; Sutherland v. Brooklyn, 87 Hun, 82, 33 N. Y. Supp. 959; People ex rel. McColgan v. Palmer, 10 App. Div. 395, 41 N. Y. Supp. 760.

"A situation will not be assumed in the absence of proof to defeat the acts of an officer apparently clothed with authority and discharging duties imposed upon him by statute." Fred Miller Brewing Co. v. Capital Ins. Co. 111 Iowa, 590, 82 Am. St. Rep. 529, 82 N. W. 1023; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919.

"The fact that no affidavit of the posting of a notice of tax sale, as required by law, is found in the files and records, is not rebutting evidence of the recitals of the tax certificate that the notice was duly given." Cook v. John Schroeder Lumber Co. 85 Minn. 374, 88 N. W. 971; Bryant v. Estabrook, 16 Neb. 217, 20 N. W. 245; Alling v. Woodward, 2 Neb. (Unof.) 235, 96 N. W. 127; Gallentine v. Fullerton, 67 Neb. 553, 93 N. W. 932; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; Bullis v. Marsh, 56 Iowa, 747, 2 N. W. 578, 6 N. W. 177; Cruser v. Williams, 13 N. D. 284, 100 N. W. 721.

The only just finding that could be made from the evidence is that the money was paid in at the time provided by law, and the recital in the certificate is entitled to every fair presumption. Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112; Shuttuck v. Smith, 6 N. D. 73, 69 N. W. 5; Darling v. Purcell, 13 N. D. 288, 100 N. W. 726; Black Tax Titles, § 243.

It does not amount to an extending of credit for the officer conduct-

ing the tax sale to postpone payment to a time just following the sale. Farmers' Loan & T. Co. v. Wall, 129 Iowa, 651, 106 N. W. 160; Minnesota Debenture Co. v. Scott, 106 Minn. 32, 119 N. W. 391; Minn. Rev. Laws 1905, § 937; "Forthwith," Neb. Comp. Stat. chap. 77, art. 1, § 111; Green v. Hellman, 61 Neb. 675, 86 N. W. 912; Leavitt v. S. D. Mercer Co. 64 Neb. 31, 89 N. W. 426; Ure v. Bunn, 3 Neb. (Unof.) 61, 90 N. W. 904; Cook v. John Schroeder Lumber Co. 85 Minn. 374, 88 N. W. 971.

The notice of expiration of time for redemption of lands from tax sale may contain several descriptions where all were assessed to one person, and sold to same purchaser at sale. Snyder v. Ingalls, 70 Minn. 16, 72 N. W. 807; Funson v. Bradt, 105 Iowa, 471, 75 N. W. 337; Flint Land Co. v. Godkin, 136 Mich. 668, 99 N. W. 1058; Nycun v. Raymond, 73 Iowa, 224, 34 N. W. 819.

"It is conceded that the legislature might, had it desired, have omitted any provision for notice of the expiration of the time of redemption." Munroe v. Donovan, 31 N. D. 235, 153 N. W. 461; Black, Tax Titles, 2d ed. § 350; Beggs v. Paine, 15 N. D. 451, 109 N. W. 322.

The determination of the auditor, of the sufficiency of the notice as evidenced by the recitals in the deed, shall be conclusive. Comp. Laws 1913, § 2206; Chippewa River Land Co. v. J. L. Gates Land Co. 118 Wis. 345, 94 N. W. 37, 95 N. W. 954; Marx v. Hanthorn, 12 Sawy. 374, 30 Fed. 579; Maguiar v. Henry, 4 Am. St. Rep. 188, note; Crisman v. Johnson, 58 Am. St. Rep. 224 and note, 23 Colo. 264, 47 Pac. 296; Hurley v. Powell, 31 Iowa, 64; Larson v. Dickey, 39 Neb. 463, 42 Am. St. Rep. 595, 58 N. W. 167; Miller v. Miller, 96 Cal. 376, 31 Am. St. Rep. 229, 31 Pac. 247; Soukup v. Union Invest. Co. 84 Iowa, 448, 35 Am. St. Rep. 317, 51 N. W. 167.

Bradford & Nash, for respondents.

The land involved was sold for a general tax and for special assessments of the city of Minot. Certainly as a sale for special assessments it was void. Comp. Laws 1913, § 3733.

"In order to constitute a valid sale, it is necessary that the provisions of the statute authorizing the sale and describing the nature thereof be complied with strictly." 2 Page & J. Taxn. by Assessment, §§ 1174, 1179; Gage v. Waterman, 121 Ill. 115, 13 N. E. 543.

"A sale for an amount in excess of the amount provided by statute,

namely, the amount of legal taxes, penalties, and costs charged against the land, renders the sale void." Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; Cooley, Taxn. 2d ed. p. 497, and cases in note 2; Desty, Taxn. p. 972; Comp. Laws 1913, § 2193.

Where a question is not presented and considered in a case, an opinion upon it amounts to mere dictum. Shuttuck v. Smith, 6 N. D. 77, 69 N. W. 5.

The notice of sale shall contain a list of the lands to be sold and the amount of taxes and penalty due. This notice is vital to all after proceedings in connection with a tax sale. Whatever provision the law makes in regard to this must be strictly complied with. Black, Tax Titles, § 209; Alexander v. Pitts, 7 Cush. 503; Chouteau v. Hunt, 44 Minn. 173, 46 N. W. 341; Mather v. Darst, 13 S. D. 75, 82 N. W. 407; 2 Page & J. Taxn. by Assessment, § 1178; Gage v. Waterman, 121 Ill. 115, 13 N. E. 543.

"A deviation however small is fatal, because a rule of law cannot be made to fluctuate according to the degree or extent of its violation." Black, Tax Titles, § 207, pp. 258, 259; 37 Cyc. 1296; Clarke v. Strickland, 2 Curt. 439, Fed. Cas. No. 2,864; California Loan & T. Co. v. Weis, 118 Cal. 489, 50 Pac. 697; Mann v. People, 102 Ill. 340; Cole v. Van Ostrand, 131 Wis. 454, 110 N. W. 884.

"A tax sale must be made for cash." Cushing v. Longfellow, 26 Me. 306; Black, Tax Titles, § 243; Comp. Laws 1913, § 2195.

The notice of redemption must clearly state the actual sum required to redeem each piece of land sold for taxes. It must give full information as to just what is required to make redemption as by law provided. 27 Cyc. 1400, 1401, and cases cited in note 24; White v. Smith, 68 Iowa, 313, 25 N. W. 115, 27 N. W. 250; Adams v. Burdick, 68 Iowa, 666, 27 N. W. 911; Snyder v. Ingalls, 70 Minn. 16, 72 N. W. 807; Ambler v. Patterson, 80 Neb. 570, 114 N. W. 781, 117 N. W. 990; G. F. Sanborn Co. v. Johnson, 148 Mich. 405, 111 N. W. 1091; Haden v. Closser, 153 Mich. 182, 116 N. W. 1001; Jackson v. Mason, 143 Mich. 355, 106 N. W. 1112; John Duncan Land & Min. Co. v. Rusch, 145 Mich. 1, 108 N. W. 494; 37 Cyc. 1402, 1403, and cases cited; Blessett v. Turcotte, 20 N. D. 151, 127 N. W. 505; Black Tax Titles, § 337.

A person holding a tax certificate has the right to pay subsequent

taxes, and take receipts, and hold them as additional liens against the premises. Rev. Codes 1905, § 1596; Comp. Laws 1913, § 2211; State ex rel. Moore v. Furstenau, 20 N. D. 542, 129 N. W. 81.

A tax deed is not conclusive of the fact that all proceedings leading up to it were regular. "If a tax deed is conclusive evidence of notice where there is no notice, the provision constitutes a most dangerous trap, instead of a protection to property owners." Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; State Finance Co. v. Mulberger, 16 N. D. 214, 125 Am. St. Rep. 650, 112 N. W. 986; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132.

GRACE, J. An appeal from a judgment of the district court of Ward county and involving the validity of a certain tax deed to certain real estate.

The complaint is one in the statutory form for quieting title. The complaint of the plaintiff is in the statutory form. The plaintiff relies upon the validity of a certain tax deed.

The defendant answers, alleging that she is the owner of the premises described in the complaint; that her title was derived by virtue of United States patent from the United States government to Solomon G. Comstock, for certain described lands, he deeding the land to Northwestern Land Company; that the original town site of Minot, North Dakota, was platted by the Northwestern Land Company, said plat being duly recorded in Ward county; that lots 6 and 7, block 5, and lots 19 and 20 of said block 5, of the original town site of Minot, being part of said land so patented and platted, were by various transfers to warranty deeds eventually transferred to Millie Botz, and since she has received said transfers of such lands she has not alienated them,—in other words, she claims ownership of said lands by a perfect chain of title proceeding from the government patent and the warranty deeds of other grantors, until a perfect title in fee to said lots was placed in her.

The defendant, further answering, alleges that the only interest or claim of interest of the plaintiff in and to said premises is under and by virtue of a certain purported tax deed issued by the county auditor of Ward county, North Dakota, to the plaintiff on the 8th day of July, 1914, under and by virtue of a purported sale of said premises for tax

deeds for the year 1908; and further alleges that the said sale for taxes for the year 1908 was and is void for the reason that no notice of the sale of said premises was given; that the amount bid at the purported sale for the premises heretofore described was not paid into the county treasurer or county auditor before the close of the sale, as provided by law, and that the property was not again offered before the close of the sale; that the amount of taxes for which said premises were attempted to be sold included special assessment for public improvements in the city of Minot, North Dakota; that the price for which said premises were purported to be sold was not the amount of taxes against the premises aforesaid with penalty and interest thereon, but included the special assessments with penalty and interest thereon, as aforesaid.

That no notice of expiration of redemption was ever made or given, excepting a purported notice of expiration of redemption served on the 13th day of October, 1914, which notice stated that the premises had been sold for taxes for the year 1908 on the 14th day of December, 1909; that the amount for which said premises were sold was $146.53; the amount required to make redemption, which she would be required to pay, was $910; that sum was largely in excess of the amount she would have been required to pay had the sale been lawful and valid, and had the said purported sale been one in which the premises described in plaintiff's complaint were sold in one parcel; that said premises consist of three separate and distinct parcels, and the taxes levied and assessed against said premises were levied in three distinct and separate parcels and amounts, and that the said notice of expiration of redemption did not give notice to this defendant of the amount necessary to redeem the separate parcels of the said premises from the separate sales or purported sales thereof; that separate certificates were issued by the county auditor of Ward county, North Dakota, on the purported sale of the said premises for each separate and distinct parcel.

That, prior to the commencement of this action, defendant offered and tendered the plaintiff the amount of his purchase, with interest and penalty, together with the amount of subsequent taxes paid by the plaintiff, with penalty and interest and costs accruing in connection with the said purchase inclusive of special assessments contained therein, with interest thereon, all of which plaintiff refused to accept or

receive. That this defendant has at all times been ready and willing to pay such amount required to redeem the several parcels aforesaid, and offers to pay the same into court.

The facts in the case are substantially as follows:

That the Trustee Loan Company is a Minnesota corporation authorized to do business in the state of North Dakota. That the defendant Millie Botz is the owner of lots 7, 19, and 20 of block 5, of the original town site of Minot, now city of Minot, unless her title has been devested by the tax deed hereinafter mentioned.

That in the year 1908 there was levied by the proper authorities of the city of Minot, Minot special school district, the county of Ward, and state of North Dakota, certain taxes against the said premises. The amount of the taxes levied against lot 7 of block 5 for all purposes being the sum of $30.72, and the amount of the taxes levied against lot 19 in block 5 for all purposes being $8.08, and the amount of the tax levied against lot 20 in block 5 for all purposes being $16.99; that prior thereto the proper authorities of the city of Minot proceeded to levy special assessments against the said premises for grading and sewer, the amount of which is certified and appearing upon the tax list of the county auditor of Ward county for the year 1908, against each of said lots as follows: Lot 7, $21.02; lot 19, $25.63; lot 20, $25.63. Said taxes and special assessments were not paid, and became delinquent, and thereafter and prior to the 14th day of December, 1909, the county auditor of Ward county, North Dakota, served a notice of tax sale of said premises, among others in said county, for the delinquent taxes for that year. That in such notice the county auditor of said county caused it to be shown that the amount of delinquent taxes due and owing upon said lot 7 was $51.94, and the penalty thereon and additional penalty of $7.27; and as to lot 19 there was shown delinquent tax of $33.71, with an additional sum of $4.72 penalty; as to lot 20 there was shown the sum of $42.62 delinquent tax, with an additional penalty of $5.97. That the amount of delinquent taxes as contained in the said notice included the sums of special assessments, and also the amount of delinquent taxes upon such premises, and the amount of penalty above referred to, which included penalty upon the special assessments as well as the penalty upon delinquent taxes; that such notice of sale made no reference to the fact that special assess-

ments or penalty thereon was included in the amount for which the premises would be sold; that said notice was the only notice given of said sale.

On the 14th day of December, 1909, the county auditor of said county brought on a tax sale for that year, and sold the premises as three separate and distinct parcels and as separate and distinct sales; that upon each of said parcels the plaintiff bid at the rate of 5 per cent, and agreed to take the said premises and each parcel thereof and pay the amount of taxes due thereon, together with the penalty, interest, and costs of publication at that rate, and the several parcels were thereupon struck off to the plaintiff herein, and thereupon the county auditor of Ward county, North Dakota, issued to the plaintiff three separate and distinct certificates of tax sale for each of the said lots, specifying in each the amount of taxes and penalty due thereon, the total amount of taxes, special assessments, and penalty as contained in the notice of sale; that said certificates contained no information or statement upon their face or otherwise, nor anything to indicate that the said sale was made for special assessments as well as for delinquent taxes.

That said sale was concluded by the 24th day of December, 1909; that the amount agreed to be paid by the plaintiff on said sale to the county treasurer of Ward county was not paid prior to the close of said sale, but was paid on the 5th day of January, 1910.

That on the 23d day of March, 1910, plaintiff paid subsequent taxes upon said lot 7 in the sum of $85.57, and on the 1st day of March, 1911, the sum of $60.56, and on the 30th day of April, 1912, the sum of $58.03, which amount included the interest and penalty; and upon lot 19, on the 23d day of March, 1910, the plaintiff paid subsequent taxes in the sum of $73.14, and on the 1st day of March, 1911, the sum of $66.29, and on the 30th day of April, 1912, the sum of $41.45, which amount includes interest and penalty; and upon said lot 20, on the 23d day of March, 1910, the plaintiff paid as subsequent taxes the sum of $68.83, and on the 1st day of March, 1911, the sum of $53.17, and on the 3d day of April, 1912, the sum of $33.81, which amounts included interest and penalty. That all such payments were as subsequent taxes and assessments. There was included special assessments levied for special improvements in the city of Minot, North Dakota, which were not a part of the general taxes.

On the 1st day of October, 1913, plaintiff produced said certificates and each of them to the county auditor of said Ward county, and demanded a deed of the premises, producing at the same time receipts for the subsequent taxes and assessments which had been paid, and thereupon the county auditor, under his hand and seal, made out a notice of expiration of time of redemption, wherein it was recited that the premises aforesaid and all of them were sold for delinquent taxes on the 14th day of December, 1909, for the sum of $146.53 to the plaintiff herein; said notice was delivered to Millie Botz, the defendant; and it was further stated in said notice that there was due and unpaid on the said sale subsequent taxes for the years 1909, 1910, and 1911, with interest and penalty, the sum of $910.98; that such amount was necessary to redeem said premises from said sale exclusive of accruing costs, and that unless said amount of $910.98, together with the accrued costs, were paid within ninety (90) days after the service of the notice, tax certificate would be issued therefor, and that the period of redemption would expire ninety days after the service of the notice; said notice was dated on the 1st day of October, 1913, and was personally served upon said Millie Botz on the 6th day of March, 1914. On the 8th day of July, 1914, the county auditor of Ward county, North Dakota, executed and delivered to the plaintiff under the seal of his office and over his signature, in the form of a tax deed, which form was provided by law for the sale of property for delinquent taxes; that said deed does not mention or indicate in any way that special assessments are involved therein, or were involved in the sale upon which the same is based.

Defendant on trial offered to pay into court for plaintiff the amount of all payments made by it on said sale, together with all subsequent taxes, and the payment by it on the premises, and the further sum of $2 for the service of the notice of expiration of the time of redemption, with interest on all such sums from the date of such payments.

The only specification of error is as follows: "The appellant desires a review of the entire case in the supreme court, and a trial *de novo* of all questions of law and fact. The appeal to this court is from the judgment."

There are presented in this case numerous legal propositions for consideration and decision. The first of these propositions which we

shall consider is whether or not the failure to advertise and sell special assessments separately from a general tax, where both are to be sold at the same time, is sufficient cause to avoid or set aside such tax sale. Section 3733 of the Compiled Laws of 1913 provides as follows: "If the real property against which any assessment is levied is sold to enforce the collection of a special assessment which has become delinquent, the sale shall be made by the same officer, and upon like notice and subject to the same provisions in relation to redemption, and the same record thereof shall be kept by the officer making the sale, as in cases of real property for delinquent taxes; but if any real property is subject to sale at the same time for delinquent taxes, and also for delinquent special assessments *it shall be sold separately for each, and a separate certificate of sale shall be issued upon each of said sales, although both sales are made to the same person, and the certificates issued upon the sale for special assessments shall so state.*"

This section constitutes the law of this state in regard to the sales for special assessments. The statute specifically and expressly requires that there should be a *separate notice* and a *separate sale,* and that a certificate issued for a sale of special assessment should state that it was for special assessment. The reason for this is quite apparent, and is that the special assessment is not correctly and strictly speaking a tax, but is what its name implies, a special assessment for some special purpose, and is not considered nor classed as a tax. Therefore it should be sold separately, and not sold with the general tax. If the same is sold at the same time as the general tax, and is offered together with the general tax by the sheriff in one gross sum, and a certificate is issued for such gross sum, and separate and distinct certificates are not issued for the general tax and special assessment separately, the effect is much the same as if the property assessed was sold for a much larger general tax than was levied or assessed against it. The general tax and the special assessment against the property in question having at the same time and place been sold together, and not separately, and the certificate of sale upon each of said sales included both the general tax and the special assessment, and there being no separate notice or separate sale of general tax and special assessment, and no separate certificate issued stating that it was for special assessment, all of which was in direct contravention and violation of a plain and specific statutory

provision, namely, § 3733 of the Compiled Laws of 1913, the sale is invalid. Under the statute, general taxes and special assessments may be sold at the same time; but all the proceedings of sale with reference thereto must, as to the general tax and special assessment, be entirely separate and distinct, including the notice of sale; and if all such proceedings relating to the sale of property for general taxes and special assessments are not so had in a separate and distinct manner, the sale is invalid. Notice of sale in the case under consideration was bad for the reason that the general tax and special assessment were included in such notice in one sum, when describing each tract in such notice, when such notice of sale of such special assessments should have been an entirely separate and distinct step in the proceedings just the same as the sale. Special assessments and certificates of sale therefor must be separate. In other words, all statutory requirements must be strictly complied with. Black, Tax Titles, § 209; 2 Page & J. Taxn. by Assessment, § 1178; Chouteau v. Hunt, 44 Minn. 173, 46 N. W. 341.

The next matter under consideration is the sufficiency of the notice of expiration of redemption.

The notice of expiration of redemption is void for the reason that it is a blanket notice, and not in conformity with law, and covered several distinct tracts which were sold separately and which the owner had the right to separately redeem. All the tracts may be described in the same notice of expiration of redemption, but they should be separately described, and the amount required to redeem each tract should be specifically and separately set forth in such notice. This was not done in the certificate of sale in question, and the same is therefore void. The defendant in this case had the right to know the amount necessary to redeem each separate tract and she should have been able to have received this knowledge from the notice of the expiration of redemption. The notice having failed to convey such notice to her, it was insufficient. White v. Smith, 68 Iowa, 313, 25 N. W. 115, 27 N. W. 250; Adams v. Burdick, 68 Iowa, 666, 27 N. W. 911; Snyder v. Ingalls, 70 Minn. 16, 72 N. W. 807; Haden v. Closser, 153 Mich. 182, 116 N. W. 1001; John Duncan Land & Min. Co. v. Rusch, 145 Mich. 1, 108 N. W. 494; 37 Cyc. 1402; Blessett v. Turcotte, 20 N. D. 151, 127 N. W. 505.

It appears from the computation that the amount of money stated in the notice of expiration of redemption necessary to redeem was a sub-

stantial excess of amount actually necessary under a correct computation. Under the most favorable construction of the statutes relating to such computation, it appears that the computation submitted by respondent in his brief is substantially correct, which is $839.60; and there is a substantial difference between that and the amount of $910.53 as specified in the notice of expiration of redemption, and is sufficient in amount to avoid the certificate.

It seems that the plaintiff in this case has figured interest after the expiration of the three-year period allowed for redemption, and that, by reason of estimating the interest upon the amounts after the expiration of the three-year period, there is a substantial amount by that reason added to the amount necessary to redeem, and that the amount specified in the notice of expiration of time of redemption was enlarged by at least $71. It is plain under the law that no interest could be charged upon the amount claimed after the expiration of the three years allowed for redemption.

All special assessments under article 20 draw interest at the rate of 7 per cent per annum from the time when such special assessments shall have been approved by the city council; and where a special assessment has become delinquent and the property upon which such special assessment is made is offered for sale in payment of such special assessment, the purchaser who pays subsequent special assessments would be entitled to interest at the rate of 7 per cent per annum on such subsequent special assessments so paid. This is the proper rate of interest as provided by § 3722 of the Compiled Laws of 1913.

We now proceed to consider the validity of the tax deed. The said tax deed is held to be invalid because of an improper notice of sale, an improper sale, improper tax certificates, and an improper notice of the expiration of the time for redemption, all of which have been previously shown and discussed. All of the acts stated to be done in a tax deed must have been done in accordance with the statutory provisions relative thereto, in order that such deed shall be valid; and such deed is only prima facie evidence of the regularity of the proceedings from the inception of the tax by assessment until the final step by the execution of the tax deed. The strength and validity of a tax deed depend upon whether all the requirements of law concerning a sale of real property for taxes have been fully complied with. If any act

required by law, such as a proper notice of sale, proper certificates, proper notice of the expiration of the time for redemption, have not been complied with pursuant to statute, the recital of the performance of each of such acts in a tax deed would not make the tax deed valid notwithstanding such recital; for the tax deed does not depend for its validity on the recitals, but must depend and rest upon the proper compliance with the requirements of law relative to the sale of property for taxes.

The writer of this opinion, speaking for himself, holds that, it being provided by § 2191, Compiled Laws of 1913, that the sale shall be for cash, and that, if the amount is not paid in before the close of the sale, the premises shall again be offered and sold, and, if there is no bidder, the county auditor shall bid the same in the name of the county. It appears from the examination of the testimony in this case that the payment of the bid was not made until after the close of the sale. The sale was on the 14th day of December, 1909, and under the law the sale closes in ten days, and the payment of the bid was not made until the 5th day of January, 1910, this being a clear violation of § 2191 of the Compiled Laws of 1913. The sale is invalid for that reason. Public agents authorized to make sale of taxes must make such sale for cash in accordance with the provisions of the statute.

The judgment of the District Court is in all things affirmed, together with costs of both courts.

CHRISTIANSON, J. (concurring specially). I concur in an affirmance of the judgment appealed from, on the sole ground that no legal notice of expiration of redemption was given, and consequently the tax deed under which the plaintiff claims title is void.

The premises involved herein are lots 7, 19, and 20 of block 5 in the original town site of Minot. It appears from the certificates of tax sale offered in evidence upon the trial that these lots were sold as separate parcels at the tax sale held December 14, 1909, and that separate tax certificates were issued for each lot. Lot 7 was sold for $51.94; lot 19, for $38.53; and lot 20, for $42.50. On October 1, 1913, notice of expiration of time of redemption was issued by the county auditor of Ward county, directed to the defendant Minnie Botz as the person in whose name such real estate then appeared of record

in the office of the register of deeds of said county, and in whose name said real estate was assessed in the year 1908. The notice recites that said three lots were sold on December 14, 1909, at the annual delinquent tax sale held on that day, and that "the amount of the delinquent tax due upon the property aforesaid at the date of sale was $146.53, including penalty, costs, and interest, to make which amount the said property was then and there sold as provided by law, and a certificate of said sale was issued to the purchaser thereof." The notice further states "that the owner and holder of the certificate so issued has presented the same to the undersigned as auditor of said county, and demanded a deed for said property as provided by law; and said certificate being and remaining unredeemed, and there being $910.98 due and unpaid thereon, including subsequent taxes for the years 1909, 1910, and 1911, penalties and interest, and there appearing no legal objection why a tax deed should not be issued as demanded. You are therefore notified that $910.98, exclusive of accruing costs, is necessary to redeem said property from said sale, and that unless the said amount and costs of this proceeding are paid on or within ninety days after the service of this notice upon you, a tax deed will be issued therefor as provided by law."

The statute requires that the notice of expiration of time of redemption specify, among other things, the amount for which the lands were sold, and the amount required to redeem such lands from the tax sale. Comp. Laws 1913, § 223. This statute should be strictly construed against the party claiming title under a tax deed. Archer v. N. S. Tubbs Sheep Co. 25 S. D. 399, 126 N. W. 577.

The notice of expiration of time of redemption here under consideration does not specify the amount for which each lot was sold, or the amount required to redeem each lot, but it merely states the aggregate amount of the purchase price and the aggregate amount required to make redemption. Not only so, but the amount stated in the notice is concededly in excess of the aggregate amount actually due upon the tax certificates. The aggregate amount due thereon was only $839.60, or *$71.38* less than the amount stated in the notice of redemption. It seems clear that the person to whom the notice was addressed did not receive the notice contemplated and directed by the statute. And, in my opinion, the irregularities and defects therein invalidated such

notice and the tax deed subsequently issued. See 37 Cyc. 1402, 1403; G. F. Sanborn Co. v. Johnson, 148 Mich. 405, 111 N. W. 1091; Ambler v. Patterson, 80 Neb. 570, 114 N. W. 781, 117 N. W. 990; Haden v. Closser, 153 Mich. 182, 116 N. W. 1001; Jackson v. Mason, 143 Mich. 355, 106 N. W. 1112; John Duncan Land & Min. Co. v. Rusch, 145 Mich. 1, 108 N. W. 494.

Plaintiff's counsel contend, however, that the court cannot go behind the tax deed and inquire into the sufficiency of the notice of expiration of redemption. This contention is based upon § 2206, Compiled Laws 1913, which provides that a tax deed "shall be conclusive evidence of the truth of all the facts therein recited, and prima facie evidence of the regularity of all the proceedings, from the assessment and valuation of the land by the assessor up to the execution of the deed."

Even though it be conceded that the legislature has the power to declare in advance that a recital in a tax deed, to the effect that notice of expiration of redemption has been given, although false in fact, shall nevertheless be conclusive evidence of its truth (and the existence of such power has frequently been questioned. See Adams v. Beale, 19 Iowa, 61; Cairo & F. R. Co. v. Parks, 32 Ark. 131; Miller v. Miller, 96 Cal. 376, 31 Am. St. Rep. 229, 31 Pac. 247; 12 Enc. Ev. 358, 359), the legislative intent to exercise such power should be expressed in language too plain and positive to admit of doubt. The legislature not only prescribed the evidentiary effect of the recitals in tax deeds, but in the same section of the statute it prescribed the form and language of such deeds.

The only recital required to be inserted in a tax deed relative to the notice of expiration of redemption (and this is the recital contained in the tax deed involved in this case) is as follows: "The time fixed by law for redeeming the land having now expired, and proof of legal notice of expiration of the period of redemption having been filed in the office of the county auditor prior to the maturity of such certificate, as provided by law."

It will be noticed that this recital does not purport to state as a fact that notice of expiration of redemption has been given, but merely that proof of such notice has been filed in the county auditor's office. If it had been the intent of the legislature to make the tax deed conclusive evi-

dence of service of legal notice of expiration of redemption, it would doubtless have prescribed a recital in the tax deed in accordance with such intent. The recital which it did prescribe, however, manifests no such intent; but on the contrary indicates that the legislature considered the service of legal notice of expiration of redemption to be one of the steps in the proceedings, of whose regularity the tax deed is made prima facie evidence only.

I express no opinion upon the other questions discussed in the majority opinion.

ROBINSON, J. (concurring specially). In this case the plaintiffs claim title to three lots, under a tax deed, and appeal from a judgment quieting title in the defendant who owns the patent title. As the record shows, the tax deed is void on its face. It shows that the three lots were sold to the company for a specific sum, and does not show a separate sale of each lot. Under the statute, each lot must be sold for the precise amount of the tax, and the deed must show the sum for which each lot was sold; and in this case each lot was sold for the sum total of the general tax and also a special assessment for improvements; and in such a case, the law is that there must be a sale for the general tax and another sale for the special assessment. Hence, of course, when one sale was made for the sum total of the general tax and the special assessment, the sale was contrary to the statute, and it was void.

And in this case the redemption notice is void on its face, because it fails to show the sum for which each lot was sold. It shows only that the three lots were sold for a lump sum.

And so the tax deed is void for three fatal and obvious defects.

To make title under a tax deed, there must be a compliance with all the requirements of the statute in regard to the assessment, the levying of the tax, the sale, the notice of sale, the redemption notice, and the making of the tax deed. Judgment affirmed.

J. R. COOPER v. W. B. GORDON.

(164 N. W. 21.)

Demised premises — possession of — withheld from lessee — lessor — action for possession.

1. Where possession of the demised premises is withheld from the lessee he may maintain an appropriate action against any person, including the lessor, who so wrongfully withholds the possession from him.

Adverse claims — statutory action — to determine — lessee may maintain.

2. The lessee may assert his right to such possession by a statutory action to determine adverse claims.

Opinion filed July 9, 1917.

From a judgment of the District Court of Bottineau County, *Burr*, J., defendant appeals.

Affirmed.

Weeks & Moum, for appellant.

"A cropper's contract gives the cropper no legal possession of the premises further than as an employee; the legal possession is in the employer, who alone can maintain trespass." 12 Cyc. 980, and notes.

Respondent's duty under the contract was to perform personal service, and he could not be compelled to specifically perform. Comp. Laws 1913, § 7197.

And, if one party to a contract cannot be compelled to specifically perform, the other party occupies the same position. Comp. Laws 1913, § 7193.

Bowen & Adams, for respondent.

"No particular words are necessary to create a lease, and whatever is sufficient to explain the intent of the parties that one shall devest himself of the possession, and the other to come in for a determinate time, amounts to a lease." 24 Cyc. 894A.

An action to determine adverse claims may be maintained by any person having an estate or interest in lands, and possession shall be awarded to the party who has the paramount right or claim to the property. Comp. Laws 1913, §§ 8144, 8153; 24 Cyc. 1049 (II.), 1051.

In such actions the district court has original jurisdiction, and the facts necessary to state a cause of action are not the same as those required in forcible entry and detainer. Ottow v. Friese, 20 N. D. 86, 126 N. W. 503.

CHRISTIANSON, J. Plaintiff brings this action to determine adverse claims, and thereby seeks to obtain possession of a tract of land in Bottineau county in this state. The material and undisputed facts are as follows: On November 5, 1915, the plaintiff entered into a contract with the defendant, Gordon, who was the owner of certain lands in Bottineau county, under the terms of which the defendant did "demise, lease, and let"—to the plaintiff the premises in question, and the defendant agreed to hire and take said premises for the term of one year commencing on the 1st day of December, 1915, and expiring on December 1, 1916.

The contract provides for an equal division between the parties of the crop to be produced in 1916. It further provides that in case the plaintiff should fail to perform any of the covenants to be performed on his part that then the defendant, his heirs, executors, administrators, or assigns should have the lawful right "to re-enter and take full and absolute possession" of said premises; that the plaintiff is not to sublet any part of the premises or "to use or occupy the premises above described, or any part thereof, for any other purposes than those . . . mentioned, and not to make any alterations, additions, or change in or about said premises, nor do or permit to be done anything that shall lessen the value of said premises, or increase the risk of, or vitiate the insurance on the buildings on the premises, without first obtaining the consent of the first part thereto in writing; . . . and if the said second party shall remain in the possession of said premises after the termination of said lease in any manner above named, or otherwise, or after the expiration of said term, he shall be deemed guilty of forcible detainer and unlawful conversion of said premises under the statute." The contract further provides that "the second party . . . will permit the first party, or his agent, to enter in and upon said premises and make repairs and alterations thereto, and also to show the premises to persons desiring to hire or purchase the same."

The evidence shows that a short time after the execution and delivery

of the contract the defendant caused to be served on the plaintiff a notice of rescission on the ground that defendant's "consent to the execution of said contract was given by mistake, and that said contract does not express the agreement of the parties thereto, or the intentions of either party." The defendant refused to permit the plaintiff to enter into possession of the premises, and the plaintiff thereupon on December 30, 1915, brought the present action to determine adverse claims, claiming that he had an estate or interest in and was entitled to possession of the premises involved under and by virtue of his lease. The defendant answered and asserted that he was the owner of the premises, and that plaintiff's claim was based upon a written lease or cropper's contract, but that such instrument was not supported by any valid consideration; that defendant never agreed to its terms; and that the terms, conditions, and stipulations were so vague, ambiguous, indefinite, and uncertain as to be impossible of interpretation.

The cause came on for trial on March 19, 1916. The trial court rendered a judgment in favor of the plaintiff for the possession of the premises involved, as provided for in, and for the purpose of carrying out the terms of, the leasing contract. An appeal was taken and a stay of proceedings obtained, the defendant furnishing a supersedeas bond in the sum of $750, in accordance with the order of the court.

There is no dispute in the evidence, and defendant rests his contentions solely on two propositions of law, which are stated in his brief as follows:

"(1) That the written contract, exhibit 1, is so indefinite, ambiguous, and contradictory that it could not be considered as a lease or as conferring any estate in respondent sufficient to maintain the statutory action to determine adverse claims; and further, even when reformed by the oral testimony offered by respondent, it would constitute no more than a cropper's contract, which confers no estate in respondent whatever, and consequently no equitable action in the form of ejectment can be maintained.

(2) That this action regardless of the form of it, is in effect an action for specific performance and cannot be maintained for the reason that the contract under any interpretation of it, in the main calls for personal services only on the part of the respondent, and as respondent could not be compelled specifically to perform, neither can appellant."

Neither of the propositions are argued to any extent in defendant's brief. No attempt is made to point out wherein the contract is indefinite, ambiguous, or contradictory. And defendant refrained from offering any evidence upon the trial to substantiate his claim that it did not represent the agreement of the parties.

Nor do we understand that the action is one for specific performance. The plaintiff was entitled to enter into possession of the premises on December 1, 1915, under the express terms of the contract. He asks judgment for possession. That a tenant may maintain an appropriate action against the lessor or any other person wrongfully withholding possession of leased premises is not disputed in this case, and is well supported by authority. See 24 Cyc. 1049, 1051, 1152.

We are agreed that, under the evidence in the case, no other conclusion can be reached than that reached by the trial court; namely, that the plaintiff was entitled to the possession of the premises in accordance with the terms of the contract. The question which has caused us more difficulty than either of those argued by the defendant is whether a lessee may maintain a statutory action to determine adverse claims against his lessor. The action is certainly somewhat novel, but after some hesitancy we have come to the conclusion that under our statute such action will lie in behalf of a lessee who claims an interest in, and the right of possession of, the premises.

The statutory action to determine adverse claims may be maintained to obtain possession of realty. 17 Enc. Pl. & Pr. 290. Such action embraces both the common-law action of ejectment and the equitable action to quiet title. Burleigh v. Hecht, 22 S. D. 301, 306, 307, 117 N. W. 367; Ottow v. Friese, 20 N. D. 86, 126 N. W. 503. And the right of the lessee to maintain the statutory action to determine adverse claims has been sustained in well-considered decisions. See German American Sav. Bank v. Gollmer, 155 Cal. 683, 24 L.R.A.(N.S.) 1066, 102 Pac. 932; McDonald v. Early, 15 Neb. 63, 17 N. W. 257. See also Merrill v. Gordon, 15 Ariz. 521, 140 Pac. 496; Berrington v. Casey, 78 Ill. 317.

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

Robinson, J. (dissenting). This is an action for the determination of adverse claims to certain real property. Judgment was entered

awarding the plaintiff possession of the land in question, with costs, and the defendant appeals.

The action is based on a cropping land contract, dated November 5, 1915, whereby it is agreed that the plaintiff shall have and crop the land during the year 1916. Defendant refused to abide the contract, and he never delivered to the plaintiff possession of the land.

The remedy of the plaintiff, if any, was an action for specific performance or for money damages. An action for the determination of adverse claims to real property does not lie when the plaintiff has no claim of title. The judgment should be reversed, with directions to dismiss the action.

JAMES A. TYVAND v. EMMA McDONNELL, as Administratrix of the Estate of John A. McDonnell.

(164 N. W. 1.)

County courts — probate jurisdiction — orders of — application for — issued on own motion.

1. County courts may make, in the exercise of their probate jurisdiction, two kinds of orders: First, orders which are based upon a written application; second, orders which they may make at their own discretion on their own motion, without a written application.

County courts — family maintenance — additional allowance — orders for — estate — claim against — discretion of court.

2. Where the county court, in compliance with § 8727, Compiled Laws of 1913, by its order makes additional allowance for the maintenance of the family, even though such order is one allowing a claim against the estate after the time has expired in which claims may be filed against the estate, such order is a valid order, being one which the court had authority to make under § 8728, Compiled Laws of 1913, being such an order as was addressed to the sound discretion of the court, and was a discretionary order.

Opinion filed July 9, 1917.

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

John H. Kirk and *Cray & Eaton,* for appellant.

It is invariably held that debts contracted by the widow and heirs of a deceased person are not debts of the estate and cannot be enforced against the estate. Harkins v. Hughes, 60 Ala. 316; Hulbert v. Waller, 3 Colo. App. 250, 32 Pac. 985; Normand v. Barbin, 18 La. Ann. 611; Potter v. Potter, 64 Vt. 298, 23 Atl. 856; Carter v. Tippins, 113 Ga. 636, 38 S. E. 946.

Coger & Nelson, for respondent.

The county court acting in its appropriate sphere in ordering an allowance for the maintenance of the family has exclusive jurisdiction, equal in degree to that of the district court, and is a court of record, and its judgment becomes final, in the same manner as do the judgments of other and superior courts. No appeal was here taken, and the judgment in relation to the matter here involved became final. Joy v. Elton, 9 N. D. 438, 83 N. W. 875.

The county court had jurisdiction in this case, and its order is a sufficient and legal exercise of its power. Worner, Am. Law of Administration, 189; Re Lux, 100 Cal. 606, 35 Pac. 345; Dickinson v. Hendrickson, 122 Mich. 538, 81 N. W. 583; Huntley v. Denny, 65 Vt. 185, 26 Atl. 486; Simmons v. Byrd, 49 Ga. 285; Milner v. Vandivere, 86 Ga. 540, 12 S. E. 879; Cross v. Johnson, 82 Ga. 67, 8 S. E. 56; Shepard v. Stebbins, 48 Hun, 247.

GRACE, J. The action is one to recover the balance on account for goods, wares, and merchandise sold and delivered by the respondent to the appellant. It appears that this matter having first come up for determination in the probate court of Bottineau county, after such determination of the probate court an appeal was taken therefrom to the district court of Bottineau county. It does not appear after the matter reached the district court that any regular pleadings were ordered filed nor issue formed in a formal manner, as should have been done. The matter was brought on by petition in the probate court, and after the appeal to the district court the matter was heard on the same petition. We will therefore state the facts of the case as they appear from the record, and thus be able to determine what is the issue involved in this action.

One John A. McDonnell died on or about the 10th day of January,

1903, in Bottineau county, North Dakota, possessed of the following described real estate in the county of Bottineau and state of North Dakota, to wit: The northwest quarter and the north half of the southwest quarter, and the northwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter, all in section 26, township 159, range 74. At the time of his death he was also possessed of personal property of the value of $1,000. The value of the real estate was approximately $8,000 at the time the account in question was filed against the estate, and such real estate was shown by the inventory in the year 1903 to be worth $3,500. On the 27th day of February, 1903, Emma McDonnell was appointed as the administratrix of the estate of John A. McDonnell, who died intestate, and ever since has been and now is such administratrix. As such administratrix she gave a bond with sufficient sureties as required by law in the sum of $5,000 for the faithful execution of her duties as such administratrix. Between the 1st day of November, 1905, and the 30th day of November, 1906, it is claimed by James A. Tyvand that she purchased as such administratrix from said Tyvand goods, wares, and merchandise in the sum of $591.49, the claim for which against such estate was presented to said administratrix on the 28th day of March, 1907, and allowed by an indorsement in writing thereon by said Emma McDonnell, administratrix. On the 29th day of March, 1907, said allowance was confirmed and said claim approved by the Honorable John H. Kirk, then judge of the probate court of Bottineau county. Said Emma McDonnell was ordered to appear in the county court and account for the property which had come into her hands as such administratrix, and further notified that upon such accounting, if the petitioner for such accounting, who is this respondent, should show himself entitled to the payment of the said $591.49, a peremptory decree would be made ordering said Emma McDonnell, as such administratrix of the estate of John A. McDonnell, to make immediate payment of the said sum; and notifying the appellant further that the court would also authorize this respondent to bring an action upon the bonds of said administratrix against her and her sureties for the amount of said claim and interest thereon. Upon such accounting being had, the county court made an order that in the event of the nonpayment of the said sum of $591.49 and interest since March 28, 1907, the respondent might bring an action against

the principal and sureties on the bonds and the undertaking of the said Emma McDonnell for the purpose of recovering from the said principal, Emma McDonnell, and her sureties upon the bonds, as such administratrix, the sum of $591.49, with interest thereon at the rate of 7 per cent per annum from March 28, 1907. An appeal was taken from such order to the district court, and, upon proceedings had in such district court, a judgment was ultimately entered, from which this appeal is taken.

It further appears that, in the course of the probating of such estate, notice to creditors under the statute was completed May 1, 1903. The same was filed on October 2, 1903, and an order was entered adjudging that due and legal notice to creditors had been given in the manner, for the purposes, and the period required by law and prescribed by the court. The judgment of the district court was substantially the same as the judgment of the county court.

It is sought in this case to charge the estate of John A. McDonnell, deceased, with a debt which did not exist at the time of his decease, but which it is claimed by Tyvand was contracted by the administratrix in her representative capacity about two years after her husband's decease. The owner of such claim, Tyvand, seeks to charge such estate with such claim on the theory that it is a proper charge on account of it being for necessaries furnished for the support of the family of the deceased, while the estate was being settled, and when such estate was solvent.

Section 8730, Compiled Laws of 1913, provides what debts are chargeable against the property of the decedent. Such section, after deducting the homestead exemption and personal property set aside for the surviving wife or husband and minor child or children, says that the remainder of such property shall be chargeable with the payment of the *debts of the deceased, the expenses of administration, and the allowance to the family,* and further provides that the property, both real and personal, may be sold as the court may direct in the manner prescribed by law.

Under § 8723 of the Compiled Laws of 1913, upon the death of either husband or wife, the survivor, as long as he or she does not again marry, may continue to possess and occupy the whole homestead as defined in § 5605 of the Civil Code. Such homestead shall not be subject to the

payment of any debts or liabilities contracted or existing against the husband or wife, or either of them, previous to or at the time of the death of such husband or wife, so that the homestead, the northwest quarter of section twenty-six, township one hundred fifty-nine, range seventy-four, of the approximate value of $4,800, need not be considered as any part of the estate so far as the payment of debts are concerned. Section 8725 of the Compiled Laws of 1913 provides that there shall also be set apart absolutely to the surviving wife or husband, or minor children, all the personal property of the testator or intestate which would be exempt from execution if he were living, including all property absolutely exempt, and other property selected by the person or persons entitled thereto to the amount and of the value of $1,500 according to the appraisement, and such property shall not be liable for any prior debt of the decedent except necessary charges of his last sickness and funeral, and expenses of administration, and only then when there are no other assets available for the payment of such charges.

Personal property thus set apart becomes the absolute property of the surviving widow and children. Fore v. Fore, 2 N. D. 260, 50 N. W. 712. In the case at bar there was only $1,000 of personal property, all of which was set aside or should have been set aside by the court to the surviving widow as exempt. Section 8725 is mandatory, and, after the inventory and appraisement of the personal property, the amount specified in said section as exempt must be set aside for the surviving wife or husband or minor children as an exemption which in no manner can become liable to execution or otherwise for the payment of the debts as provided in said section. In the case at bar the total value of the homestead, and the full amount of exempt personal property, being deducted from the whole estate, would leave the amount of property subject to the payment of the debts of the deceased, the expense of administration, and the allowance to the family, if any.

Section 8727, Compiled Laws of 1913, provides: "If the amount so set apart [that is, the homestead and the personal property in the sum of fifteen hundred dollars] is insufficient for the support of the widow and children, or either, and there is other estate of the decedent, the court may in its discretion order such reasonable allowance . . . for the maintenance of the family according to their circumstances *during the progress of the settlement of the estate.*" It is under this section

that Tyvand seeks to recover, claiming he furnished necessaries for the support of such family, and makes claim against the estate.

Every direction entered of record or given in writing by a county court, and not included in a decree, is styled an order. There are two kinds of orders a county court may make in the exercise of probate jurisdiction: First, orders which are based upon, and *must* be based upon, a written application; second, orders which such court may make at its discretion or on its own motion without any written application. See § 8581, Compiled Laws of 1913. In this case Tyvand presented a bill for $591.49 to the administratrix for what he claimed to be necessaries for the support of the administratrix and her children, and she as such administratrix approved such bill for necessaries for the support of herself and children, and the same was also approved by the county court and allowed by the order of such court as a claim against the estate. Such order of the county court allowing such claim was a discretionary order, and such allowance by the county court became a preferred claim against the estate and had preference of payment to all other claims against the estate, except funeral charges or expenses of administration. Section 8727, Compiled Laws of 1913, is as follows: "If the amount so set apart is insufficient for the support of the widow and children or either [of them] and there is other estate of the decedent, *the court may in its discretion order such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate,* which in case of an insolvent estate must not be longer than one year after granting letters testamentary or of administration."

Section 8728 of the Compiled Laws of 1913 provides that "any allowance made by the court in accordance with the preceding section must be paid in preference to all other charges except funeral charges or expenses of administration, *and any such allowance whenever made may in the discretion of the court take effect from the death of the decedent.*" It is seen, therefore, that the order which the county court made allowing such claim, or in other words, making such allowance for the support of the widow and children, that is, for the necessaries of life with which they were furnished, was a discretionary order. The court could make such order at any time that it appealed to his discretion that it was proper and right that he should do so, and without any applica-

tion in writing having previously been made for such order; and when the court exercised its discretion and made such order for such allowance, it constituted a preferred claim which was payable out of the remainder of such estate exclusive of all exemptions. The language of § 8728 of the Compiled Laws of 1913 is exceedingly broad, and gives the county court very extensive discretion as to the time of making an order effecting the allowance. Particular attention is drawn to these words in such section: "And any such allowance *whenever made* may in the discretion of the court take effect from the death of the decedent." It would appear, therefore, that the county court could make such order whenever in its discretion it saw fit at any time during the progress of the settlement of the estate. The court, therefore, could make such an order after the time limited for filing claims against the estate had expired, and the same, being a valid order and one which the court had authority to make under the law, would be effective. The court had the power in the exercise of its discretion under § 8728, Compiled Laws of 1913, to order such allowance to take effect from the death of the decedent. The court thus having the power to make the claim for the allowance take effect from the death of the decedent, it may be assumed the court exercised such power in a valid manner and in a manner so as to make such order effective.

The merchandise in question was purchased by Emma McDonnell while she was administratrix, between November, 1905, and the latter part of November, 1906, and while she was engaged in running an hotel at Barton, North Dakota, most of which time, however, she had her children with her, and was caring for them, and furnished them the necessities of life. The testimony shows that a good share of the merchandise so purchased was paid for in cash. We think the testimony, all considered, fairly shows that a good share of such merchandise was used by the widow, who was the administratrix, in support of herself and seven children. She afterwards allowed, as such administratrix, the claim against the estate for such merchandise described in the account, and the allowance was affirmed and the claim approved by the written order of John H. Kirk, judge of the county court of Bottineau county, on the 30th day of March, 1907. In this connection it may be said that no exception having been taken to the allowance of such claim at the time it was filed, and no appeal having been taken from the

allowance of such claim within the time prescribed by law for such appeals, it would seem that such order had become final.

The court having had jurisdiction to order the payment of such claim, and the order being a discretionary one, it should not be disturbed.

In view of the law relating to allowances for the support of the widow and children, we think the judgment of the District Court was proper, and the judgment of the District Court is in all things affirmed, with costs.

ROBINSON, J. (concurring). In this case it appears that in February, 1903, the defendant was appointed administratrix of the estate of her deceased husband by order of the county court of Bottineau county, and between November 1, 1905, and November 30, 1906, the plaintiff advanced and furnished to the defendant goods, wares, and merchandise to the amount of $591.41 for the use of herself and family during that time. She received and accepted the same as a family allowance, and as such the same was duly allowed by order of the county court of Bottineau county on the 28th of March, 1907, and by said court it was duly ordered and adjudged that the defendant pay the same from said estate, and that in case of nonpayment the plaintiff may proceed by action against said administratrix and against the surety on her bond, and on appeal to the district court the judgment of the county court was duly affirmed in June, 1916.

By statute it is provided that the county court may, in its discretion, order such a reasonable allowance out of the estate as shall appear to be necessary for the maintenance of the family during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after the granting of letters testamentary. When the allowance in question was made, the estate was perfectly solvent, and the county court had ample jurisdiction and discretion to make such an allowance. The law allows it and the court awards it.

"The allowance is for the maintenance of the family during the progress of administration, and the maintenance of the family includes keeping its members together and preserving the home relations, as well as merely supplying food, raiment, education, and other like needs."

"No notice of application for the allowance is requisite, and the

court may make the order of its own motion. The right of a widow to a family allowance is one strongly favored, and statutes conferring it are construed with liberality." Though it might have been more regular for the court to have made an order allowing the groceries and family supplies in advance of the furnishing of the same, the result of the subsequent order was just the same as if the order had been previously made. The allowance was in truth an allowance made to the widow herself for the support of herself and her family. It gave her the right, and made it her duty, to pay for such support from the property of the estate. The order was made in her favor against an estate which was perfectly solvent, and the law respects form less than substance.

THE STATE OF NORTH DAKOTA ON THE RELATION OF OLGER B. BURTNESS v. THOMAS HALL as Secretary of State of the State of North Dakota.

TWO CASES.

(163 N. W. 1055.)

Party candidates — nomination of — primary elections — special elections — delegate conventions — repeal of laws.

1. Chapter 109 of the Session Laws of 1907, which provides for the nomination of party candidates for various public offices at primary elections, and declares that for special elections for the offices therein enumerated nominations shall be made as otherwise provided by law; and which concludes with a repeal clause, repealing all conflicting laws in so far as they relate to the provisions of the Primary Election Act,—does not repeal § 498 of the Revised Codes of 1899 nor its cognate sections, authorizing party nominations for public offices in delegate conventions, in so far as those sections are applicable to the making of nominations for offices to be filled at special elections.

Legislature — political parties — perpetuation of — party candidates — public offices — nomination — by parties — delegate convention.

2. Where the legislature, for the avowed purpose of securing the "perpetuation of the political parties," provides for the selection of party candidates for public office by popular vote, and by express enactment retains as a part of the machinery for placing candidates upon the general election ballot, a section

of the statute (Rev. Codes 1899, § 501) authorizing the making of individual nominations by groups of electors independent of party affiliations, it is not to be assumed that the legislature thereby intended to preclude party nominations for elections to which the primary law is expressly declared to be inapplicable.

Primary Election Law — precinct committeemen — original functions — preserved.

3. The Primary Election Law, which authorizes the direct election of precinct committeemen, and which directs how the regular party organization shall be effected, contemplates that all of the original functions previously exercised by party committeemen shall devolve upon the committeemen organized in conformity with the Primary Election Law.

Secretary of state — nominations — certified by — to county auditors — special elections.

4. Section 974, Compiled Laws of 1913, which directs the secretary of state to certify nominations to county auditors not less than thirty days before an election, construed and *held* applicable to special elections.

Australian Ballot Law — elections — general and special — applicable — legislative regulation — appropriate subjects — exception in law.

5. Where a proviso contained in one section of a chapter, the whole of which constitutes the Australian Ballot Law, which is applicable to both general and special elections, excepts the provisions of the particular section from applying to special elections; and where the other sections of the chapter deal with subjects appropriate for legislative regulation of special elections as well as general elections, the exception is not to be read into the other provisions of the chapter.

Secretary of state — ministerial functions — special election — nominating certificate — statutory time in which to file — mandamus — writ of.

6. Where, after the secretary of state has performed all of his ministerial functions in connection with a special election, demands are made upon him, requiring that he file a nomination certificate after the statutory time for filing the same has elapsed, that he make changes in the form of the ballot such as would necessitate the cancelation of individual nominations after the statutory time has elapsed for withdrawing a nomination, and which would require him to honor the choice as to position on the ballot of a candidate having two nominations after the time for the exercise of an option has expired, a writ of mandamus will not issue to compel compliance with the demands.

Party committee — power of — to fill vacancies — election ballot — original nomination by — cannot make.

7. The power of a party committee to fill vacancies on an election ballot, under §§ 977 and 978, Comp. Laws 1913, can be exercised where a vacancy occurs after a regular nomination, but not to make an original nomination.

Opinion filed July 9, 1917.

Original proceeding on writ of mandamus and injunction on the relation of Olger B. Burtness, plaintiff.

Writ and injunctional relief denied.

William Langer, Attorney General, and *H. A. Bronson,* Assistant Attorney General, and *William Lemke,* as *amicus curiæ* for defendant.

B. F. Spalding, R. M. Pollock, A. W. Fowler, J. B. Wineman, and *Fred T. Cuthbert,* for plaintiff.

BIRDZELL, J. This is an application for a writ of mandamus directed to the secretary of state, compelling him to insert the name of Olger Burtness in the Republican column on the ballot to be used at a special election to fill a vacancy in the office of Congressman from the first congressional district of this state. Accompanying the application a petition was presented asking that the secretary of state be enjoined and restrained from causing the names of Charles W. Plain, Fred T. Cuthbert, and H. G. Vick to be certified or printed upon the ballot in any form or place. Both applications having been made in the interest of Burtness as the nominee of the Republican convention, they may properly be considered together. The facts appearing in the affidavits in support of the petitions and in the returns to the order to show cause are as follows: During the month of April, 1917, a vacancy occurred in the office of representative in Congress from the first congressional district of North Dakota, occasioned by the death of H. T. Helgesen, who had represented the district for some time prior thereto. Thereafter, on the 20th day of June, 1917, a delegate convention was held for the purpose of nominating a Republican candidate to fill such vacancy. On the 25th day of May, 1917, the governor called a special election for the purpose of filling the vacancy, setting the date for the election the 10th day of July, 1917. In the governor's proclamation calling the election it was stated that nominations should be made under the provisions of § 501 of the Political Code of 1899, wherein provision is made for making nominations by petition. After the issuance of the proclamation, and more than thirty days prior to the date set for the election, petitions were filed with the secretary of state on behalf of Olger B. Burtness, Charles W. Plain, Fred T. Cuthbert, H. G. Vick, John Baer, and two other persons who are not concerned in this application, each petition bearing the signatures of the requisite number of

electors to place the petitioner in nomination for the office of member of Congress. To each petition except the Baer petition was added, over the signature of the nominee, the request that his name be printed upon the election ballot, as provided by law, as a candidate for said office, and as a representative of the Republican party. On the 20th of June, a Republican delegate convention was held in the city of Grand Forks, resulting in the choice of the petitioner, Olger B. Burtness, as the nominee of the convention. On June 21st, Plain, Cuthbert, and Vick notified the secretary of state of the withdrawal of their respective names as candidates for the office, and each requested and demanded that his name be not certified or printed on the election ballot. The convention nomination of Burtness was duly certified to the secretary of state, and a formal request was also made by the nominee for the printing of his name in the Republican column. This request, after reciting both the convention nomination and the individual nomination, designated the Republican column as that in which the candidate desired his name to appear upon the ballot, and requested publication in that column, and not in the column under individual nominations. Upon the refusal of the secretary of state to comply with these various requests, and upon his refusal to recognize the convention certificate of nomination as entitling the convention nominee to have his name appear in the Republican column solely and exclusively, the petitions herein were filed, asking for the relief above indicated. In the defendant's return, it appears that he had, on the 12th day of June, issued certificates of nomination to each of the candidates nominated by petition as hereinabove set forth, and that on the same day he had duly certified such nominations to the county auditors in the district wherein the election was called. The foregoing statement comprises all the facts which are deemed by us to be material to a determination of the questions raised upon this application.

The chief questions raised and discussed upon the argument in this court on June 26th related: First, to the legality of the delegate convention method of nominating a candidate for election at a special election to fill a vacancy; second, to the regularity of the proceedings had in calling and holding the convention; third, to the applicability of certain sections of the election laws to special elections, particularly those

sections relating to the duties of the secretary of state in certifying nominations and indicating the form of the ballots.

The attorney general contends that, since the adoption of the primary law, no convention may be held for the purpose of making party nominations to fill any office. He argues that § 24 of chapter 109, Sess. Laws 1907, this being the Primary Election Law, operates to repeal entirely those provisions of the statutes which formerly sanctioned the caucus-convention system as a method of making party nominations and continuing the party organization. He fortifies the argument by emphasizing the intent and spirit of the Primary Election Law as compared with pre-existing nominating machinery, and also by specific reference to § 34, chapter 109, Sess. Laws 1907, which expressly preserves § 501 of the Revised Codes of 1899 as a part of the election machinery to be coexistent with the primary election system. This argument is untenable. Section 2 of the Primary Election Law (Sess. Laws 1907, § 2, chap. 109), concludes with the following sentence: "For special elections for the officers enumerated herein [this includes members of Congress] the nominations shall be made as otherwise provided by law." The repeal section of the same chapter (§ 41) reads as follows: "All acts and parts of acts in conflict with the provisions of this act are hereby repealed, *in so far as they relate to the provisions of this act.*" Section 34 is as follows: "Nothing herein contained shall be construed as repealing or being in conflict with § 501 of the Revised Codes of 1905 [1899]." From the language above quoted from the various sections of the Primary Election Law, it is quite apparent that the legislative assembly refrained from making any provision for choosing by the primary election method party nominees for offices to be filled at special elections, and it is equally apparent that it intended that such nominations should be made as otherwise provided by law.

At the time of the adoption of the primary law other methods were provided for making nominations at special elections. According to these methods party nominees could be selected in party conventions and individual nominations could be made by petition or in mass conventions. The fact that the primary law itself makes express provision for continuing in force other existing methods for the making of individual nominations, while, at the same time, providing that nominations preceding special elections may be made as otherwise provided by law, is

a strong indication that the legislature desired to continue the then existing method of making party nominations for special elections. Section 501, Revised Codes of 1899, provides for the making of individual nominations, *not* party nominations, and it is not inconsistent with the primary law as applied to regular primary elections. The legislature has very properly determined that the two methods may coexist. The primary election is substituted for the convention as a means of securing party representation upon the general election ballot, and those who do not care to vote for any candidate who represents a party upon the general election ballot are given the right, regardless of party, to nominate an adherent of their principles who may run as an individual nominee. It has been established by adjudications in our sister states that nominations under sections similar to § 501, Rev. Codes 1899, are not entitled to be considered as party nominations. Phillips v. Curtis, 4 Idaho, 193, 38 Pac. 405; State ex rel. Woody v. Rotwitt, 18 Mont. 502, 46 Pac. 370;; Atkeson v. Lay, 115 Mo. 538, 22 S. W. 481; McCrary, Elections, § 702.

It is true that the supreme court of Minnesota, however, yielding to a custom of making party nominations in sparsely settled counties in mass conventions, has held that the nominees of mass conventions, properly called and held in obedience to such custom for the purpose of placing in nomination candidates to represent a party, were entitled to recognition on the general election ballot as the representatives of such party. See Manston v. McIntosh, 58 Minn. 525, 28 L.R.A. 605, 60 N. W. 672. But such holding in no way detracts from the general rule that the primary purpose of sections similar to § 501, Rev. Codes 1899, which is an integral part of the Australian Ballot Law, is to secure to the electors the right to have the names of candidates placed upon the ballot to represent principles other than those advanced by regular party representatives. We can see nothing in the section of the primary law, which merely continues in force the method according to which individual nominations may be made, that in any way conflicts with the right of the adherents of a political party to secure proper recognition for the party on the general election ballot. Bearing in mind that the repeal clause of the Primary Election Law only purports to repeal conflicting acts in so far as they relate to the provisions of the primary law, and that the law itself expressly excepts its provisions from special elec-

tions, there can be nothing in the primary law to operate as a repeal by implication of the pre-existing laws, providing other means of securing party representation upon a special election ballot. Were this not clear from a reading of the act itself, and from the considerations hereinbefore referred to in this opinion, an additional cogent reason for an interpretation such as we have adopted would seem to lend assurance to the views expressed. Unless pre-existing methods for making party nominations at special elections continue in force, political parties are entirely precluded from representation upon such special election ballot, and this by the operation of a law that was avowedly designed to *perpetuate* as well as purify political parties. See the title of chapter 109, Sess. Laws 1907. The argument of the attorney general mainly resolves itself into an argument for the implied repeal of the pre-existing caucus convention method on account of the radically different policy evinced by the adoption of the primary law, and in this connection the argument is made that the Primary Election Law even provides in detail for the perpetuation of party committees by the direct election of precinct committeemen at the primary election. It is true that the primary election system does differ radically from the delegate convention system, and it cannot be disputed that the delegate convention system is entirely supplanted so far as regular elections are concerned. But, in view of the express exception in § 2 of the Primary Election Law, and in view, further, of the considerations previously mentioned, this argument can have no effect as to special elections. As to that part of the argument that is drawn from the different methods of constituting the party committees, it confuses function with choice. There can be no doubt that it is no longer competent for electors to choose party committeemen according to methods formerly in vogue, but neither is there any doubt that the legislature contemplated that committeemen, chosen according to the plan of the Primary Election Law, might be called upon to perform the functions ordinarily devolving upon party committeemen in connection with special elections, as well as in connection with general elections. There is but one committee for each party, and special elections do not furnish occasion for changing the personnel of or reconstituting party committees. The Primary Election Law does not recognize new officers for the administration of party affairs; it merely pro-

vides a different method of selecting such officers as experience had demonstrated a need for in handling the affairs of the party.

As to the regularity of the proceedings had in calling and holding the convention, we think little need be said. This, for the reason that, in our opinion, the convention was not held in such time as to entitle the nominee thereof to a place upon the ballot as a party nominee. Furthermore this issue is not directly raised by the pleadings. The executive proclamation calling the election is dated on May 25, 1917, and it fixes the date of the election as July 10, 1917. The validity of the executive act in this connection is not questioned. It determines absolutely for all purposes of this application the date of the election. We are not disposed to consider the effect, from any standpoint, of calling the election for the date named. As to the functions of the state central committeemen, the chairman of the state central committee, and the national committeeman in connection with the calling of the convention, and as to the propriety or the regularity of the call made by the national committeeman in conjunction with certain members of the Republican state central committee of the first congressional district, and of their ignoring the chairman of the state central committee, no question properly calling for a decision is raised. But one convention was held, and no one claims a superior right to represent the Republican party as its convention nominee. Furthermore, this application must necessarily be disposed of adversely to the relator, by considerations wholly apart from the regularity of the convention. This leads us to the third question discussed upon the argument.

Counsel for the relator contend that the statutory provision (Comp. Laws 1913, § 994) regulating elections in general has no application to special elections, so far as time for certifying nominations is concerned. This argument is drawn largely from § 973, Comp. Laws 1913, but in our opinion the language of this section does not warrant so broad a conclusion. This section originally appeared as § 8 of chapter 66, Session Laws of 1891. It then provided that the certificates of nominations to be filed with the secretary of state should be filed not more than sixty days or less than thirty days before the date fixed for the holding of the election, and that the certificates of nomination to be filed with county auditors should be filed not more than sixty days, and not less than twenty days, before the election; and it contained the

proviso that the *section* should not apply to nominations for special elections. It was doubtless the intent of the proviso to enable nominees to file certificates with the county auditor less than twenty days before a special election, and with the secretary of state twenty-five days before a special election, but, in our opinion, it was not intended to remove all limitations as to the time for filing certificates of nomination for special elections. It is significant that the immediately following section (§ 9, chapter 66, Sess. Laws 1891) requires the secretary of state to certify the nominations filed with him not less than twenty-five days (now thirty days) before an election, and there is no proviso excepting this section from operation in connection with special elections. Clearly the proviso of § 8 does not relate to the same subject-matter. That section limits the time for the filing of certificates of nomination with the secretary of state to not less than thirty days, whereas § 9 deals with the certification of nominations by the secretary of state to the county auditors within the minimum period of twenty-five days. Before the proviso can be held to extend to § 9 by implication, it must be shown to relate to the same subject-matter, and that this subject-matter is affected in the same way.

It must be remembered that the sections under discussion are but parts of the original Australian Ballot Law, adopted in 1891, which was intended to apply as a whole to both special and general elections. It makes a radical change from the pre-existing laws on the subject, and it provides in considerable detail for the administration of the system therein inaugurated. It specifies that certain certificates of nomination shall be filed with county auditors and others with the secretary of state. It is specific as to the time for the filing of certificates of nomination and certifying them to other officers whose duty it may be to provide for the printing of the ballots in order that they may be in turn distributed by yet another set of officers. Public notice of nominations is required to be given for a period of ten days, and such notice is peculiarly important as applied to special elections. McCrary, Elections, §§ 182–185. The adoption of counsel's argument would leave special elections absolutely devoid of legislative regulation in regard to many matters covered by the original Australian Ballot Law, which matters are as appropriate subjects of legislative regulation in connection with special elections as with general elections. It would require

us to ignore provisions which the legislature has deemed it wise to adopt in order to regulate a matter clearly and peculiarly within its scope. Instead of reading the exception contained in § 973, Comp. Laws 1913, into every other provision of the election laws, we are impressed that it is more proper to follow the maxim, *"Expressio unius est exclusio alterius."*

In the defendant's return it appears that a certificate, purporting to certify to the nomination of John M. Baer as the nominee of the Republican party, has been presented to the defendant. The certificate purports to be that of the executive committee of the Republican state central committee, and, in support of such nomination of Baer, it is urged that if, in any event, any Republican nomination was proper to be received and filed after the time fixed by statute, such nomination of Baer is the only one that could be recognized. So little argument was advanced in support of this claim that we feel justified in saying that it was not seriously urged. At any rate, it was only presented for consideration in case it should be held that a Republican nominee was entitled to a place on the ballot in the party column. It is clear, however, that neither the executive committee nor the state central committee would have power to make an original nomination. This could only be done by convention, regularly called in accordance with the statutes and the customs and practices of the party, or by primary election, where authorized. The power of party committees to fill a vacancy on the ticket, under §§ 977 and 978, Comp. Laws 1913, is only a power to supply a nomination where one has been made but has since become vacant.

Since, then, the provisions of our Political Code, which make it the ministerial duty of the secretary of state to receive certificates of nomination and to abide by requests of nominees as to the appearance or nonappearance of the names upon the ballots, are equally applicable to special elections and general elections, since the provisions as to the time for doing the various acts required are a proper exercise of legislative control binding upon this court as well as upon the secretary of state, and since the ministerial duties devolving upon the secretary of state in connection with the special election in question had been fully performed before the various requests hereinbefore referred to

were made, it follows that there is no duty devolving upon the defendant which can be enforced by this court.

For the reasons indicated, the mandatory writ and injunctional relief asked for by the relator and plaintiffs are denied, as is also the request made on behalf of defendant for recognition of Baer as the Republican nominee.

GRACE, J. I concur in result.

ROBINSON, J. (concurring specially). This motion does not involve any dollars or cents, nor the right to an office. It is merely a contest for a party label. It is a political motion in which certain parties are sparring for an advantage at a special election for representative in Congress to succeed the late Mr. Helgesen. It is an attempt to resurrect the old political caucus and convention system which has been dead and buried for a score of years.

Pursuant to authority by law vested in the governor on May 25, 1917, he issued a proclamation calling for a special election to be held on July 10, 1917; and in the proclamation it is stated that the nominations of candidates to be voted for shall be made under § 501 of the political Code of 1899, wherein provision is made for nomination by petition, and that the public and election officers take notice and act accordingly.

On May 20, 1917, the secretary of state issued a proclamation reciting that of the governor, and stating that under the ruling of the attorney general nominations must be made by petition, pursuant to § 501 of the Code of 1899, and that all candidates will be required to file their petitions in the office of the secretary of state not less than thirty days prior to the date of the election.

Pursuant to the statute and the proclamation, Olger B. Burtness and several other parties filed certificates of nomination thirty days before the election, and in like manner John M. Baer, of Fargo, filed a certificate of nomination signed by several thousand voters. (Seven thousand it is said to be.) He also filed a certificate of nomination signed by William Lemke and others as the chairman and executive committee of the Republican state central committee. The statute provides that, not less than twenty-five nor more than thirty days before

the election, the secretary of state shall certify to each county auditor the name and postoffice of every person nominated; and that at least ten days before the election the several county auditors shall publish the nominations in one or more newspapers; that when any person declines a nomination he must give written notice to the secretary of state twenty-five days before the election. The purpose of this time limit is that the secretary of state may have proper time to certify the nominations to the several county auditors.

Now it appears that at Grand Forks on June 20, 1917, twenty days before the election, there was held a convention of 196 persons, claiming to be Republican delegates of the first congressional district, and that at such convention Olger B. Burtness was declared the nominee of the Republican party for representative in Congress, and he offered to file a certificate of such nomination with the secretary of state; and the secretary declined to file it, insisting that the nominations must be made according to the statute and the proclamation of the governor. Now, though the nominations may have been certified to the county auditors before the holding of the Grand Forks convention, and though the ballots may have been printed, the court is asked to issue a mandate to the executive department or the secretary of state commanding him, in effect, to undo all that he has done, and to permit Mr. Burtness and other candidates to decline and withdraw their nominating petitions and to file his nominating certificate, and to certify such nomination to the county auditors, so that the name of Burtness may appear on the ballot as the Republican candidate. It is claimed that the Grand Forks convention was held in accordance with the old caucus and convention system which has not been in use since the adoption of the Primary Election Laws; but there is no proof to sustain such claim, and the presumption is against it. In fact, after the date of the governor's proclamation, the time was not sufficient for the giving of notices, the holding of caucuses, the holding of county conventions, and the election of delegates to a congressional convention. And it does not appear that the call for such a convention was made by any authorized person, nor that any person had a right to overrule the governor and the executive department in regard to the manner of making the nominations. It was purely a political and party act; and the governor, the secretary of state, and the attorney general had been elected as Republi-

cans by a great majority, and, in the language of President Wilson: The governor was the captain of the team. It was for him to give orders to play ball. The convention was not called by the chairman of the Republican state central committee, or by anyone having special authority, or any authority, to call such a convention. The court must take judicial notice of the fact that William Lemke is the chairman of the state central committee of the Republican party. He is, in effect, the bishop of the Republican party, and he is to be honored and respected accordingly. He is not to be overruled or ignored by any political ex-bishops, ex-deacons, or ex-anything, because his views differ from their views. The Scriptural command is: Obey them that have rule over you. That is the way to avoid anarchy, and it is the way to prevent a house, a party, or a state from falling by reason of being divided against itself. If it were proper to call a Republican convention to nominate a person to represent the state of North Dakota in Congress, the call should have been made by the governor or by the chairman of the Republican state central committee, and by no other person or persons.

However, it is entirely clear that the old caucus system has been wholly abrogated. At general elections all party nominations must be made in accordance with the Primary Election Laws. At either general or special elections, individual or independent nominations may be made by procuring and filing with the secretary of state a certificate of nomination signed by the requisite number of voters, as provided for by § 501, Code 1899; Laws 1891, chap. 66; Laws 1893, chap. 60; and in that way the nominations in question were duly made and certified to the county auditors,—and that is the end of the matter. The only purpose of this proceeding is to secure a party label for one of the candidates. It is not the province of the court to label them or to supervise the political discretion and action of the executive department. Full faith and credit must be given to the official action of the Republican central committee and its chairman, yet the nomination of John M. Baer must rest on his petition, signed by thousands of voters, in accordance with the statute and the proclamation of the executive department. We do not overlook the fact that the time limit fixed by the statute for the doing of certain things does not necessarily apply to a special election, but in this case it was necessary and proper for

the executive department, in issuing its call for a special election, to fix a time limit so as to make the election practicable, and its action must be sustained. The order to show cause is dismissed.

P. J. STOFFELS v. GEORGE J. BROWN, as Sheriff of Stark County, North Dakota.

(163 N. W. 834.)

Personal property — mortgage on — bill of sale — estoppel — waiver — agency — jurisprudence — maxim of — act of third person — one of two innocent persons — negligent one must suffer.

It is a maxim of jurisprudence, when one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer.

Opinion filed March 3, 1917. Rehearing denied July 10, 1917.

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

Affirmed.

Linde & Murphy and *M. L. McBride,* for appellant.

A mortgagee can no doubt waive the mortgage by his conduct, but in this case there is not the slightest legal or other evidence to show a waiver, by acts or conduct, and in addition there is the direct and positive evidence of the mortgagee that he did not waive his mortgage, but expected it to be paid out of the proceeds of the sale to be consummated in his office. New England Mortg. Secur. Co. v. Great Western Elevator Co. 6 N. D. 407, 71 N. W. 130.

There must be a showing of either direct or implied consent to waive the mortgage. Peterson v. St. Anthony & D. Elevator Co. 9 N. D. 55, 81 Am. St. Rep. 528, 81 N. W. 59; Driscoll v. Murphy, 59 Neb. 210, 80 N. W. 813; Seymour v. Cargill Elevator Co. 6 N. D. 444, 71 N. W. 132; Trabue v. Wade, — Tex. Civ. App. —, 95 S. W. 616; Bowman v. Eppinger, 1 N. D. 21, 44 N. W. 1000.

There being no evidence of waiver or release of the mortgage in this case, there was question of fact in such connection to be submitted to

the jury; and the court should have directed a verdict for defendant, or defendant's motion for a new trial should have been granted. State Bank v. Bismarck Elevator & Invest. Co. 31 N. D. 102, 153 N. W. 459; Jones, Ev. p. 906; Star Wagon Co. v. Matthiessen, 3 Dak. 233, 14 N. W. 107; Dickinson v. Hahn, 23 S. D. 65, 119 N. W. 1034; Lowry v. Piper, 20 N. D. 637, 127 N. W. 1046.

F. E. McCurdy and *H. E. Haney,* for respondent.

A mortgagee may waive his mortgage by his silence, his acts and conduct, or by oral declarations. Whether or not he does so in any contested case, and where this is a material and disputed matter, is very properly a question for the jury, and the trial court committed no error in submitting such question to the jury, and there being substantial evidence to sustain the verdict, it should not be disturbed. Simmons v. McConville, 19 N. D. 793, 125 N. W. 304.

Plaintiff had actual notice of the mortgage when he purchased the property of the mortgagor, but he insisted that this be cared for, and was told by the mortgagor that he had authority from the mortgagee to sell and would procure and execute a bill of sale, which he thereafter did, and it appears that the bill of sale was drawn and witnessed by the mortgagee. New England Mortg. Co. v. Great Western Elevator Co. 6 N. D. 407, 71 N. W. 130; Peterson v. St. Anthony & D. Elevator Co. 9 N. D. 55, 81 Am. St. Rep. 528, 81 N. W. 59; Seymour v. Cargill Elevator Co. 6 N. D. 444, 71 N. W. 132; 2 C. J. 594; Equitable Loan & Secur. Co. v. Lewman, 3 L.R.A.(N.S.) 879 and note, 124 Ga. 190, 52 S. E. 599; Golding v. Brennan, 183 Mass. 286, 67 N. E. 239.

An agent has implied authority to do whatever is usual and necessary in the particular transaction in which he is engaged, and where one has authority to *sell* and *deliver* property, he has authority to collect the purchase money. 2 C. J. pp. 595, 600, §§ 231, 234.

Robinson, J. This is a suit against Mr. Brown, the sheriff of Stark county, to recover possession of personal property—a gray mare and colt—taken by him under a mortgage made by one Kramchuck.

As the complaint and the evidence shows, the plaintiff purchased the property in good faith for the sum of $175, receiving a bill of sale made by the mortgagor and owner of the property, and written, witnessed,

and acknowledged by M. L. McBride, who now claims the property under a chattel mortgage. The bill of sale shows payment by P. J. Stoffels; it conveys the property to P. J. Stoffels; it grants title to P. J. Stoffels; it delivers the property to P. J. Stoffels. Four times his name is written in the bill of sale by the same McBride who now seeks to avoid the bill of sale by him written, witnessed, and acknowledged as a notary public. The jury found a verdict for the plaintiff and against McBride, and he appeals, claiming that the evidence is insufficient to sustain the verdict. It is claimed there is no testimony showing that McBride had waived his mortgage lien or consented to a sale of the property without payment of the purchase price to him, but on this point the bill of sale was sufficient evidence to justify the verdict of the jury. It is in the usual form. It is signed by the mortgagor of McBride; it is in the handwriting of McBride; it discloses property included in his mortgage; it is witnessed by M. L. McBride; it is acknowledged by him as a notary public and given under his official seal. In the bill of sale the name of P. J. Stoffels is written four times by the hand and pen of McBride, and the writing appears to be that of a competent business man. If he did not trust his mortgagor to deliver the bill of sale and to receive the purchase price of the mare and colt, it were easy for him to have written in the bill of sale: "The purchase price must be paid to M. L. McBride." It is a maxim of jurisprudence that where one of two innocent parties must suffer for the act of a third, he by whose negligence it happened must be the sufferer. The bill of sale was a power of attorney to the mortgagor to deliver the bill of sale and to receive the purchase money. The judgment of the District Court is clearly correct, and it is affirmed.

CHRISTIANSON, J. (dissenting). I have no quarrel with the doctrine of law announced in the majority opinion when applied in a proper case. That doctrine is declared by our statutes to be one of the maxims of our jurisprudence (Comp. Laws 1913, § 7277). The trouble with the majority opinion is that the writer of that opinion has formulated a statement of facts in disregard of the evidence contained in the record, so as to bring the case within the maxim, rather than applied the maxim to the facts as established by the evidence.

There is no material conflict in the evidence in the case. The only possible question of fact is what inferences are to be drawn from certain uncontroverted facts. It is undisputed that one McBride held a chattel mortgage on the horses involved in this controversy, properly executed and delivered to him by one Kramchuck, who at that time was the owner of the horses. It is also undisputed that the mortgage was duly recorded in the office of the register of deeds of Stark county. The debt secured by the mortgage was past due and McBride, who had been trying to collect the same, caused Kramchuck to be called to his office with respect to the matter. The only evidence as to what took place at that time is the testimony of McBride. According to McBride's testimony, Kramchuck stated that he was unable to make any payment on the indebtedness, and requested permission to sell some of the property covered by the mortgage, for the purpose of paying off McBride's mortgage. Kramchuck further requested that McBride release his mortgage, which McBride refused to do, stating that he would release such mortgage only when the purchaser was brought to his office and the purchase price paid over to McBride and applied on the indebtedness. Kramchuck thereupon requested McBride to prepare for him a bill of sale of the horses involved in this controversy, which McBride did.

McBride testified positively that the name of the plaintiff was not written into the bill of sale by himself, but that he left a blank space where such name might be inserted.

It is undisputed that Kramchuck thereafter sold the horses to the plaintiff Stoffels. There is no dispute in the evidence as to what took place at the time of the sale. The only evidence as to what took place at that time is the testimony of the plaintiff, and his son Peter, and his son-in-law, Frame.

The plaintiff Stoffels testified, on his direct examination, as follows:

Q. Was there anything said at the time he talked to Kramchuck about whether or not the horses were clear?

A. There was a mortgage against the horses held by Mr. McBride, but he had the bill of sale to them . . .

Q. Did Kramchuck tell you that McBride had a mortgage on the horses?

A. Yes. . . .

Q. Did you afterwards pay for the horses?

A. If the horses were delivered with proper papers, the bill of sale, he would order Mr. Frame to pay them at the elevator.

Q. Did Frame afterwards pay for the horses according to his order?

A. Yes.

The son, Peter Stoffels, testified:

Q. And when you talked to Kramchuck out there, was there anything said about there being a mortgage on the horses?

A. Yes.

Q. What was said.

A. Well, we was down there and Frame told him he got a mortgage down there, Mr. Frame told Kramchuck that he had a mortgage against *it and he say when he put the mortgage off we pay him $175 when he bring us a bill of sale.*

Frame testified:

Q. Were you with them at the home of Kramchuck when they saw these horses in question?

A. Yes.

Q. What, if any, deal was made at that time?

A. I think they made an agreement of this kind with Kramchuck; that they were to take the horses home with them and keep them a few days and try them out to see if they proved satisfactory in working, and so on, and if they did they were to pay him $175 for the mare and colt, the two horses they got of him, *if he would get a release and bill of sale* from Mr. McBride. *McBride* had a mortgage on the horses.

It is asserted in the majority opinion as a fact that the name "P. J. Stoffels" appearing in the bill of sale is in the handwriting of McBride. This assertion, however, is not substantiated by one word of testimony, and is directly contrary to the positive testimony of McBride. And McBride's testimony to this effect is strongly corroborated by certain facts and circumstances in the case, and to some extent by the testimony of the plaintiff and one of his witnesses.

It will be noted from the testimony of the plaintiff, quoted above, that at the time the plaintiff received the horses Kramchuck stated that he (Kramchuck) then had a bill of sale. It also appears from the testimony of Frame that the horses were sold and delivered condi-

tionally to the plaintiff on that day, in order that he (plaintiff) might "keep them a few days and try them out to see if they proved satisfactory in working, and so on." It further appears from the testimony of Frame that Kramchuck did not deliver the bill of sale until some days thereafter. Hence, if Kramchuck had the bill of sale at the time he made the conditional sale and delivered the horses to the plaintiff, such bill of sale must have been prepared before he went to see Stoffels about the sale of the horses. The bill of sale, therefore, must have been prepared without any definite purchaser in view to be utilized whenever Kramchuck found a purchaser for the horses. Under such circumstances it would have been necessary to leave the space provided in the bill of sale for the name of the purchaser, in blank, in order that such name might be inserted, when the purchaser was found. The evidence also shows that McBride and the Sheriff spent considerable time in making search and inquiry to ascertain the whereabouts of the horses after Kramchuck had left the country. If it is true, as asserted in the majority opinion, that McBride knew that Kramchuck intended to sell the horses to Stoffels, obviously such search would have been unnecessary. These various inferences certainly tend to corroborate the testimony of McBride, rather than to contradict it.

The statement in the majority opinion must, therefore, be based upon comparison of handwriting by the members of this court. The only specimen of McBride's handwriting in the record is the bill of sale itself. And with all due respect to the expert knowledge of the writer of the majority opinion, an examination of the bill of sale leads me to the conclusion that the name "P. J. Stoffels" appearing in the bill of sale is not in the handwriting of McBride. The letters S. t and f, and the combination of the letters S and t in the word "Stoffels" are in every instance differently formed from where these letters or a combination thereof appear in other words written in the bill of sale.

The maxim set forth in and upon which the majority opinion is based involves negligence on the part of one party, and resulting injury to the other by reason of such negligence.

One of the essential elements of an equitable estoppel is that the person claiming the benefit thereof must have been misled and induced by the words or conduct of another to alter his position in such way that he will be injured if the other person is not held to the representation

or attitude on which the estoppel is predicated. 10 R. C. L. p. 697, § 25. "The vital principle is," said the United States Supreme Court (Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618), "that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations on which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault." "Acts done or knowledge acquired subsequent to the transaction out of which the estoppel is claimed to arise can have no bearing upon the question. The representation or conduct relied on to raise the estoppel must have been concurrent with or anterior to the action which they are alleged to have influenced." 16 Cyc. 741.

There is no contention on the part of the plaintiff that McBride's conduct induced plaintiff to purchase and pay for the horses. In fact, there is not even an intimation on the part of the plaintiff or any of his witnesses, that the plaintiff knew that McBride had prepared the bill of sale. And the undisputed testimony shows that the plaintiff did not know McBride at the time he purchased the horses, and that the plaintiff and McBride had never met until the day of the trial of the present action. Manifestly the doctrine of estoppel can have no application unless it was shown that plaintiff had knowledge of McBride's conduct, and that it was plaintiff's knowledge of and reliance upon such conduct which induced him to purchase the horses without requiring a release of the mortgage.

The principle of estoppel discussed in and upon which the majority opinion is based, was not even suggested in the trial court.

The only contention made by the plaintiff upon the trial, and the only question considered in the court below and submitted to the jury for determination, was whether McBride by his conduct constituted Kramchuck his agent to make sale of the horses, and thereby waived his chattel mortgage lien thereon.

While waiver may be said to belong to the family of estoppel, and the doctrine of estoppel to lie at the foundation of the law of waiver, they are nevertheless distinguishable terms, and there are several essential differences between the two doctrines.

"Waiver is the voluntary surrender of a right, estoppel is the inhibition to assert it from the mischief that has followed, waiver involves both knowledge and intention; an estoppel may arise where there is no intent to mislead; waiver depends upon what one himself intends to do, estoppel depends rather upon what he caused his adversary to do; *waiver involves the acts and conduct of only one of the parties, estoppel involves the conduct of both.*" 40 Cyc. 256. "A waiver exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon that right." 40 Cyc. 259.

"The question of waiver is mainly a question of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such *it must in all cases be intentional.* There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other is estopped thereby." 40 Cyc. 261. Waiver is a matter of fact to be shown by the evidence. 40 Cyc. 267. And the burden is upon the party claiming the waiver to prove it by the preponderance of evidence. 40 Cyc. 269. Waiver is a mixed question of law and fact. And as it is mainly a question of intent; and since intent is an operation of the mind, it should be proved and found as a fact, and is rarely to be inferred as a matter of law. But when only one inference can be drawn from the facts, as established by the evidence, it is the duty and province of the court to determine such question as one of law. 40 Cyc. 270.

It is a rule of law in this jurisdiction that unconditional consent, by a chattel mortgagee that the mortgagor may sell the whole or any part of the mortgaged property is to that extent a waiver of the mortgage lien. But when the mortgagee gives merely a conditional consent, "and the conditions imposed relate directly to matters connected with the sale itself, and not merely to promises or acts to be performed by the mortgagor after the completion of the sale,—then the consent does not become availing or effective until the condition is performed. . . . In the case of Whitney v. Heywood, 6 Cush. 82, the supreme court of Massachusetts held that, where the parties to a mortgage indorsed thereon an agreement that, if the mortgagor should sell any of the property, the mortgagee should discharge all claim on the same upon the receipt of the money therefor, that this agreement was conditional, and gave no

authority to the mortgagor to divest the mortgagee's interest in the property by a sale, except upon a performance of the condition of paying the purchase money to him. The purchaser in such case, if he knew of the agreement, knew all its qualifications and conditions precedent, and was properly bound by them. If he had no such knowledge, and the mortgage was duly recorded, he bought the property subject to the mortgage, and was bound to know that the mortgagor had no right to sell." Shortridge v. Sturdivant, 32 N. D. 154, 159, 155 N. W. 20.

In the case at bar as already stated the only evidence with respect to the conditions under which the bill of sale was prepared, and the authority, if any, given by McBride to Kramchuck to sell the mortgaged property, appears in McBride's testimony. And in order that there may be no misunderstanding as to whether McBride gave Kramchuck unconditional permission to sell the horses, and intended to waive his lien, I desire to quote this testimony as it appears in the record.

Q. And how did you come to draw the bill of sale, at whose request, and so on?

A. Well, I had sent for Kramchuck sometime before that and he had not showed up, and he came up to the office on the date this was drawn, and stated that he wasn't able to make payment of the note and he wanted to dispose of some of the property to pay it with, and he wanted me to give him satisfaction of the mortgage so that he could dispose of the stuff, and I told him I wouldn't do it. I told him that if he wanted to sell this stuff, after he had found the parties to dispose of it, to bring them down to me and pay me the money, and I would give them satisfactions.

In this connection it should be mentioned that the plaintiff called the coroner Davis apparently for the purpose of impeaching McBride's testimony by showing a certain statement made by McBride at the time Davis served on McBride a notice that plaintiff required defendant's sureties upon the redelivery bond to justify. On direct examination Davis testified: "As I remember the conversation that took place there at the time that McBride said that, if this Kramchuck, I believe the name was, had done as he agreed when he sold this property, that this matter would have been all settled up." Upon his cross-examination Mr. Davis admitted that there was considerable more conversation had,

and that McBride in such conversation probably told of his refusal to give a satisfaction to Kramchuck, and might have said that although he (McBride) never made any agreement to satisfy the mortgage and wouldn't do it, still if he (McBride) could have gotten hold of Kramchuck in any way and gotten the money out of him, the present lawsuit would never have arisen. It seems to me that it is wholly immaterial which version of the conversation be accepted. Manifestly the statement testified to by Davis as having been made by McBride is not at all inconsistent with McBride's testimony upon the trial. Of course if Kramchuck had done nothing further than McBride says he authorized him to do, the lawsuit would never have arisen.

I have quoted in this opinion every iota of evidence contained in the record with respect to the authority given by McBride to Kramchuck. And the record will be searched in vain for any other evidence, fact, or circumstance bearing on this question.

It is also asserted in the majority opinion that McBride constituted Kramchuck his agent for the purpose of selling the horses. Under our laws, an agency is either actual or ostensible. Comp. Laws 1913, § 6322. An agency is actual when the agent is really employed by the principal. Comp. Laws 1913, § 6323. And an agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent, who is not really employed by him. Comp. Laws 1913, § 6324. An agent has such authority as the principal actually or ostensibly confers upon him. Comp. Laws 1913, § 6336. Actual authority is such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess. Comp. Laws 1913, § 6337. Ostensible authority is such as the principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess. Comp. Laws 1913, § 6338.

Ostensible agency, as well as ostensible authority, rests on the principle of estoppel, and for the reasons already stated, the facts in this case do not warrant the application of the principle of estoppel, as there is no contention that Stoffels had any knowledge of or placed any reliance upon anything that was said or done between Kramchuck and McBride. If Kramchuck was McBride's agent, such agency and the agent's authority must have been actual.

It is wholly immaterial whether the pivotal question in this case be deemed one of agency or of waiver. The result must be the same. In either case the plaintiff had the burden of proof, and must establish the material facts involved by a fair preponderance of the evidence. If the question be deemed one of agency, plaintiff must establish the fact of agency and the agent's authority by a preponderance of the evidence. Martinson v. Kershner, 32 N. D. 46, 155 N. W. 37. If the question be deemed one of waiver, plaintiff must establish, by a preponderance of the evidence, the fact of waiver including McBride's intention to waive his lien. 40 Cyc. 269. The undisputed testimony shows that McBride refused to release his mortgage lien, and that the plaintiff had not only constructive but actual notice of the execution of such lien thereof at the time he purchased the horses. I do not believe that the plaintiff sustained his burden of proof.

On Petition for Rehearing.

BIRDZELL, J. (concurring specially). I concur in the result reached in the original opinion, written by Mr. Justice Robinson, but I am not convinced that the name of Stoffels, appearing in the bill of sale, was written by McBride, nor do I believe that it makes any difference whether McBride, Kramchuck, or some third person wrote in the name "P. J. Stoffels" where it appears in the bill of sale. As I view the case it presents a question of agency, rather than of waiver or of estoppel. There is evidence to the effect that McBride authorized the mortgagor to sell the horses, collect the purchase price, and pay it to him to apply on the mortgage indebtedness.

It is true that McBride testifies that he prepared the bill of sale at Mr. Kramchuck's request, and that he told him at the time that, if he wanted to sell the horses, he should bring the parties to him and pay him the money, and he would give them satisfactions: but in my judgment there are other facts and circumstances in the case, from which the jury would have been warranted in finding an agency. It is difficult to see why McBride, a lawyer, would arm Kramchuck with a bill of sale witnessed by him, if he expected to have any prospective purchasers brought to him before the price was to be paid. The witness Davis testified that upon one occasion when he was in Mc-

Bride's office, McBride said that if Kramchuck had done as he agreed when he sold this property this matter would have been all settled up. In my opinion there was sufficient evidence to warrant the submission of the question of agency to the jury.

The trial court's instruction upon this was proper, and, finding no error in the record, I concur in an affirmance of the judgment.

BRUCE, Ch. J., and GRACE, J. I concur in the above opinion.

CHRISTIANSON, J. I adhere to the views expressed in my dissenting opinion.

FRANK GLINSKI v. JAMES KOWALSKI, John Czapiewski, and the Township of Ardoch.

(163 N. W. 1069.)

Highway — on section line — located — established — graded — many years standing — impeachment of — vacating — convincing proof of error.

Where a section-line highway has been for many years located, graded, and established with due care and in manifest good faith, it may not be impeached without clear and convincing proof of error.

Opinion filed July 10, 1917.

Appeal from the District Court of Walsh County, Honorable *W. J. Kneeshaw,* Judge.

Plaintiff appeals.

Affirmed.

Bangs & Robbins, for appellant.

The original government-survey posts, mounds, and monuments govern and control as to survey corners, section and boundary lines. U. S. Rev. Stat. §§ 2395, 2396, Comp. Stat. 1916, §§ 4803, 4804, 6 Fed. Stat. Anno. 363, 367; Radford v. Johnson, 8 N. D. 182, 77 N. W. 601; Propper v. Wohlwend, 16 N. D. 110, 112 N. W. 967; Nystrom v. Lee, 16 N. D. 561, 114 N. W. 417.

Where such original monuments can be located definitely, they control absolutely over all other evidence, including plats and field notes. Arneson v. Spawn, 2 S. D. 269, 39 Am. St. Rep. 783, 49 N. W. 1066; Randall v. Burke Twp. 4 S. D. 338, 57 N. W. 4; Dowdle v. Cornue, 9 S. D. 126, 68 N. W. 194; McGray v. Monarch Elevator Co. 16 S. D. 109, 91 N. W. 457; Tyler v. Haggart, 19 S. D. 167, 102 N. W. 682; Unzelmann v. Shelton, 19 S. D. 389, 103 N. W. 646; Thayer v. Spokane County, 36 Wash. 63, 78 Pac. 200; Washington Rock Co. v. Young, 29 Utah, 108, 110 Am. St. Rep. 666, 80 Pac. 382; Kleven v. Gunderson, 95 Minn. 246, 104 N. W. 4; Stonewall Phosphate Co. v. Peyton, 39 Fla. 726, 23 So. 440; Wheeler v. Benjamin, 136 Cal. 51, 68 Pac. 313; 9 C. J. § 18, p. 64.

In the event of such monuments becoming destroyed or extinct, then there must be a relocation thereof, according to the government survey and field notes. 9 C. J. § 19, p. 165; Weaver v. Howatt, 161 Cal. 77, 118 Pac. 519, 171 Cal. 302, 152 Pac. 925.

New monuments cannot be supplied in any other way. Hale v. Ball, 70 Wash. 435, 126 Pac. 942; Inmon v. Pearson, 47 Wash. 402, 92 Pac. 279; Yolo County v. Nolan, 144 Cal. 448, 77 Pac. 1006; Weaver v. Howatt, 161 Cal. 77, 118 Pac. 519, 171 Cal. 302, 152 Pac. 925.

The testimony of the surveyors is of no more value than that of other witnesses. Radford v. Johnson, 8 N. D. 184, 77 N. W. 601.

H. C. DePuy, for respondents.

The surveyor who made the survey, the chain carrier who assisted him, and other nonexperts, may testify as to the locating of the lines upon the ground. 2 Enc. Ev. 713, 727.

Robinson, J. The plaintiff owns certain land extending for half a mile on the west side of the highway between sections 2 and 3 in township 155, range 52. He claims that the highway as laid out and graded is out of line, and that it takes from his land a strip from 2 to 4 or more rods wide, for which he demands damages. He appeals from the judgment and findings of the trial court, which are in effect:

That the certain line of the public highway between sections 2 and 3 does not encroach upon the land of the plaintiff situated in section 3, and that the highway is wholly to the east of a line 2 rods west of the true section line between said sections.

It appears that some twenty years ago the location of the same line was in dispute, and that several surveys were made for the purpose of establishing the true line, and that the highway for many years graded, used, and established is located according to careful surveys made by the county surveyor and others. While it is not possible to prove to an absolute certainty the correctness of the surveys, the grading, and location of the section-line highway, yet it is certain that it was all done in good faith, and with care and caution and by competent surveyors; and this court is in no position to undo it without risking a grave error.

The burden of proof was on the plaintiff, and the evidence does not show that the trial court was wrong. There is nothing to be gained by a discussion of this, and there is no reason for protracting the dispute. The findings are well sustained and the judgment is affirmed.

NORTHERN DRUG COMPANY, a Corporation, v. T. N. KUNKEL, as Sheriff of Wells County.

(163 N. W. 832.)

Sheriff — amercement of — fees of sheriff — payment in advance — provision for — statute — payment demanded — refused — such proceedings will not lie.

A proceeding will not lie for the amercement of a sheriff under the provisions of § 7770, Compiled Laws of 1913, for the failure to perform services for which he is entitled, under § 3548, to the payment of his fees in advance, and where such fees were demanded and were not paid.

Opinion filed May 14, 1917. Rehearing denied July 10, 1917.

Proceeding to amerce a sheriff.

Appeal from the District Court of Benson County, Honorable *C. W. Buttz,* Judge.

Judgment for defendant. Plaintiff appeals.

Affirmed.

Henry G. Middaugh and *Rollo F. Hunt,* for appellant.

Where the sheriff of a county shall refuse or neglect to execute any

writ of execution to him directed, which has come into his hands, or to sell any personal or real property, or to return the writ timely, or on demand refuses to pay over to the proper person moneys collected, or fails on demand to do any act required on him in the execution of any such writ, he shall, on motion in court and on two days' notice, be amerced in the amount of the debt, damages, and costs, and 10 per cent thereon to and for the use of the plaintiff, or defendant, who required the services performed. Code Civ. Proc. 1877, § 359; Rev. Codes 1899, § 5555; Lee v. Dolan, 34 N. D. 449, 158 N. W. 1007.

Flynn & Traynor and *B. F. Whipple,* for respondent.

A sheriff has the right to demand his fees in advance, and if he do so, and they are not paid, he violates no law in refusing to execute the writ or perform the services requested. Comp. Laws 1913, § 3548.

Where the requirements of the statute have been substantially complied with so far as the interests of each party are concerned, the officer cannot be amerced. Conkling v. Parker, 10 Ohio St. 28.

BRUCE, Ch. J. This is a proceeding to amerce a sheriff under the provisions of § 7770, Compiled Laws of 1913. The only remissness in duty in any way apparent or urged by counsel for appellant is that the defendant officer failed to return the execution "on or before the return day." The affidavits, however, show that the sheriff attempted by phone to demand, and actually mailed a letter demanding, his fees in advance, as he was entitled to do under the provisions of § 3548, Compiled Laws of 1913; and that such payment was not made. Even though the receipt of the letter was denied, its mailing was positively testified to; and under these circumstances the officer was under no further obligation to act in the premises, and the proceedings for amercement will not lie. There was no breach of duty.

The judgment of the District Court is affirmed.

ROBINSON, J. (specially concurring). This is an appeal from an order denying a motion to amerce the sheriff for an alleged failure to levy and return an execution for $130.53, with a subsequent credit of $61.48. The motion was made and submitted on affidavits and counter affidavits, from which it appears that such an execution was issued to the sheriff without any fees or bonds, and without instructions to

make a levy on any particular property; and that the sheriff was not able to find property on which to make a levy.

The motion is without any merit, and is not worthy of any discussion. Such a motion should not be sustained unless on a very clear showing of grave fault.

LAWRENCE HENRY RANDOM v. ELIZA RANDOM.

(163 N. W. 833.)

District court — judge — orders — not discretionary — necessary orders — stay proceedings — to enable appeal — refusal — supreme court judge — may act — judgment — decree — executed in part — prior to appeal — cannot supersede.

Section 7836 of the Compiled Laws of 1913, which provides that "when the court or the judge thereof from which the appeal is taken or desired to be taken shall neglect or refuse to make any order or direction not wholly discretionary, necessary to enable the appellant to stay proceedings upon an appeal, the supreme court, or one of the justices thereof, shall make such order or direction," does not give an intending appellant a right to supersede a portion of a judgment or decree that is executed prior to the taking of an appeal.

Opinion filed July 11, 1917.

Application for the fixing of a supersedeas bond to stay proceedings under a decree of the District Court pending an appeal in a divorce action.

Petition denied.

PER CURIAM: This is an application to the supreme court for an order fixing the sum, terms, and conditions of an undertaking which will operate to stay all proceedings upon the judgment and decree of the district court of the fifth judicial district entered in the above-entitled action on the 3d day of May, 1917. Its main purpose is to stay the operation of that portion of the judgment of the court below which, in an action for divorce between the plaintiff, Lawrence Random, and the defendant Eliza Random, found the issues for the plain-

tiff, Lawrence Random, and awarded to him the sole custody of the minor children, aged eleven, nine, and seven years respectively, together with a permission and direction to such plaintiff, to take the children from the home of the defendant's parents, or from anyone in whose possession they might be, and allowing the plaintiff to keep the said children at his parents' home in the state of North Dakota.

The motion to fix the sum, terms, and conditions of a supersedeas bond is denied, for the reason that the moving papers show that the trial judge did not neglect or refuse to make an order which would enable the appellant to stay proceedings upon the appeal, in so far as any further proceedings might be had under the judgment. It appears that the judgment had been partially executed before the application was made to the district court. Under such facts the appellant is not entitled to have the executed portion of the decree stayed. We do not question the soundness of the moving party's contention that the appellant is entitled, as a matter of right, to have the sum, terms, and conditions of a supersedeas bond fixed by the trial judge, and, in case of his neglect or refusal, by this court or a judge thereof. Comp. Laws 1913, § 7836. We cannot see that the question of the custody of the children is in any way involved in this motion.

ARVID NORDBY v. O. J. SORLIE.

(163 N. W. 833.)

Henry Leum and *Chas. A. Lyche,* for motion, and *Theo. Kalder* and *John Carmody,* against motion.

ROBINSON, J. This action is based on a claim of damages by reason of a collision between an automobile and a motor cycle driven by the plaintiff at a reckless dare-Devil speed. In November, 1916, the judgment of this court was that the verdict against the defendant be set aside and the action dismissed on the ground that the collision was the result of plaintiff's reckless driving. On December 2d a motion for rehearing was duly denied. 35 N. D. 395, L.R.A.1917B, 753, 160

N. W. 70. And now, on July 11th, after the lapse of over seven months, there is filed a second motion for rehearing, without any showing, only a mere contention that the decision of the court was wrong.

Now, from reading the record, the decision appears to be clearly right, but, if it were wrong, that would be no sufficient reason for allowing the motion to reconsider. There must be an end to litigation. The appeal was for the December, 1915, term. Appellant's brief of 74 pages was filed February 15, 1916. Respondent's brief of 48 pages was filed June 26, 1916. There is no claim that the counsel for each party did not have a fair opportunity to argue and present the case, and the long decision, covering five large printed pages, shows that the case was well argued and considered on its merits. Motion denied.

GRACE, J. I concur in result.

BRUCE, Ch. J., and CHRISTIANSON, J. I concur in the above. We have no right to recall a remittitur in any case unless it has been handed down by inadvertence or mistake.

ARTHUR G. STRASSHEIM v. JOHN McGUIRE.

(164 N. W. 26.)

Promissory note — giving of — final settlement — not conclusive of — services performed — payee indebted for — offset — evidence.

1. The giving of a note is not, in itself, conclusive evidence of a final settlement between the parties; and evidence is admissible to prove that at the time of its execution and delivery the payee was indebted to the maker for services performed, and such indebtedness may be pleaded as an offset.

Counterclaim — evidence — ample to support.

2. The record examined and *held* to contain substantial evidence in support of the counterclaim of the defendant.

Opinion filed July 13, 1917.

Action to recover on a promissory note. Counterclaim for services rendered.

Appeal from the County Court of Ward County, Honorable *Wm. Murray,* Judge.

Judgment for defendant. Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, Ch. J.

This is an action to recover on a promissory note for $126, executed by the defendant, McGuire, on September 27, 1909, to Strassheim & Company, composed of Arthur G. Strassheim and Arthur L. Schoeninger, and alleged to have been assigned to the plaintiff.

The defendant admits the execution of the note, but alleges:

"That heretofore, to wit: during the year 1909, and in the months of May, June, July, August, and September, he was employed by Strassheim & Company, mentioned in plaintiff's complaint, as solicitor for the brokerage of insurance and collection of rents. That he was so employed on the following terms: He, the defendant, to receive fifteen dollars ($15) from the plaintiff herein, and ten dollars ($10) from the plaintiff's associate, each and every week from and after May 1, 1909, and during his employment. That in consideration thereof he was to devote his entire time and attention to the soliciting of insurance and the collection of rents; that he was to receive a percentage on all insurance written and rents collected, from which percentage was to be deducted the amount of twenty-five ($25) dollars, per week paid to him as salary, but that in all events under the terms of said contract he was to receive twenty-five ($25) dollars per week, whether such amount was earned in commissions or not.

"That he worked under said contract for a period of twenty-two weeks, and that there was paid him by the plaintiff the sum of one hundred twenty-six and no /100 ($126) dollars, and by the plaintiff's associate the sum of two hundred twenty and no /100 ($220) dollars, which the latter sum was in full at the rate of ten dollars ($10) per week.

"That on or about September 27, 1909, the defendant quit said employment; and as there was pending various and divers rental and insurance contracts on which he would have been entitled to commissions and which commissions would amount to much more than his

regular salary, and this plaintiff requested that the defendant give him a note for the purpose of keeping their accounts straight so that the amount actually advanced could be charged up against the commissions on the books of the plaintiff; and for the further reason that the plaintiff was dissolving with his brother, who was known as the company in the copartnership of Strassheim & Company by whom the employment was made. That since such time the plaintiff and the copartnership known as Strassheim & Company have never accounted to the defendant for the amounts due him by way of salary and commissions, and that there is still due and owing to the defendant from the plaintiff and the copartnership of Strassheim & Company the sum of two hundred four and no/100 ($204) dollars no part of which said sum has been paid which said sum of two hundred four and no/100 ($204) dollars is due on commissions and for salary at the rate of fifteen dollars ($15) per week, which the plaintiff and copartnership of Strassheim & Company agreed to pay to the defendant."

The case was tried to the court without a jury, and the trial court found "that the defendant was employed by the plaintiff and Henry E. Strassheim, a copartnership known as Strassheim & Company, as their representative and solicitor, with a guaranty of ten ($10) dollars per week for his services, and commissions on all business that he did, which commissions were to be applied, first, towards the payment of the ten dollars ($10) of guaranty, and all additional and further earnings by way of commissions were to be paid to the defendant as extras; that this defendant did, pursuant to such agreement, work for the plaintiffs for a period of twenty-two weeks; that the defendant did give to the plaintiff the note mentioned in plaintiff's complaint, but that same was given solely as a memorandum for the purpose of bookkeeping to show the amount drawn by him under the guaranteed salary, and to keep a record of same as an offset against commissions which he might earn; that there is nothing due or owing to the plaintiff from the defendant by reason of the premises." He therefore entered judgment dismissing the action, and from this judgment the appeal is taken.

Halvor L. Halvorson, for appellant.
Palda & Aaker and *Mark Oseth,* for respondent.

BRUCE, Ch. J. (after stating the facts as above). The plaintiff contends that the facts referred to in the findings took place prior to the giving of the note, and that, if such facts did occur, the settlement by note constituted a final settlement between the parties. He also contends that the note imports a consideration, and that the testimony of the defendant in support of his defense tends to vary its terms.

There is, of course, no merit in the contention that the note imports a consideration, and that the evidence of the defendant tends to vary its terms. The evidence tends to show that, if there was any assignment, the assignee was cognizant of the conditions surrounding the note, and the presumption of consideration goes no further than to establish a prima facie case. When one seeks to prove a parol agreement that services may be offset against a note, and that a note was merely given as a memorandum, he is not varying its terms. There is no pretense in the case at bar that the note did not represent moneys advanced to the defendant. The contention is merely that it was taken as a memorandum, and that the plaintiff was owing to the defendant moneys which could be offset against the note when the settlement came to be made, or if the payment of the note was sought to be enforced. The question is merely whether the note was given in final settlement.

Although, too, we agree with counsel for appellant that the evidence is extremely unsatisfactory as to the guaranty of $10 a week for services, and whether the note was given in complete settlement of the transaction between the defendant and Strassheim & Company and the defendant and Henry E. Strassheim, and on the contention of the defendant that the two $25 and the $10 payments made by him were intended to apply on a personal indebtedness to Henry E. Strassheim, and that the letters written by him were in relation to this personal indebtedness and not to his account with the firm, we still cannot hold that there is not substantial evidence in the record in the support of the findings of the trial judge. Such being the case, and the trial judge having had the opportunity of seeing the witness face to face, we do not feel justified in interfering with his findings and judgment.

The judgment of the County Court is affirmed.

SCANDINAVIAN AMERICAN BANK, a Corporation, v. N. W. HALL and Mrs. N. W. Hall.

(164 N. W. 22.)

Justice's court — action pending in — want of jurisdiction — dismissal — defendant — appearance — motion — demurrer — entitled to costs.

Upon the dismissal of a case in a justice's court for want of jurisdiction, upon motion made or demurrer interposed by the defendant, he is entitled to judgment for costs.

Opinion filed July 14, 1917.

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

Plaintiff appeals.

Affirmed.

Harry Lashkowitz, for appellant.

No appearances for respondents.

CHRISTIANSON, J. Plaintiff brought this action in a justice's court upon a promissory note. It appears from the summons and complaint that the amount due upon the note is $200, principal, and $13.32 interest, making an aggregate of $213.32. On the return day the defendants appeared by an attorney duly authorized to practise in the courts of this state, and demurred to the complaint on the ground that the justice's court had no jurisdiction of the subject of the action. The demurrer after argument was sustained by the justice. The parties thereupon stipulated "that the plaintiff be given one day in which to amend his complaint and that postponement be taken for that purpose." At the time stipulated, the parties having again appeared before the justice by their respective attorneys, plaintiff's attorney stated that he had not amended the complaint. The justice thereupon ordered that the demurrer be sustained and the action dismissed. The defendants' attorney thereupon demanded that costs be taxed in favor of the defendants. This question was argued by the respective attorneys, and the justice refused to tax costs. The defendants appealed to the district court from the judgment, assigning the failure to tax costs in their

favor as error. The district court reversed the justice's decision on this question, and taxed costs in favor of the defendants.

Plaintiff has appealed from the decision of the district court, and the sole question involved on this appeal is whether defendants were entitled to recover costs in the justice's court. Plaintiff contends that, inasmuch as the amount prayed for in the complaint exceeded the jurisdiction of the justice of the peace, all proceedings had before the justice were a nullity, and the justice had no power or authority to tax costs or enter judgment therefor. Costs are the creature, and their allowance in any case depends upon the terms of the statute. 5 Enc. Pl. & Pr. 110.

Section 9106, Comp. Laws 1913, provides: "The justice must tax and include in the judgment the costs allowed by law to the prevailing party." Section 9097, Comp. Laws 1913, provides: "Judgment that the action be dismissed without prejudice to another action may be entered with costs to the defendant in the following cases. . . . (3) When a demurrer to the complaint has been sustained and the plaintiff fails to amend within the time allowed by the court."

Section 9009, Comp. Laws 1913, makes the provisions of the Code of Civil Procedure applicable to proceedings in justice courts as far as applicable when the mode of procedure is not prescribed by the Justice's Code.

Section 7797, Comp. Laws 1913, provides: "When an action is dismissed from any court for want of jurisdiction, . . . the costs must be adjudged against the party attempting to institute or bring up the action."

While the allowance of costs are dependent upon statutory provisions, the courts have differed as to the application of such provisions and as to the allowance of costs in causes where there is a want of jurisdiction. Some courts proceed upon the theory that, as the court is without power to adjudicate upon the merits, it possesses no jurisdiction or power to give costs to either party, and can only strike the case from its docket. Other courts have refused to adopt this theory and allow costs to a party who is successful in securing a dismissal of an action even for want of jurisdiction.

The supreme court of Indiana, in adopting the latter theory, said: "The court had jurisdiction of the parties. The parties had the right

to appear,—the plaintiff to insist upon his right to have the action maintained, the defendant to urge his motion to dismiss,—and the court must adjudge the matter. Upon the result of such adjudication it seems to be reasonable and proper that the prevailing party recover a judgment for his costs." Dixon v. Hill, 8 Ind. 147. The supreme court of Texas, in discussing this question, said: "A party cannot attempt to invoke the jurisdiction of a court by suit and say he is exempt from the costs of the proceeding on the ground that the court had no jurisdiction." Baines v. Mensing, 75 Tex. 200, 12 S. W. 984. See also Kent v. Labette County, 42 Kan. 534, 22 Pac. 610; Bradstreet Co. v. Higgins, 114 U. S. 262, 29 L. ed. 176, 5 Sup. Ct. Rep. 880; Paine v. Chase, 14 Wis. 653; 5 Standard Enc. Proc. 847.

We are satisfied that, under the statutory provisions above quoted, a defendant who appears in an action, and raises the question of want of jurisdiction, and succeeds in having the action dismissed upon such ground, is entitled to recover costs against the adverse party.

The decision of the District Court must therefore be affirmed. It is so ordered.

E. R. BRADLEY v. S. J. MALEN.

(164 N. W. 24.)

Magistrate — offense — threats to commit — against person or property of another — order requiring undertaking — to keep the peace — not appealable.

No appeal lies from the order of a magistrate requiring a person who has threatened to commit an offense against the property or person of another to enter into an undertaking to keep the peace.

Opinion filed July 14, 1917.

From a judgment of the District Court of Foster County, *Coffey*, J., plaintiff appeals.

Affirmed.

T. F. McCue, for appellant.

If a justice of the peace can put a stigma upon a person by requir-

ing him to give a bond to keep the peace, and there is no appeal from such order, then it would seem that the civil rights of man as guaranteed by our Constitution are wholly lost. Comp. Laws 1913, §§ 9174–9176, 10,408 to 10,425; Const. § 114.

In such cases habeas corpus is not the proper remedy. State ex rel. Beslow v. Sargent, 74 Minn. 242, 76 N. W. 1129; State ex rel. Peterson v. Barnes, 3 N. D. 131, 54 N. W. 541.

An order of a magistrate with the jurisdiction of a justice of the peace, in requiring a defendant to give bond to keep the peace, is an appealable order, because it is final and affects substantial rights. Weisselman v. State, 95 Wis. 274, 70 N. W. 169; Comp. Laws, 1913, § 425.

Appellate courts liberally construe statutes so as to protect the right of appeal. Houk v. Barthold, 73 Ind. 21; Lloyd v. Sullivan, 9 Mont. 577, 24 Pac. 217; Haas v. Lees, 18 Kan. 449; San Francisco v. Certain Real Estate, 42 Cal. 513.

In a civil action, an order of a justice of the peace dismissing the action and taxing costs is a final decision. Jackson v. Berndt, 24 S. D. 14, 123 N. W. 76; Mannie v. Hatfield, 22 S. D. 475, 118 N. W. 817; Huron v. Carter, 5 S. D. 4, 57 N. W. 947; Houghton's Appeal, 42 Cal. 35.

Where a statutory right of appeal is denied by a trial court, mandamus is the proper remedy. McCreary v. Rogers, 35 Ark. 298; Ware v. McDonald, 62 Ala. 81; Wilkes v. Hunt, 4 Wash. 100, 29 Pac. 830.

C. B. Craven and *C. W. Burnham,* for respondent.

"Unless provided by statute it has been held that no appeal lies from the order of a justice requiring a recognizance, adjudging costs, or dismissing the complaint." 9 C. J. 397, and cases cited in notes 19–21; 12 Cyc. 332, and cases cited in notes 25, 26.

The undertaking given in such cases provides that defendant shall abide the order of the district court, and the law requires the magistrate to transmit the order and papers to the next district court of the county, when defendant must appear. Comp. Laws 1913, §§ 10,413, 10,416.

Such proceeding is not a criminal case. 9 C. J. 393, and cases cited in notes 17–19.

In Wisconsin the court expressly holds that the statute of that state

authorizes an appeal. Such condition does not exist in this state. Weisselman v. State, 95 Wis. 274, 70 N. W. 169.

No appeal lies even from the final judgment of the district court. State v. Arnold, 56 Kan. 307, 43 Pac. 267.

All proceedings of this nature are to be finally reviewed by the district court of the county, and this insures to defendant all the rights given to him by statute. Comp. Laws 1913, §§ 10,413, 10,425.

CHRISTIANSON, J. The defendant, Malen, is a justice of the peace in Foster county. On November 3, 1915, one J. L. Nicoll laid a complaint before said Malen as such justice of the peace, that the plaintiff, E. R. Bradley, had threatened to kill said Nicoll. Upon the filing of such complaint properly subscribed and sworn to by said Nicoll, the said Malen issued a warrant for the arrest of said Bradley, and Bradley was arrested and brought before said justice of the peace. A hearing was had, at which Bradley appeared in person and by counsel, witnesses were sworn and testified both in behalf of the prosecution and the defendant. After such hearing Malen entered an order requiring the defendant to enter into an undertaking in the sum of $500 conditioned as provided by § 10,413, Comp. Laws 1913. Bradley gave oral notice of an appeal to the district court of Foster county from the order of the said justice of the peace, and requested the justice to fix the amount of the bond to be given on such appeal. The justice refused to fix the amount of such bond, and the plaintiff applied to and received from the district court an alternative writ of mandamus to compel said justice of the peace to fix the amount of the bond. Malen filed a return to said alternative writ setting forth the proceedings had before him, and the trial court entered its order quashing the alternative writ and dismissing the proceedings. Plaintiff has appealed from the judgment entered upon such order.

The sole question presented and argued on this appeal is whether an appeal will lie from an order of a magistrate requiring a person to furnish security to keep the peace in a proceeding instituted before such magistrate under article 3, §§ 10,004–10,425, of chapter 3 of the Code of Criminal Procedure.

Such proceeding is not a prosecution for the commission of an offense, but is a criminal or quasi criminal proceeding to prevent the

commission of a crime. And while in this and practically all other states proceedings to require security against breach of peace are prescribed by statute, such proceedings were also recognized and in force under the common law.

Blackstone stated that preventive justice is preferable to punitive justice. In the chapter upon the means of prevention of offenses, he said: "Preventive justice, upon every principle of reason, of humanity, and of sound policy, is preferable to punitive justice, the execution of which is always attended with harsh circumstances. Preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehavior, to stipulate with, and to give full assurance to, the public that such offense shall not happen, by binding pledges or securities for keeping the peace or for their good behavior." Browne's Bl. Com. bk. 4, chap. 28, p. 668.

The statute does not require that a proceeding to require a person to give security to keep the peace be brought before a justice of the peace, but it authorizes the complaint to be laid before any of the magistrates mentioned in § 10,529, Comp. Laws 1913, and makes it the duty of a magistrate, upon the filing of such complaint, to issue a warrant for the arrest of the person complained of (Comp. Laws 1913, §§ 10,408–10,410). Section 10,529, Comp. Laws 1913, declares the following officers to be magistrates:

"1. The judges of the supreme court, with authority to act as such throughout the state.

"2. The judges of the district courts, with authority to act as such throughout the judicial districts for which they are respectively elected.

"3. As limited by law, directing the place of exercising their jurisdiction and authority, county, city, township, and other justices of the peace, police magistrates, and, when authorized by law, the judges of the county courts, with authority to act as such throughout the counties or the judicial subdivisions in which the county, city, township, or municipality for which they are respectively elected are located."

When the person complained of is brought before the magistrate, if the charge is controverted, the magistrate must take testimony in relation thereto. And the evidence must, on demand of the defendant, be reduced to writing, and subscribed by the witnesses. Comp. Laws 1913, § 10,411. If it appears upon such hearing that there is no

just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged. Comp. Laws 1913, § 10,412. But, if there is just reason to fear the commission of the offense, the person complained of may be required to enter into an undertaking in such sum, not exceeding $1,000 as the magistrate may direct, with one or more sufficient sureties, to abide the order of the next district court of the county, and in the meantime to keep the peace toward the people of this state, and particularly toward the complainant. Comp. Laws 1913, § 10,413. If the undertaking so required is given, the party complained of must be discharged, and the undertaking transmitted by the magistrate to the next district court of the county. Comp. Laws 1913, §§ 10,414, 10,416. If he fails to give such undertaking he is committed until it is given. Comp. Laws 1913, §§ 10,414, 10,415. The person who has entered into an undertaking to keep the peace must appear on the first day of the next term of the district court of the county, or his undertaking may be forfeited. Comp. Laws 1913, § 10,418. And if the complainant does not appear, the person complained of may be discharged, unless good cause to the contrary is shown. Comp. Laws 1913, § 10,419. If both parties appear, the court may hear their proofs and allegations, and may either discharge the undertaking or require a new one for a time not exceeding one year. Comp. Laws 1913, § 10,420. The statute further provides that "in all cases of security to keep the peace under this article, the court, in addition to the orders mentioned in said article, shall tax the costs against the complainant or defendant or both, as justice may require, and enter judgment therefor, which may be enforced as judgments in criminal cases, and execution may issue therefor." Comp. Laws 1913, § 10,425.

We find nothing in these provisions to indicate that the legislature intended to authorize an appeal from an order entered by a magistrate in a proceeding under this statute. And, in our opinion, the legislature had no such intent. The statute expressly provides for a full hearing upon the merits of the controversy before the district court at the next term thereof. The defendant in such proceeding is, therefore, by the terms of the statute afforded every protection which an appeal would afford him. See 9 C. J. 397; Note in 90 Am. St. Rep.

799 et seq. What possible reason could there be for granting an appeal under such circumstances?

It will also be noted that a complaint may be laid, a warrant issued by, and the proceeding heard, before any magistrate within whose territorial limits the proceeding is maintainable. If the complaint in the case at bar had been laid and the hearing thereon had before the judge of the district court of Foster county or before one of the justices of this court, to what court would plaintiff then have taken his appeal?

Appellant's counsel suggests that a justice of the peace may tax costs and render judgment therefor against a defendant in such proceeding, and that such judgment becomes final unless appealed from. Counsel is in error. The determination of the magistrate is not final in any particular. The district court is vested with power and authority to hear and determine all the questions involved, including the question of costs. The statute contemplates that the final order and judgment (including the judgment for costs) be entered in the District Court.

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

J. J. MURPHY and C. L. Merrick v. JONES T. WILSON, John R. Mulvane, Anna F. Wilson, George J. Wilson, and L. E. Wilson, as Trustees, Substituted in Place of the Missouri & Kansas Land & Loan Company, a Defunct Corporation, and All Persons Unknown Claiming Any Estate or Interest in, or Lien or Encumbrance upon the Property Described in the Complaint.

(163 N. W. 820.)

Taxes — sale of land — tax deed — issuance of — requirements of statute — contrary to — shown on face of — void.

1. A tax deed is void on its face when it shows a sale of land in a manner not authorized by statute.

Judgment — against individual — claim by in representative capacity — not bar to — corporation — successor in interest — original judgment.

2. A judgment against one in an individual capacity is not a bar to a

claim which is asserted by him in a representative capacity, or as the successor in interest to a corporation which was not precluded by the original judgment.

Opinion filed April 24, 1917. Petition for rehearing denied July 14, 1917.

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

Affirmed.

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

All acts by a corporation, or even an affirmance by an appellate court, after the death of a corporation, and in an action to which it was a party, are void. MacRae v. Kansas City Piano Co. 69 Kan. 457, 77 Pac. 94; Krutz v. Paola Town Co. 20 Kan. 397, 22 Kan. 726; Eagle Chair Co. v. Kelsey, 23 Kan. 631; Atchison v. Twine, 9 Kan. 350; McCulloch v. Norwood, 58 N. Y. 562; Sturges v. Vanderbilt, 73 N. Y. 384; Venable Bros. v. Southern Granite Co. 135 Ga. 508, 32 L.R.A.(N.S.) 446, 69 S. E. 822; Crossman v. Vivienda Water Co. 150 Cal. 575, 89 Pac. 335; Newhall v. Western Zinc Min. Co. 164 Cal. 380, 128 Pac. 1040; Lowe v. Superior Ct. 165 Cal. 708, 134 Pac. 190; Root v. Sweeney, 12 S. D. 43, 80 N. W. 149; Miami Exporting Co. v. Gano, 13 Ohio, 270; United States v. Spokane Mill Co. 206 Fed. 999; First Nat. Bank v. Colby, 21 Wall. 609, 22 L. ed. 687; Marion Phosphate Co. v. Perry, 33 L.R.A. 252, 20 C. C. A. 490, 41 U. S. App. 14, 74 Fed. 425; Harris-Woodbury-Lumber Co. v. Coffin (C. C.) 179 Fed. 257; Robinson v. Mutual Reserve L. Ins. Co. (C. C.) 182 Fed. 850; Olds v. City Trust, S. D. & Surety Co. 185 Mass. 500, 102 Am. St. Rep. 356, 70 N. E. 1022; Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649; Combes v. Keyes (Combes v. Milwaukee & M. R. Co.) 89 Wis. 297, 27 L.R.A. 369, 46 Am. St. Rep. 839, 62 N. W. 89; May v. State Bank, 2 Rob. (Va.) 56, 40 Am. Dec. 726; Thornton v. Marginal Freight R. Co. 123 Mass. 32; Gulledge Bros. Lumber Co. v. Wenatchee Land Co. 115 Minn. 491, 132 N. W. 992; Sinnott v. Hanan, 156 App. Div. 323, 141 N. Y. Supp. 505.

The question of continuing or reviving actions depends upon the law of the place where the action was brought. Union Nat. Bank v. Chapman, 169 N. Y. 538, 57 L.R.A. 513, 88 Am. St. Rep. 614, 62 N. E. 672; Sturges v. Vanderbilt, 73 N. Y. 384; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Baltimore &

O. R. Co. v. Joy, 173 U. S. 226, 43 L. ed. 677, 19 Sup. Ct. Rep. 387, 5 Am. Neg. Rep. 760.

The default judgments against the individual defendants were regular, valid, and are in full force as a bar. Code Civ. Proc. chap. 31; Comp. Laws 1913, §§ 8144–8165; Comp. Laws 1913, § 7483; Sargent v. Kindred, 5 N. D. 8, 63 N. W. 151; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381; Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 25, 84 N. W. 581; Fargo v. Keeney, 11 N. D. 484, 92 N. W. 836, 14 N. D. 419, 105 N. W. 92; Emmons County v. Thompson, 9 N. D. 603, 84 N. W. 385; Kirschner v. Kirschner, 7 N. D. 292, 75 N. W. 252; Gauthier v. Rustika, 3 N. D. 1, 53 N. W. 80; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75; Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Freeman v. Wood, 14 N. D. 95, 103 N. W. 392; Olson v. Mattison, 16 N. D. 231, 112 N. W. 994; Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491; Braseth v. Bottineau County, 13 N. D. 344, 100 N. W. 1082; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; Hunt v. Swenson, 15 N. D. 512, 108 N. W. 41; Olson v. Sargent County, 15 N. D. 146, 107 N. W. 43; Colean Mfg. Co. v. Feckler, 16 N. D. 227, 112 N. W. 993; Gaar, S. & Co. v. Collins, 15 N. D. 622, 110 N. W. 81; Williams v. Fairmount School Dist. 21 N. D. 198, 129 N. W. 1027; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; Acme Harvester Co. v. Magill, 15 N. D. 116, 106 N. W. 563; Plano Mfg. Co. v. Doyle, 17 N. D. 386, 17 L.R.A. (N.S.) 606, 116 N. W. 529; Kitzman v. Minnesota Thresher Mfg. Co. 10 N. D. 26, 84 N. W. 585; Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292; Naderhoff v. George Benz & Sons, 25 N. D. 165, 47 L.R.A. (N.S.) 853, 141 N. W. 501.

The most elementary requisites as a part of the taking of property by judicial process are notice, opportunity to answer, and a hearing. Where these are absent, there is no due process, and orders and judgments made in their absence are void for want of jurisdiction and because they are without due process. The default judgments against the defendants were and are valid. Parsons v. Russell, 11 Mich. 120, 83 Am. Dec. 728; Clapp v. Houg, 12 N. D. 600, 65 L.R.A. 757, 102 Am. St. Rep. 589, 98 N. W. 710; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Virginia v. Rives, 100 U. S. 313,

318, 319, 25 L. ed. 667, 669, 3 Am. Crim. Rep. 524; Ex parte Virginia, 100 U. S. 339, 346, 25 L. ed. 676, 679, 3 Am. Crim. Rep. 547; Neal v. Delaware, 103 U. S. 370, 397, 26 L. ed. 567, 573; United States v. Cruikshank, 92 U. S. 542, 554, 23 L. ed. 588, 592; Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. ed. 559, 561; Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. ed. 979, 983, 984, 17 Sup. Ct. Rep. 581; Gibson v. Mississippi, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 751; Cooley Const. Lim. pp. 504, 505, and notes; Blake v. McCung, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

This action is equitable, and is to be determined on equitable principles. Defendants have the burden as against plaintiffs in possession under color of title. O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Reichelt v. Perry, 15 S. D. 601, 91 N. W. 459; Betts v. Signor, 7 N. D. 399, 75 N. W. 781; Walton v. Perkins, 28 Minn. 413, 10 N. W. 424; Christian v. Bowman, 49 Minn. 99, 51 N. W. 663; Woolfolk v. Albrecht, 22 N. D. 36, 133 N. W. 310, cases cited.

The rule of comity does not apply on the facts in this case. Walker v. Rein, 14 N. D. 613, 106 N. W. 405; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Atty. Gen. v. Bay State Min. Co. 99 Mass. 148, 96 Am. Dec. 717, 14 Mor. Min. Rep. 158; People v. Formosa, 131 N. Y. 479, 27 Am. St. Rep. 612, 30 N. E. 492; Stanhilber v. Mutual Mill Ins. Co. 76 Wis. 285, 45 N. W. 221; Rose v. Kimberly & C. Co. 27 L.R.A. 556, 46 Am. St. Rep. 855, 89 Wis. 545, 62 N. W. 526; Seamans v. Temple Co. 105 Mich. 400, 28 L.R.A. 430, 55 Am. St. Rep. 457, 63 N. W. 408; Seamans v. Zimmerman, 91 Iowa, 363, 59 N. W. 290; Pope v. Hanke, 155 Ill. 617, 28 L.R.A. 568, 40 N. E. 839.

Defendants, having failed to assert any claim to the land after the tax certificates and tax deeds therefor were issued, cannot assail the title in view of the three-year limitation statute. Sess. Laws 1897, § 79, chap. 126; Comp. Laws 1913, § 2194; Munroe v. Donovan, 31 N. D. 228, 153 N. W. 461.

Defendants having abandoned the land, they cannot now claim it.

Cotton v. Horton, 22 N. D. 1, 132 N. W. 225; Higbee v. Daeley, 15 N. D. 339, 109 N. W. 318; Bausman v. Faue, 45 Minn. 418, 48 N. W. 13; Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722; Shelby v. Bowden, 16 S. D. 531, 94 N. W. 416; Farr v. Semmler, 24 S. D. 290, 123 N. W. 835; Ford v. Ford, 24 S. D. 644, 124 N. W. 1108; 16 Cyc. 718; 11 Am. & Eng. Enc. Law 394; Dimond v. Manheim, 61 Minn. 178, 63 N. W. 495; Pom. Eq. Jur. 802.

The alleged corporation and the defendants who claim through it had and have no standing in courts of law or equity either in the state of Kansas or in this state. They took no legal steps toward organizing a corporation, and the proposed corporation was abandoned and forfeited. Their so-called articles failed to state any purpose for which corporations might be organized as authorized by statute, and such articles are fatally defective. 10 Cyc. 224, and cases cited.

A corporation, having no power to acquire or hold lands, has no standing in a court of equity seeking the aid of the court to enable it to do that which is in violation of law. 10 Cyc. 1135, 1274, 1293.

Under statutes like ours, authorizing the plaintiff to dismiss his action as of right and by the filing of a dismissal with the clerk, the right to dismiss is held to be absolute, and proceedings taken by the court thereafter are void. Allen v. Van, 1 Iowa, 568; Burlington & M. R. Co. v. Sater, 1 Iowa, 420; Ballinger v. Davis, 29 Iowa, 512; St. John v. Harwick, 17 Ind. 180; Miller v. Mans, 28 Ind. 194; Gordon v. Goodell, 34 Ill. 429; Ferguson v. Ingle, 38 Or. 43, 62 Pac. 760; Deere & W. Co. v. Hinckley, 20 S. D. 359, 106 N. W. 138; 14 Cyc. 416, 422, notes 9, 10; Fisk v. Chicago, R. I. & P. R. Co. 53 Barb. 513, 36 How. Pr. 20, 4 Abb. Pr. N. S. 379; House v. Cooper, 30 Barb. 157; Richardson v. New York C. R. Co. 98 Mass. 85; Koerper v. St. Paul & N. P. R. Co. 40 Minn. 132, 41 N. W. 656; Minor v. Mechanics Bank, 1 Pet. 46, 7 L. ed. 47; Hancock Ditch Co. v. Bradford, 13 Cal. 637; Reed v. Calderwood, 22 Cal. 464; Dimick v. Deringer, 32 Cal. 488.

Defendants do not come here with clean hands and good motives. They acquired their so-called interest in these lands knowing of the pendency of the litigation, and dealt with one not in possession. Comp. Laws 1913, §§ 9405, 9406, 9414.

The defendants abandoned this land for years, and plaintiffs have

assumed the burden of all the taxes and have been in possession, and defendants now want the land because of the increased value. Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Holgate v. Eaton, 116 U. S. 33, 29 L. ed. 538, 6 Sup. Ct. Rep. 224; O'Fallon v. Kennerly, 45 Mo. 124; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856; Spoonheim v. Spoonheim, 14 N. D. 389, 104 N. W. 845.

Miller, Zuger, & Tillotson and *W. P. Costello,* for respondents.

The defendant corporation was fully and duly qualified to take title to the lands, having complied with all legal requirements. Washburn Mill. Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; Gilbert v. Hole, 2 S. D. 164, 49 N. W. 1; American De Forest Wireless Teleg. Co. v. Superior Ct. 153 Cal. 533, 17 L.R.A.(N.S.) 1117, 126 Am. St. Rep. 125, 96 Pac. 15.

The tax deed in this case is void on its face, because it shows a sale of land in a manner not authorized by statute, and plaintiffs took with full knowledge of all the defects. Such a deed cannot set the Statute of Limitations in motion. Hegar v. DeGroat, 3 N. D. 355, 56 N. W. 150; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 570; Batelle v. Knight, 23 S. D. 161, 120 N. W. 1102, 20 Ann. Cas. 456; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Mathews v. Blake, 16 Wyo. 116, 27 L.R.A.(N.S.) 339, 92 Pac. 242; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Sheets v. Paine, 10 N. D. 106, 86 N. W. 117; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737.

The question of the forfeiture of corporate powers by a corporation, for irregularities in its organization, can be raised only by the state in a direct proceeding between it and the corporation, and cannot be raised by a third person in a collateral proceeding. A private person may not champion the cause of the state. 10 Cyc. 256; Pape v. Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183; Murdock v. Lamb, 92 Kan. 857, 142 Pac. 961; Hunt v. Pleasant Hill Cemetery Asso. 27 Kan. 734; State v. Pipher, 28 Kan. 128; Miller v. Palermo, 12 Kan. 14; Eagle Chair Co. v. Kelsey, 23 Kan. 632; Swift v. Platte, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635; John Deere Plow Co. v. Wyland, 69 Kan. 255, 76 Pac. 863, 2 Ann. Cas. 304; Harris v. Independence Gas Co. 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123; John T. Stewart Estate v. Falkenberg, 82 Kan. 576, 109 Pac. 170; Beal v. Childress, 92 Kan.

109, 139 Pac. 1198; Mackell v. Chesapeake & O. Canal Co. 94 U. S. 308, 24 L. ed. 161; 10 Cyc. 257, and note.

The defendant corporation is not seeking to acquire lands. It is merely attempting to prevent its dispossession of lands which it already owns under the law. 10 Cyc. 1135, 1274; New York, H. & N. R. Co. v. Boston, H. & E. R. Co. 36 Conn. 196; Re Brooklyn, W. & N. R. Co. 72 N. Y. 245; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 525; United States v. Grundy, 3 Cranch, 337, 351, 2 L. ed. 459, 462; Atchison Street R. Co. v. Nave, 38 Kan. 744, 5 Am. St. Rep. 800, 17 Pac. 587.

The record shows plaintiffs never had possession of the lands. Their only claim of possession rests upon their void tax deed. Plaintiffs' title deeds are mere quitclaim deeds, evidently given with full knowledge of the defective title. Schauble v. Schulz, 69 C. C. A. 581, 137 Fed. 389; Nearing v. Coop, 6 N. D. 345, 70 N. W. 1044; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856; Salzer Lumber Co. v. Claflin, 16 N. D. 601, 113 N. W. 1036; Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623.

Robinson, J. This action is the second edition of a similar action commenced seven years ago to quiet title to a half section of land in Logan county. (S.½ 23—134—73). The defendants own the patent title, and the plaintiffs claim under tax deeds which are void on their face, and appeal to this court from a judgment against them.

In August, 1912, the plaintiffs obtained a default judgment against the Wilsons and John R. Mulvane, to the effect that they have no estate or interest in, or lien or encumbrance upon, said property. The title to the property was in the corporation, and it served an answer claiming title, but during the protracted litigation it died and expired by lapse of time, and was succeeded by the parties that had made default. Then the plaintiffs moved to dismiss their action against the corporation, with a view of insisting on their default judgment against the other defendants. The case went to the supreme court (28 N. D. 521, 149 N. W. 957), and it was held that the default judgment was properly set aside, and that the motion for substitution of the trustees should have been granted and the action continued against them under new pleadings, and so the case was remanded.

On June, 1916, judgment was duly entered quieting title in the defendants, and the plaintiffs appealed to this court, demanding a review of the entire case. The review is short. The defendants have the patent title, and the claim of the plaintiffs is based on two tax deeds which are obviously void on their face. The tax deeds are dated January 30, 1906. One deed recites a sale made in December, 1902, for the taxes of 1901 of the S. W. section 27, township 134, range 73, to W. C. Foster, for the sum of $10.99, being the amount of taxes, penalty, and costs charged against the land, and that the sale was made for the *smallest or least quantity of the tract* that would sell for the total amount of the taxes, penalty, and interest. The other tax deed was in all respects the same, only the tract described in S. E. of the same section. As the sale was made in December, 1902, it was made under chap. 114, Laws 1901, which provides that at a tax sale each tract or lot shall be offered separately and struck off to the bidders who will pay the total amount of taxes, penalty, and costs charged against it, for the *lowest rate of interest from the date of sale.* Now it appears from the tax deeds that the sales were made in a manner not authorized by statute, and so it appears from the tax sale certificates. And hence they are all obviously void on their face. The record shows several other fatal defects, needless to consider. One such defect is quite enough. There was no reason for making a long, protracted, and expensive defense of several years, or any defense in this case. There was no reason for taking a mass of evidence on matters having no bearing on the title to the land.

And there is no possible reason for arguing that the plaintiffs have any claim under a default judgment, which has been set aside and held void by the district court and by this court. 28 N. D. 521, 149 N. W. 957. When the original action was commenced in February, 1910, it was based on the void tax deeds, and those deeds are still void. The complaint stated no cause of action against any party only the Kansas Land & Loan Company. It averred that the company owned the patent title to the land, and that the other defendants might claim some title or interest as the incorporators and stockholders. Now then, the plaintiffs dismissed their action against the company, and took a default judgment against the other parties, declaring that they had no title or interest in the land. Now, pending this long-winded and manifestly

groundless action, the corporation has ceased to exist, and the other defendants have succeeded to the title of the corporation, and they have been made parties to the action and obtained a judgment which is manifestly just and right. And as the defendants paid into court, for the benefit of the plaintiffs, all sums of money paid by them as taxes, regardless of the validity of such taxes, the plaintiffs have no cause for complaint. The judgment is affirmed.

Upon Petition for Rehearing.

ROBINSON, J. Some three years ago this action was commenced by the plaintiffs against the defendants and against a corporation which then had title to the land in question. The complaint in that action averred that the defendants in this action were made parties, not because they then had any claim or title to the land, but because they might acquire title. The complaint stated no cause of action against the defendants in this action, but, on failure of the defendants to answer, plaintiffs took a default judgment, declaring that the defendants had no title or interest in the land. The default was very properly set aside, and the judgment setting it aside is not in any way open to review or question.

The case was duly brought to trial on the issues presented by the respective claims of the plaintiffs and the defendants. The district court gave judgment in favor of the defendants, which has been affirmed by the decision of this court. Now the plaintiffs present a petition for rehearing, virtually attacking the decision of this court and asking the court to reconsider several matters having no bearing on the case. Such a petition looks like an imposition. The default judgment is not in the case. It was completely wiped out by the decision of this court. The plaintiffs' claim of title is based on a tax deed manifestly void on its face. The plaintiffs have never had any color of title to the land or any reasonable excuse for this long-protracted litigation. It is conceded that Jones T. Wilson owned the patent title to the land, and he made a deed purporting to convey it to his corporation, which has ceased to exist, and now he and the other defendants have the

patent title and a right to the immediate possession of the land without any further delays or vexatious litigation.

Motion denied.

BIRDZELL, J. Counsel for appellants have filed a long petition for rehearing in this case, which is directed, not only to the opinion filed upon this appeal, but, as is the case with a large portion of the brief on appeal, to the former decision of this court in the case of Murphy v. Missouri & K. Land & Loan Co. 28 N. D. 519, 149 N. W. 957, as well. It is contended that because the defendants, some of whom had defaulted before the original trial, had been referred to in the complaint as those who "may claim some interest or estate in said land, so they (plaintiffs) are informed and believe because they are incorporators, stockholders, or trustees in the Missouri & K. Land & L. Co.," a default judgment against them in individual capacity would prevent them from subsequently asserting a title that might devolve upon them as trustees of a defunct corporation. This question was disposed of upon the former appeal, and the rule there laid down and directions given have become the law of the case. In that appeal the default judgment was set aside and the trustees' names were ordered substituted as of September 3, 1912, the date of their application. It is strenuously argued that neither the district court nor this court had power to enter any order or judgment depriving the plaintiff and appellant of the benefit of the default judgment previously obtained. But this court is of the opinion that, from its commencement to its conclusion by a final judgment, the district court and this court, upon appeal under the *de novo statute,* have ample authority to enter such orders, or to modify any orders previously entered, as to enable it to render a proper judgment upon the merits. Furthermore, this court is of the opinion that the former decision touching this question has become the law of the case.

The petition enumerates a number of questions relating to the power of the defunct corporation to hold a title which could descend to the trustee defendants as its successors. These are raised and discussed in the brief, but are not referred to in the original opinion filed upon this appeal. If all the contentions of the appellant in this connection

are correct, we do not see wherein their title is strengthened. These are questions which the original grantor could not raise, because he is not permitted to thus collaterally attack the corporate existence (10 Cyc. 1134), much less can they be raised by one who is a stranger to the chain of the title. The petition for rehearing is denied.

We concur in Mr. Justice BIRDZELL'S opinion on the rehearing: BRUCE, GRACE, and CHRISTIANSON, JJ.

E. C. KRUEGER v. THE FIRST STATE BANK OF BOWBELLS.

(163 N. W. 817.)

Banks — deposit — action to recover — obligations of plaintiff to defendant — on appeal bond — used for — defense — surety on bond — appropriation of deposit.

In this case the plaintiff sues to recover money deposited to his credit in the defendant bank. The defense is that the bank used the deposit money to pay an obligation of the plaintiff on an appeal bond which he signed in a suit of one Kennedy against the State Bank of Bowbells. As it appears that the defendant was the successor of the state bank and assumed its debts and liabilities, it had no right to pay its own obligation and to charge the same to the plaintiff, whose obligation was of surety on the bond.

Opinion filed June 2, 1917.

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

Affirmed.

John E. Greene (*Chas. J. Fisk,* of counsel), for appellant.

The agreement between the banks, when defendant bought out the old bank, does not purport to be a memorial covering the transactions between these two banks, but is merely an *ex parte* recital that a proposal had theretofore been made, looking to a sale and purchase of the assets, and an assumption of liabilities.

The defendant is not bound by such a mere *ex parte* recital, upon the theory that it constituted a written contract between these banks, and parol evidence may be received to show the actual contract. 4 Wig-

more, Ev. §§ 2425, 2429 to 2431 inclusive, and authorities cited; 10 R. C. L. pp. 1019, 1024, and 1030, and cases cited.

An appeal bond at most only creates a contingent liability, and at the time defendant bought out the old bank, it only assumed actual, existing liabilities, and parol evidence is admissible to show that any such contingent liability was not within the contemplation of the parties. 5 Chamberlayne, Ev. § 3559, and cases cited; 17 Cyc. 724 to 726; Pope v. Machias Water Power & Mill Co. 52 Me. 535; Beemer v. Packard, 92 Hun, 546, 38 N. Y. Supp. 1045; Long v. Long, 44 Mo. App. 141; Peaks v. Lord, 42 Neb. 15, 60 N. W. 349; Perret v. King, 30 La. Ann. 1368, 31 Am. Rep. 240; 6 R. C. L. 875.

The rule against the admission of parol evidence to vary or contradict a written contract does not apply where the writing is collateral to the issue involved and the action is not based upon such writing. 17 Cyc. 741 (37), 749; Luther v. Hunter, 7 N. D. 544, 75 N. W. 916.

D. C. Greenleaf, for respondent.

The payment of the Kennedy judgment against the old bank, by defendant, was a voluntary payment on its part, and the exhibits offered in evidence, being the resolutions of the dealing banks, were for the purpose of supporting the contention that the payment of such judgments was voluntary, and was not an advancement or loan to plaintiff.

If the officers were mistaken as to the law and as to the bank's liability, it is not the fault of plaintiff. Charnock v. Jones, 16 L.R.A. (N.S.) 233, note.

If defendant bank bought the assets of the old bank, and did not assume its liabilities, then it was not a transaction in due course of business, and defendant is not an innocent purchaser. The defendant held the assets of the old bank in trust for the benefit of its creditors. Williams v. Commercial Nat. Bank, 49 Or. 492, 11 L.R.A.(N.S.) 857, 90 Pac. 1012, 91 Pac. 443; 10 Cyc. 1265.

The property transferred by the selling bank to defendant was a fund that the law sets apart or charges with a lien in favor of creditors. The debtor corporation cannot dispose of it or encumber it to the prejudice of the creditors; there exists an equitable lien, and defendant took subject thereto. Jefferson Nat. Bank v. Texas Invest. Co. 74 Tex. 437, 12 S. W. 101; Sanger v. Upton, 91 U. S. 60, 23 L. ed. 222; Bartlett v. Drew, 57 N. Y. 589; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall.

409, 19 L. ed. 120; Kendall v. Stokes, 3 How. 87, 11 L. ed. 506; Clapp v. Peterson, 104 Ill. 30; Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; Vance v. McNabb Coal & Coke Co. 92 Tenn. 47, 20 S. W. 424; Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. 4 McCrary, 432, 13 Fed. 524; Brum v. Merchants' Mut. Ins. Co. 4 Woods, 156, 16 Fed. 143; Blair v. St. Louis, H. & K. R. Co. 22 Fed. 38; Hatch v. Dana, 101 U. S. 213, 25 L. ed. 887; Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376.

Robinson, J. The plaintiff sues to recover over $2,000 which he had on deposit with the bank. The defense is that the money was paid out for and at the request of the plaintiff on a judgment against him by one Kennedy. A verdict and judgment was given for the plaintiff and defendant appeals. The plaintiff claims that the Kennedy judgment was recovered against him on an appeal bond which he signed as surety for one of the banks. The defendant bank absorbed and took over the property and assets of the state bank, in whose name the appeal was taken. The state bank was perfectly solvent and had property more than enough to pay all its debts and liabilities, and the defendant purchased all the property and became the successor of the state bank. The claim is that, by special contract and also by operation of law, the defendant bank became liable for all the debts and obligations of the state bank, including the liability on the appeal bond made to Kennedy.

In 1906 the state bank received from Kennedy a draft for $1,700, on which it received the money and wrongfully used the same. Kennedy sued the bank to recover his money with interest. There was no real defense and judgment was given against the bank for $2,020, and on March 13, 1909, for the purpose of delay, an appeal was taken to the supreme court and the judgment was affirmed. 22 N. D. 70, 132 N. W. 657. The appeal bond was dated October 2, 1909, and signed thus:

State Bank of Bowbells,
By J. D. Langford,
Cashier.
A. B. Bickford.
E. C. Krueger.

On the trial of this case there was a mass of oral and documentary evidence submitted on the question as to whether or not the defendant assumed the liability of the state bank. It was fairly submitted to the jury as a question of fact, and the verdict was against the defendant. A motion for a new trial was denied. The reasons given were that there was no prejudicial error, and that the defendant had assumed the liability of the state bank upon the Kennedy judgment.

Exhibits 4, 5, and 6 are minutes of the stockholders and directors of the respective banks.

Exhibit 4: "A meeting of the stockholders of the State Bank of Bowbells was held at Bowbells this 16th day of December, 1907, to consider a proposition made by the First State Bank of Bowbells to take on all assets and assume all liabilities of the said State Bank of Bowbells at par value. On motion the proposition was accepted and transfer ordered."

Exhibit 5: "Bowbells, N. D., Dec. 24, 1907. A meeting of the stockholders and directors was called by the president for the purpose of discussing the purchase of the State Bank of Bowbells. It was decided to take over the business of the state bank, assume their assets and liabilities, thus merging the two institutions under the name of the First State Bank."

Exhibit 6: "Bowbells, N. D., Jan. 4, 1908. A meeting of the stockholders and directors of the First State Bank of Bowbells was held in the office of the bank, and the affairs of the bank examined. It was found that the affairs of the state bank had been assumed as per purchase authorized under meeting of December 24, 1907." G. L. Bickford was chosen president; A. B. Bickford, cashier.

In the brief of counsel for defendant and appellant the leading question argued (and the only question of the case) is: Did the defendant bank in its transaction with the other bank assume its contingent liability to W. T. Kennedy on the appeal bond?

Counsel for defendant does everywhere designate it as a "contingent liability" and "a mere contingent future liability," and he bases his argument largely on the assumed contingency of the liability. But in truth it was not at all contingent; and it was an existing, and not a future, liability. The state bank had received and used Kennedy's

draft for $1,700, and the defense was the merest sham, and the facts were known to the officers of both banks.

The manifest purpose of one bank was to close out its business and to dispose of it, and the purpose and agreement of the defendant bank and its stockholders, as expressed by their resolution, was "to take over the business of the state bank and to assume its assets and liabilities, thus merging the two institutions under the name of the First State Bank." The appeal bond was signed after the merger, and it was signed by A. B. Bickford, cashier of the defendant bank, and his name was put on the bond before the name of the plaintiff, and presumably the plaintiff signed the bond at the request of the defendant bank or its cashier to stave off its liability on an obligation for over $2,000. While the appeal was taken in the name of the defunct bank, there are reasons for thinking that it was in reality taken by its successor, the defendant. If the defendant bank took the appeal, or if the appeal was really taken for its benefit, if it induced the plaintiff to sign the appeal bond or if it in any way became legally bound to pay the Kennedy judgment, then as surety for the defendant bank the plaintiff had a perfect right to request it to pay the Kennedy judgment and to discharge him from the bond to which he had subscribed his name under the name of defendant's cashier.

On the trial the court excluded offers to prove in effect that, when the defendant bank contracted to absorb the other bank, *no special reference was made to Kennedy's claim;* that the book assets of the state bank amounted to over $53,000, and its liabilities to over $43,000, and that the difference was paid to the state bank, and that it assumed liabilities which were as follows:

Certificates of deposit	$23,280.12
Individual deposits	20,161.53
Interest	325.76

The proof would have rather strengthened the claim of the plaintiff. It indicates that the defendant bank assumed liability for the individual deposits, and the claim of Kennedy was an individual deposit of $1,700, on which there never should have been any question or dispute. Then the court excluded an offer to prove an oral agreement

between the two banks that the First State Bank should not assume any liability for the claim of Kennedy. This offer is in conflict with the prior offer to show that, at the time of taking over the assets and assuming the liability of the State Bank of Bowbells, *no reference was made to the claim of Kennedy;* and the offer was not sufficiently specific, as it did not in any manner disclose the facts to be proved, and it contradicted the record evidence of the agreement on which all the parties acted. There is not much weight to be attached to such vague and conflicting offers of testimony, especially when the offers are made to contradict the record of the transaction as made and entered on the books of both banks.

On the whole it appears that the case is fairly submitted to the jury, and the verdict is just and right. There should be an end to this long litigation.

Judgment affirmed.

CHRISTIANSON, J. (concurring specially). I concur in an affirmance of the judgment. I am not, however, prepared either to concur in or dissent from the reasons on which the opinion prepared by Mr. Justice Robinson is based.

I shall therefore briefly set forth the reasons which lead me to the conclusion that the judgment should be affirmed.

The answer "admits that on the 19th day of September, A. D. 1914, the defendant had on deposit in its bank, to the credit of the said plaintiff, the sum of $2,068.66." The answer further, "by way of counterclaim, alleges: That between said 19th day of September, 1914, and the 1st day of October, 1914, the defendant, by authority and at the instance and request of the plaintiff, paid for the use and benefit of said plaintiff of the moneys so on deposit to his credit, the full sum of $2,054.51. That the said defendant now has in its possession belonging to said plaintiff the sum of $14.15, for which said sum the defendant hereby offers judgment in favor of the plaintiff, with costs accrued to the date of service of the answer."

The plaintiff interposed a reply denying the allegations of the counterclaim and refusing the offer of judgment contained therein. The issue raised by the counterclaim and the reply was the only issue of fact presented by the pleadings in the case. As developed by the testimony,

this issue really resolved itself into whether the plaintiff Krueger in January, 1912, requested the bank to loan to, or advance for, him the necessary moneys with which to pay the Kennedy judgment. Upon this question there was a square conflict in the evidence. It is conceded that the arrangement with respect to the payment of the Kennedy judgment was made between Phelps, the vice president of the defendant bank, and the plaintiff, Krueger. It is also conceded that this arrangement or agreement rested wholly in parol; that no written memorandum was made; nor was any note or other evidence of indebtedness taken from Krueger. According to the testimony of Phelps, there were three persons present when the arrangement was made, namely, Phelps, and Powers, the cashier of the defendant bank, and the plaintiff, Krueger. Powers, however, testified that he had no personal knowledge or recollection of the conversation, and that the principal part thereof took place between Phelps and Krueger in the back room of the bank, while Powers was in the front room.

Phelps testified that Krueger requested the bank to advance the moneys required to pay the Kennedy judgment; and that pursuant to such request the bank did advance such moneys and paid the judgment, and subsequently charged the amount so advanced against Krueger's checking account in the bank.

The plaintiff, Krueger, testified that at the time the action was commenced against him on the supersedeas bond in January, 1912, he had a conversation with Mr. Phelps in regard to the matter; that during such conversation he directed the attention of Phelps to the two resolutions adopted by the stockholders of the two banks, at the time the defendant bank purchased the assets of the State Bank of Bowbells; that thereupon he and Phelps studied the resolutions together, and that after study and consideration thereof Phelps expressed it to be his opinion that under the resolutions the defendant bank had assumed liability for the claim upon which the Kennedy judgment was based, and consequently was liable for the payment of such judgment. Krueger says: "I never asked the bank to loan me $2,300. Phelps said the bank was liable under the resolutions, and that the defendant bank would pay the judgment, get the $500 from Crane and $500 from Landsborough and carry the collateral in stocks and bonds and let it work out." Krueger further testified that he did not authorize

Phelps to send the money to pay the judgment, and that Phelps sent it for the bank. Krueger also testified that the defendant bank at one time charged against him upon his bank book the expense of a certain trip made by Phelps to Idaho to see Mr. Landsborough in regard to the Kennedy judgment; that plaintiff, upon receiving his bank book, objected to such charge, and that the defendant bank receded from its position and eliminated the charge. The evidence shows that the bank paid the Kennedy judgment in January, 1912; that in the month of April following, the plaintiff, Krueger, had on deposit in the defendant bank in his checking account therein an amount considerably in excess of the amount of money involved in this litigation; that such moneys remained on deposit in the bank for some time; and that the defendant did not endeavor to charge the amount of the alleged claim to the account of Krueger until in September, 1914. The evidence also discloses the fact that Phelps, the vice president of the defendant bank, was a lawyer.

It seems clear to me that the case involves purely and simply a question of fact, *viz.*, whether the bank advanced the moneys to pay the Kennedy judgment upon the request of the plaintiff, Krueger, or whether it paid the same voluntarily and without any request from Krueger.

No error is predicated upon the court's instructions to the jury, and consequently the instructions must be assumed to be correct.

Appellant, however, assigns error on the court's refusal to receive certain evidence offered by the defendant, for the purpose of showing what liabilities were contemplated by the parties in the two resolutions referred to in the majority opinion. Defendant offered to prove that it was agreed by the directors and stockholders of the respective banks that the then pending suit of Kennedy, upon which the judgment was obtained, was not to be assumed by the defendant bank.

In my opinion it is not necessary to determine in this case whether the two resolutions must be taken to embody the entire contract, or whether they are to be deemed merely evidence tending to establish contractual relations which may be explained and supplemented by other testimony. An examination of the record shows that the two resolutions were received in evidence without objection, although a considerable time subsequent thereto defendant moved that they be stricken out.

Whether the defendant bank had assumed the Kennedy claim under its contract with the State Bank of Bowbells is not an issue raised by the pleadings. The sole issue raised by the pleadings is whether the defendant "by authority, and at the instance and request of the plaintiff, paid for the use and benefit of said plaintiff, of the moneys so on deposit to his credit, the full sum of $2,054.51." It is manifest that the defendant bank had no authority to pay such judgment of its own volition, and charge the same against plaintiff's account in the bank. Whether plaintiff requested defendant bank to pay such judgment depends upon what was said in the conversation between the plaintiff and Phelps. As already stated, the testimony of the plaintiff, Krueger, is to the effect that these resolutions were considered and read over during the conversation between Krueger and Phelps. Powers, the cashier of the defendant bank, also testified that Phelps had stated to him that "a broad construction may be applied to the resolutions," and the bank thereby held responsible for the Kennedy judgment under the resolutions.

The jury was entitled to know everything that was said during such conversation. And as these resolutions, according to plaintiff's testimony, formed part of the matter discussed and considered during such conversation, they were properly received in evidence in connection therewith, regardless of their contractual force or effect. What the defendant offered to prove did not relate to anything said or considered during the conversation between Krueger and Phelps, but something which took place at the time the resolutions were adopted five years previous thereto. It seems self-evident that this was not material and could have no possible bearing upon the conversation which took place between Phelps and Krueger, unless it was also shown that the matter which defendant offered to prove was known to Phelps and Krueger, and considered or discussed by them during their conversation.

The pivotal question in the case was whether the plaintiff requested the defendant bank to advance the money and pay the Kennedy judgment for him. The answer to this question must be found in the conversation between Phelps and Krueger.

The jury which heard the testimony upon this question believed the plaintiff's version thereof to be the correct one. The jury's finding

is amply supported by the evidence, and is binding on this court. The judgment should be affirmed.

On Petition for Rehearing. Filed July 21st, 1917.

ROBINSON, J. No decision of a cause is ever satisfactory to the party against whom it is given. Though this case has been well argued and considered, a motion is filed to reargue and reconsider it on every point that has been argued and considered. The case is fairly debatable. It is one on which lawyers and judges may differ and continue to differ even if there were a dozen arguments. The case turns not so much on questions of law as on disputed questions of fact, and in reasoning and drawing inferences from proved facts there is great reason for differences. The facts and the law are stated in the opinion, which has been signed and concurred in by all the judges and by the special opinion of Judge Christianson. Thus, all the judges of this court and the judge of the district court have concurred in the verdict of the jury, and it is idle to continue the argument. Motion denied.

JOHN F. BEYER v. THE NORTH AMERICAN COAL & MINING COMPANY, Herbert Williams, L. V. Williams, A. E. Wolpert, D. C. Wolpert, A. Maud Wolpert, J. L. Trevillyan, F. B. Nicoll, J. L. Ludwig, John E. Tappen and Investors' Syndicate, a Corporation.

(163 N. W. 1061.)

Pleading — answer — denials — new matter — neither defense nor counterclaim — demurrer will lie.

Where an answer which contains a denial of all the allegations of the complaint except such as are admitted or qualified alleges new matter constituting neither a counterclaim nor a defense to the action, the answer is demurrable under § 7452 of the Compiled Laws of 1913.

Opinion filed June 30, 1917. Rehearing denied July 25, 1917.

Appeal from Stark County, Honorable *W. C. Crawford,* Judge.

Plaintiff appeals.

Reversed.

M. A. Hildreth, for appellant.

The mortgage in question was fraudulently issued, and is *ultra vires,* and such fact was known to the investors' syndicate before its execution and delivery. Investors' Syndicate v. North American Coal & Min. Co. 31 N. D. 259, 153 N. W. 472.

The defendant's answer does not contain new matter constituting a defense or counterclaim, and is demurrable. Defendants are also estopped, and they cannot seek relief here by adopting any new theory in the case. Hubbell v. United States, 171 U. S. 203–209, 43 L. ed. 136–138, 18 Sup. Ct. Rep. 828; Hoseason v. Keegan, 178 Mass. 250, 59 N. E. 627; Parnell v. Hahn, 61 Cal. 133; Rauwolf v. Glass, 184 Pa. 237, 39 Atl. 79; Williamsburgh Sav. Bank v. Solon, 136 N. Y. 464, 32 N. E. 1058.

Bangs, Hamilton, & Bangs and *W. J. Mayer,* for respondents.

The case at bar has for its object the enjoining of the foreclosure of a mortgage. Investors' Syndicate v. Letts, 22 N. D. 452, 134 N. W. 317.

Plaintiff cannot now make claim of ownership in the mortgage. Beyer v. North American Coal & Min. Co. 32 N. D. 542, 156 N. W. 204.

Birdzell, J. This case has been before the court once before upon an appeal from an order of the district court sustaining a demurrer to the complaint. This court reversed the order of the district court and held that the complaint stated a cause of action. After the reversal of the order, separate answers were filed in the district court on behalf of two groups of defendants,—one on behalf of the North American Coal & Mining Company, J. L. Trevillyan, F. B. Nicoll, and J. L. Ludwig, and one on behalf of the Investors' Syndicate and John E. Tappen. To these answers the plaintiff interposed demurrers, which were overruled by the district court; and, from the order overruling them, this appeal is taken. Various phases of the litigation between these parties, involving the transactions set forth in the complaint and answers, have heretofore been before this court, and its history can be traced by refer-

ring to our former decisions. See Investors' Syndicate v. Letts, 22 N. D. 452, 134 N. W. 317; Beyer v. Investors' Syndicate, 31 N. D. 247, 153 N. W. 476; Investors' Syndicate v. North American Coal & Min. Co. 31 N. D. 259, 153 N. W. 472; Beyer v. North American Coal & Min. Co. 32 N. D. 542, 156 N. W. 204; Beyer v. Robinson, 32 N. D. 560, 156 N. W. 203.

The facts stated in the complaint are summarized in the case of Beyer v. North American Coal & Min. Co. 32 N. D. 542, 156 N. W. 204, and need not be repeated here. For convenience, and in the interest of a clear understanding of the questions presented upon this appeal, we will consider the two answers separately. The answer of the North American Coal & Mining Company, Trevillyan, Nicoll, and Ludwig, contains a denial of all of the allegations of the complaint, except as admitted or qualified. Paragraph 3 of the answer alleges the execution of a note by the North American Coal & Mining Company and Williams to the Investors' Syndicate for the sum of $1,118.43. Paragraph 4 alleges the execution of a mortgage by the Coal & Mining Company securing the payment of the above note. Paragraphs 5 and 6 allege the execution of the Letts note and mortgage of $500 to Dana, and its various transfers from Dana to Beyer, from Beyer to the Coal and Mining Company and from the Coal & Mining Company to the Investors' Syndicate. Paragraph 7 alleges as the only consideration for the assignment of the Dana mortgage, the $1,118.43 note from the Coal & Mining Company to the Investors' Syndicate. Paragraph 8 sets up the foreclosure proceedings under the Dana mortgage, wherein the Investors' Syndicate was given a judgment against various defendants and Beyer, intervener, for the sum of $2,524.99, which judgment decreed the amount thereof to be a lien upon the premises covered by the mortgages, directed the sale of the premises in payment of the debt, and decreed that Beyer, intervener, had no interest in the premises. Paragraph 9 sets up the foreclosure proceedings under the mortgage of the North American Coal & Mining Company to the Investors' Syndicate, wherein a final judgment was entered against the plaintiff and in favor of the Coal & Mining Company and Beyer, intervener, which judgment was affirmed by this court in the case of Investors' Syndicate v. North American Coal & Min. Co. 31 N. D. 259, 153 N. W. 472. Digressing for a moment to note the attitude assumed by the officers of the coal

company toward this litigation, it is to be observed that, in the opinion affirming this judgment, this court held "that the Investors' Syndicate Company, through its secretary, Tappen, and the officers of the coal company, principally Williams, entered into a fraudulent agreement to rob the coal company of its entire assets, for the purpose of defeating the rights of the minority stockholders." It was further found "that upon the execution of the mortgage [to which mortgage the Dana mortgage is conceded in the answer herein to be collateral] Williams took the entire proceeds, even to the last cent, from the Investors' Syndicate Company, and a few hours later paid it back to said Investors' Syndicate Company to pay his own personal note and to take down the stock which he had put up as collateral. That the coal company itself did not get a cent of this money, unless it might be said that the same had been spent in paying back salaries to Williams and his wife." The answer concludes with a demand for a judgment enjoining the Investors' Syndicate from proceeding further with the foreclosure of the mortgage and sale of the premises, and asks that the Investors' Syndicate be adjudged not the owner of the judgment, and that the same be held by it in trust for the use and benefit of the North American Coal & Mining Company. This is substantially the relief asked for in the complaint. It differs only from the complaint in that the latter asks that the enforcement of the judgment be held in abeyance until the court can hear testimony on the part of the plaintiff, Beyer, and other stockholders interested in determining the validity of the judgment.

Whether or not the foregoing answer it demurrable depends upon whether the purported new matter set forth therein constitutes either a counterclaim or defense. Comp. Laws 1913, § 7452. It is manifestly conceded in this answer that, so far as the Investors' Syndicate is concerned, some party, either the plaintiff or the answering defendants, are entitled to the relief sought in the complaint. The sole inquiry is as to who is entitled to this relief.

The complaint states facts which entitle Beyer to maintain this action. This has already been held by this court upon the appeal wherein the demurrer to the complaint was overruled. The facts themselves have also been established in previous litigation which had not been determined when the complaint in this action was filed, but

which was determined before the answers herein were filed. In the case of Investors' Syndicate v. North American Coal & Min. Co. supra, this being the action wherein the mortgage given to the Investors' Syndicate was defeated because it was held to have been fraudulently issued as a part of a scheme to defraud the coal company of its assets, it appears that no defense whatever was made by the coal company, and that the success of that litigation was due to the fact that Beyer intervened to protect the stockholders of the coal company, whose officers were apparently willing that it should be looted. In that action this court held that it was proper for Beyer to champion the interests of the stockholders of the North American Coal & Mining Company because its officers were in a conspiracy with the plaintiff to prevent a defense being interposed, and because their transactions in giving the note, to which the Dana mortgage is collateral, and in pledging the assets of the corporation, were a fraud upon Beyer and the other stockholders. As between Beyer and the set of officers claiming to represent the coal company, Beyer's right to the relief asked for in this complaint was conclusively established in the above action. It is true that the Dana mortgage was not directly involved in that action, but it is admitted in the answer before us that the transfer of the Dana mortgage to the Investors' Syndicate was upon the same consideration which supported the mortgage there involved, and that the Dana mortgage is held as collateral to the mortgage indebtedness litigated in that action. Consequently the fraud which vitiated the principal indebtedness also destroyed the collateral transaction. The answer of these defendants, then, puts in issue no issuable fact upon which the plaintiff's right to maintain this action depends. Inasmuch, however, as it purports to contain lengthy allegations of supposedly new matter which constitutes neither a counterclaim nor a defense, it is clearly demurrable. Comp. Laws 1913, § 7452. An answer of this character is not removed from the operation of a demurrer, because of the fact that it contains a denial of all allegations except as admitted or qualified. See Van Dyke v. Doherty, 6 N. D. 263, 69 N. W. 200; Kennedy v. Dennstadt, 31 N. D. 422, 154 N. W. 271.

The answer of the Investors' Syndicate and John E. Tappen is identical with that of the coal company, except that it contains no prayer for relief whatsoever. It amounts to no more or less than an offer

of judgment for the relief prayed for. Its purported allegations of new matter, of course, cannot amount to matters of defense or counterclaim, and consequently it is likewise demurrable. The appellant contends that, if this pleading be considered as containing complete admissions of the truth of the complaint, the appellant should have moved for judgment upon the pleadings, instead of demurring. Under facts assumed by this argument, a motion for judgment on the pleadings would be but another way of arriving at the same result. The judgment for the plaintiff on demurrer would likewise give him judgment on the pleadings.

In conclusion it seems proper to observe that, while this action has been held to have been properly brought as an independent suit, the relief sought, in view of the present state of the litigation between these parties concerning the subject-matter, characterizes this proceeding as being in reality an ancillary step for the protection of the fruits of the prior action in which the mortgage indebtedness to the Investors' Snydicate has been invalidated for fraud.

The order appealed from is reversed and the cause remanded for further proceedings according to law.

HUGH McDONALD et al. v. O. I. HANSON et al.

(164 N. W. 8.)

Educational institutions — common schools — organization of — methods of.

1. Chapter 135 of the Session Laws of 1915 construed, and *held* to provide two methods of organizing new common-school districts, namely:

County commissioners — boards of — county superintendent of schools — petition — property — valuation — school voters — majority — districts affected — proposed new district — three fourths of voters — hearing of petition — notice of.

a. The first method is by presenting to the board of county commissioners and county superintendent a petition containing proper and legal requirements as to assessed valuation, and extent of the territory to be contained in the new district to be organized, signed by a majority of the school voters in the districts whose boundaries will be affected by the organization of the new school district, and by at least three fourths of the residents of the territory to be

included in the new school district; such petition must be heard upon thirty days' notice as provided by § 1148 of the Compiled Laws of 1913, and only at the July meeting of the board of county commissioners, as provided by § 1147 of the Compiled Laws of 1913.

Common schools — organization — petition — how signed — hearing on — notice of — county commissioners.

b. The second method of organizing a new common-school district is by petition signed by three fourths of the school voters residing in the territory to be organized into the new school district, such petition to comply with the requirements of law as to assessed valuation, and extent of territory in both the old and the new districts; the notice required by § 1148 of the Compiled Laws of 1913 shall also be given, but such petition may be acted upon at the July meeting, or any other meeting of the board of county commissioners, conjointly with the county superintendent of schools.

Statutes — constitutionality of — general law — uniform operation — special legislation — is not.

2. Chapter 135 has been examined, and *held* not to be in conflict with, nor does it contravene any of, the provisions of §§ 11, 69, or 70 of the state Constitution; said law is a general law, operating in every part of the state uniformly when applied to like conditions and circumstances, and is in no sense special legislation. The classification of common schools, so far as the same is provided for in the law under consideration, is based upon reason, and is not arbitrary, unreasonable, or discriminating.

Opinion filed April 18, 1917. Rehearing denied July 25, 1917.

Appeal from the District Court of Traill County, Honorable *Chas. A. Pollock,* Judge.

Affirmed.

Carmody & Leslie, for appellants.

A law general in its form, but special in its operation, violates a constitutional inhibition of special legislation as much as if special in form. For the purpose of applying different rules to different subjects, the legislature cannot adopt a mere arbitrary classification. Nichols v. Walter, 37 Minn. 264, 33 N. W. 800; Scowden's Appeal, 96 Pa. 422; Vermont Loan & T. Co. v. Whithed, 2 N. D. 82, 49 N. W. 318; State, Anderson, Prosecutor, v. Trenton, 42 N. J. L. 486; McCarthy v. Com. 110 Pa. 243, 2 Atl. 423, 5 Atl. 215; Morrison v. Bachert, 112 Pa. 322, 5 Atl. 739; State, Closson, Prosecutor v. Board of License & Excise, 48 N. J. L. 438, 5 Atl. 323; Edmonds v. Her-

brandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970; Davis v. Clark, 106 Pa. 377; Com. ex rel. Fertig v. Patton, 88 Pa. 258; Scranton School Dist.'s Appeal, 113 Pa. 176, 6 Atl. 159; State, Highstown, Prosecutor v. Glenn, 47 N. J. L. 105; State, Long Branch Police, Prosecutor, v. Sloane, 49 N. J. L. 356, 8 Atl. 101.

A law which attempts to give to cities of more than a certain number in population certain rights as to granting licenses not extended to other cities is unconstitutional and void. State, Clark, Prosecutor, v. Cape May, 50 N. J. L. 558, 14 Atl. 581; State, Highstown, Prosecutor, v. Glenn, 47 N. J. L. 105; State, Long Branch Police, Prosecutor, v. Sloane, 49 N. J. L. 356, 8 Atl. 101.

Such a law must stand on some reason, having regard to the classification. State ex rel. Dorval v. Hamilton, 20 N. D. 592, 129 N. W. 916; Edmonds v. Herbrandson, 2 N. D. 270, 14 L.R.A. 725, 50 N. W. 970.

Proper classification is permitted, but arbitrary and unreasonable discrimination is forbidden. Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 257; Powers Elevator Co. v. Pottner, 16 N. D. 359, 113 N. W. 703.

The Constitution of the United States guarantees equal protection of the laws to all persons, and there can be in the law no provision for taxation by arbitrary classification, but classifications must be founded upon real differences in situation and condition, affording rational ground for difference in treatment. Northwestern Mut. L. Ins. Co. v. State, 163 Wis. 484, 155 N. W. 609, 158 N. W. 328.

P. G. Swenson, for respondents.

The petition was wholly sufficient and was heard and acted upon at the proper time and place by the proper tribunal. All opportunity was given the voters and taxpayers to appear and offer suggestions and objections. Sess. Laws 1915, chap. 135; Comp. Laws 1913, § 1147; Tallmadge v. Walker, 34 N. D. 590, 159 N. W. 71.

In the organization of common-school districts, laws restricting as to area, population, and valuation, and providing modes of procedure, are not in conflict with any provision of the Constitution. Such laws are general and uniform in their operation throughout the state. Laws

1915, chap. 135; Pol. Code, art. 2, chap. 4; Comp. Laws 1913, § 4079; Pol. Code, art. 1, chaps. 44, 47; Dill. Mun. Corp. 4th ed. § 54.

A provision requiring uniformity of legislation does not mean that all laws must embrace all persons or localities. 6 R. C. L. §§ 414–415; Eckerson v. Des Moines, 137 Iowa, 452, 115 N. W. 177; Hanlan v. Floyd County, 53 Ind. 123; Wisconsin C. R. Co. v. Superior, 152 Wis. 464, 140 N. W. 79; Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 N. E. 920, 14 Ann. Cas. 1131; Wall v. St. Louis County, 105 Minn. 403, 117 N. W. 611; Allan v. Kennard, 81 Neb. 289, 116 N. W. 63; State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A. —, —, 156 N. W. 561; State ex rel. Hagen v. Anderson, 22 N. D. 65, 132 N. W. 433; Albright v. Sussex County Lake and Park Commission, 68 N. J. L. 523, 53 Atl. 612; State ex rel. Bray v. Long, 21 Mont. 26, 52 Pac. 645.

A law is not local or special because it classifies counties and townships on the basis of population, resting on a difference in situation or needs. School Dist. v. King, 20 N. D. 614, 127 N. W. 515; Dill. Mun. Corp. 4th ed. § 185; Cooley, Const. Lim. 6th ed. p. 228; Pittsburg's Petition, 217 Pa. 227, 120 Am. St. Rep. 845, 66 Atl. 348; Valverde v. Shattuck, 19 Colo. 104, 41 Am. St. Rep. 208, 34 Pac. 947; Cicero v. Haas, 244 Ill. 551, 91 N. E. 574; McCarter v. McKelvey, 78 N. J. L. 3, 138 Am. St. Rep. 583, 74 Atl. 316; Holmes & B. Furniture Co. v. Hedges, 13 Wash. 696, 43 Pac. 944; State ex rel. Bray v. Long, 21 Mont. 26, 52 Pac. 645; Dawson Soap Co. v. Chicago, 234 Ill. 314, 84 N. E. 920, 14 Ann. Cas. 1131; Hunter v. Tracy, 104 Minn. 378, 116 N. W. 922; Eckerson v. Des Moines, 137 Iowa, 452, 115 N. W. 177; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; State ex rel. Baughn v. Ure, 91 Neb. 31, 135 N. W. 224; Douglas v. People, 225 Ill. 536, 8 L.R.A.(N.S.) 1116, 116 Am. St. Rep. 162, 80 N. E. 341; Albright v. Sussex County, Lake & Park Commission, 68 N. J. L. 523, 53 Atl. 612; State ex rel. Probtsfield v. Sharp, 27 Minn. 38, 6 N. W. 408; Wall v. St. Louis County, 105 Minn. 403, 117 N. W. 611; State ex rel. Larson v. Scott, 110 Minn. 461, 126 N. W. 70; State v. Standley, 76 Iowa, 215, 40 N. W. 815; Rev. Codes 1905, § 3013, Comp. Laws 1913, § 4051; State ex rel. Hagen v. Anderson, 22 N. D. 65, 132 N. W. 433; State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A. —, —, 156 N. W. 561; People v.

McBride, 234 Ill. 146, 123 Am. St. Rep. 82, 84 N. E. 865, 14 Ann. Cas. 994.

GRACE, J. What may be termed the pleadings in this action are composed of a petition for a writ of certiorari and the return to such writ. Omitting the title and formal parts of such writ, the same is as follows, to wit:

To the above-named court and judge thereof: Now come the above-named plaintiffs and upon the affidavit of Hugh McDonald, Henry A. Gordon, George Vettel, and George Wright, four of the above-named plaintiffs, and upon the affidavit of John Carmody, both of which affidavits are hereto attached, petition and pray said court and judge thereof that a writ of certiorari may be issued directed to the above-named defendants and requiring said defendants and each thereof to certify fully to the said court issuing said writ at a specified time and place within said writ to be specified, all the proceedings by you or any of you taken in the matter of the attempt to divide Caledonia school district in Traill county or create or organize a new district consisting of the civil township of Herberg, which now constitutes a part of said school district, and to annex to the writ a transcript of the record and proceedings therein described and referring to them with convenient certainty, and also a statement of all other matters and proceedings pertaining to matters mentioned in said affidavits by them or any of them had, in order that the proceedings had as mentioned in said affidavit to it and that such proceedings may be reviewed by your Honorable Court, and do further pray that by said writ the parties of the defendant and each of them be required to desist from further proceedings from the matters stated in and reviewed in said writ of certiorari and thus your petitioners will ever pray.

Dated this 22d day of July, A. D. 1916.

John Carmody,
C. E. Leslie.
Attorneys for the above-named plaintiffs.

The petition for writ of certiorari was supported by the affidavit of Hugh McDonald, H. C. Gordon, George Vettel, and George Wright,

to the effect that all of the plaintiffs were resident voters, taxpayers, and freeholders in Caledonia school district. The affidavit further sets forth the names of the board of county commissioners, the county auditor, and the county superintendent of Traill county, who were the acting and duly qualified officers during the times involved in such petition. It is further stated and described in such affidavit all the territory included in Caledonia school district as it then existed, and that Hugh McDonald, George Wright, and Henry Gordon did at such time constitute the school board of Caledonia school district. Such affidavit further describes the number and character of the school buildings within the school district of Caledonia as it then existed, describing among others a large school building the estimated value of which was $6,000, all of which schools were maintained at an expense of about $4,000 per year. That in the year 1915 a vote was had to build a consolidated school building in Bingham township at a cost of $6,000 and a maintenance cost of $3,000 per year. Said affidavit further alleges that the residents and voters of the school district consisting of Herberg township had taken no interest in school matters, did not attend school meetings, and in many instances neglected and refused to send their children to school. And further alleges that a petition was filed on April 29, 1916, with the board of county commissioners of Traill county by residents of Herberg township for a separate school district, to be known as Herberg School District of Traill County, and that thereafter the county superintendent of Traill county attempted to give notice of a hearing of said petition by publication of such notice in the Hillsboro Banner, in the said county of Traill, such notice being published in such paper on June 2d, 9th, 16th, 23d, and 30th, and such notice was signed by Guri Wambheim, then county superintendent, and was dated the 31st day of May, 1916. That pursuant to such notice the county commissioners and the said county superintendent on the 19th day of July, 1916, at 2 o'clock in the afternoon of said day, met in the court room in Hillsboro, in said county of Traill, and had a pretended hearing on said petition, granted the same, and provided for the organization of the township of Herberg into a new school district, to be known as Herberg School District of Traill County. That the board of county commissioners and the said county superintendent are about to complete the organization of

said civil township of Herberg into a school district, and will do so unless restrained. That said petition for the organization of such new school district was signed by sixty-nine people, all voters in Caledonia school district, and all residing within the civil township of Herberg. That there was not on said petition name or signature of any person living in that part of said Caledonia school district within the limits of said townships of Caledonia or Bingham. The affidavit further sets out that there was no legal notice of said hearing published, and that the July meeting of the Board of County Commissioners was on the 3d day of July. That the creation of such new school district would work great injury and hardship to the balance of said Caledonia school district and the voters and taxpayers thereof, and injury also to the children of school age in the township of Herberg.

The return to the writ of certiorari is as follows:

The undersigned, Ole I. Hanson, J. H. Johnson, William Carson, A. C. Ulland, and T. R. Tobiason, members of the board of county commissioners of Traill county, North Dakota, and Guri Wambheim, county superintendent of schools of said Traill county, and Nels O. Lindaas, county auditor of said Traill county, pursuant to the command of the writ of certiorari in the above-entitled matter, to us directed, do hereby certify and return to the district court of the said county of Traill;

That on the 6th day of May, 1916, there was filed in the office of the county superintendent of schools of said Traill county, a petition in writing for the organization of a new school district to be known as "Herberg School District of Traill County, North Dakota," a copy of which is hereto annexed, marked exhibit "1." That thereafter the said board of county commissioners and county superintendent fixed the time for hearing said petition for Wednesday, the 19th day of July, 1916, at 2 o'clock P. M., and a notice of the hearing of said petition was given by the said county superintendent of schools of Traill county, by publication of said notice in the Hillsboro Banner, a weekly newspaper published in the city of Hillsboro, in said Traill county, said newspaper being the newspaper nearest the said school district, and by mailing a copy of said notice to each of the school officers of said Caledonia school district; that a copy of said

notice so published and served is hereto attached, marked exhibit "2," and a copy of the affidavit of publication of said notice is hereto attached and marked exhibit "3," and that a copy of the affidavit of mailing said notice is hereto attached and marked exhibit "4."

That on the 19th day of July, 1916, the said board of county commissioners met pursuant to adjournment, said meeting being an adjourned session of the July, 1916, meeting. That all members of the said board of county commissioners were present. That the said board of county commissioners, together with the county superintendent of schools, constituting a board to act on the petition for the organization of a new school district, met in session at 2 o'clock P. M. on said day, at the county courthouse, in the city of Hillsboro, North Dakota, in accordance with the notice published and mailed, and marked exhibit "2" herein, and then proceeded to consider the petition for the organization of a new school district to be known as "Herberg School District of Traill County, State of North Dakota," from the territory embraced in the civil township of Herberg in said Traill county.

That P. G. Swenson appeared as attorney for the petitioners, and that the following petitioners appeared in person, *viz.:* Grand Baxter, Jalmer Herre, H. D. Reed, Hartvig Lund, Frank Baxter, Gunder Steenerson, B. P. Leirness, J. M. Herberg, Nels Herre, Ernest C. Steenrod, Swan Akason, and Archie Spittler.

That C. E. Leslie appeared as attorney for the school board and parties opposing the granting of the petition, and that the following persons appeared in opposition to the granting of said petition, *viz.:* Hugh McDonald, H. A. Gordon, and George Wright; that Peter Herbrandson and C. L. Gordon entered a special appearance and objected to the considering of said petition.

That the parties opposing the granting of said petition filed written objections to the hearing of said petition, copies of which are hereto attached, marked exhibits "5" and "6" respectively.

The the petitioners offered in evidence petitioners' exhibits "A" and "B," copies of which are hereto attached, marked exhibits "7" and "8." Petitioners also offered in evidence petitioners' exhibits "C" and "D," copies of which are hereto attached and marked exhibits "9" and "10." Also pages "35" and "36," book No. 1, of school officers' record, a copy of which is hereto annexed, marked ex-

hibit "11." That Nels O. Lindaas, county auditor of said Traill county, acted as clerk of the board and kept a record of its proceedings; that a true copy of which record so kept is hereto attached and made a part of this return and marked exhibit "12." That oral testimony was submitted on behalf of the petitioners and on behalf of the parties opposing said petition, but that the same was not reduced to writing.

Dated at Hillsboro, North Dakota, this 1st day of August, 1916.

Attached to said return was an affidavit of Nels O. Lindaas, which was and is as follows:

State of North Dakota, }
County of Traill. } ss:

I, Nels O. Lindaas, county auditor of the county of Traill, state of North Dakota, and clerk of the board of county commissioners of said Traill county, pursuant to the command of the writ of certiorari to me directed, do hereby certify and return to the district court of said Traill county: That I, as county auditor of said county, acted as clerk of said board consisting of the members of the board of county commissioners and the county superintendent of schools of said Traill county, on the 19th day of July, 1916, and kept a record of its proceedings; that the petition for the organization of a new school district, notice for hearing same, and all papers, exhibits, and records pertaining to the same, are on file in my office; that the exhibits hereto, being exhibits numbered "1," "2," "3," "4," "5," "6," "7," "8," "9," "10," "11," and "12" are true copies of the original documents, proceedings, and records on file in my office; that I have compared all of said copies hereto attached with the originals on file in my office, and that the same constitute a full, correct, and complete transcript of the records and proceedings in the matter referred to and described in said writ of certiorari.

Given under my hand and seal this 1st day of August, 1916 A. D.

(Signed) Nels O. Lindaas.
County Auditor of Traill County,
North Dakota.

The facts in the case are as follows: Plaintiffs are residents and taxpayers of the original school district of Caledonia; that the petition for the organization of the new school district was filed with the county superintendent on May 6, 1916, was in legal form, and contained more than three fourths of all the legal school voters then residing in the territory which the petitioners attempted to have created into a new school district. That notice of the hearing of such petition was given by the county superintendent as hereinbefore stated, and that such notice stated that a hearing would be held in the courthouse on Wednesday, July 19, A. D. 1916, at 2 o'clock P. M. That objection to the hearing of such petition at such time and place was made by Peter Herbrandson and C. L. Gordon, taxpayers of Caledonia school district; and that for the reasons heretofore stated objection to the hearing was made by the officers of Caledonia school district. That the proposed new district consisted of the civil township of Herberg, and had an assessed valuation of more than $120,000, and had an area equal to the major fraction of a congressional township, and such proposed district had residing therein more than twelve children of school age. That the organization of said school district would not leave the district from which such new district was organized with an area of less than one congressional township, nor with an assessed valuation of less than $150,000. After the filing of said petition the board of county commissioners and the county superintendent of schools of Traill county fixed the time for hearing said petition for Wednesday, the 19th day of July, 1916, at 2 o'clock P. M. on that day; and on the 19th day of July, 1916, the board of county commissioners of Traill county met, said meeting being an adjourned session of the regular July, 1916, meeting held at such time and place, together with the county superintendent of schools, being the lawful board constituted by law to act on the petition for the organization of a new school district, which meeting was held at 2 o'clock P. M. on that day, at the courthouse, in the city of Hillsboro, Traill county, and after considering the said petition and the evidence offered in support thereof, and considering the objections thereto, did grant the said petition, and did organize and establish the civil township of Herberg into a new and separate school district known as Herberg School District of Traill County, North Dakota.

Appellant in this case assigns three specifications of error, the first of which is as follows: "The court erred in its conclusions of law and order for judgment because no sufficient notice was given for the hearing of the petition for the formation of such new school district, because the notice was not a notice of a hearing to be had at the regular July session or meeting of the county commissioners."

The propositions of law involved in this assignment of error directly attack the jurisdiction of what is termed the quasi court, that is, the board of county commissioners and the county superintendent of Traill county acting together, to hear and determine such petition on its merits. The main attack of the appellant in this regard is based upon no sufficient notice for the hearing of such petition for the formation of such new school district, the notice not being a notice of the hearing to be had at the regular July session or meeting of the county commissioners. We are thoroughly convinced that there is no force in such assignment of error, that such assignment of error is based upon a misconception and misconstruction of the law concerning the matters under consideration in this case. Chapter 135 of the Session Laws of 1915 provides two distinct and separate methods for the organization of new common-school districts. Chapter 135 reads as follows:

"New Common School Districts. How Organized. The board of county commissioners and county superintendent may organize a new school district from portions of school districts already organized, if in their judgment the organization of a new district is desirable and necessary, upon being petitioned so to do by at least a majority of the school voters residing in the districts, whose boundaries will be affected by the organization of a new district, and by at least three fourths of the residents of the territory to be included in the new district. No school district shall be organized under the provisions of this section which shall have less than $20,000 assessed valuation and shall have residing therein less than twelve children of school age; provided, that when the districts from portions of which such new district is sought to be organized, lie in two or more adjoining counties, such new district shall be organized by the concurrent action of the boards of county commissioners and county superintendents of such counties; provided, further, that action on such organization shall be taken only at the July meeting of the county com-

missioners when petitioned by a majority of the voters residing in each of the districts to be affected.

"Provided further, that the county commissioners and county superintendent of schools may organize a new school district from portions of school districts already organized, if in their judgment a new school district is desirable and necessary, upon being petitioned so to do by at least three fourths of the school voters residing within the territory to be included in the new district, provided, such proposed new district shall have an assessed valuation of at least $120,000, and shall have an area equal to a congressional township or major fraction thereof, and shall have residing therein at least twelve children of school age, provided, that such organization will not leave the district from which such new district is sought to be organized with an area of less than one congressional township and an assessed valuation of at least $150,000."

The first part of this law, as far as the word "affected" occurring just before the word "provided," states the first method for the organization of new common-school districts. Commencing with the word "provided" and including the balance of the chapter constitutes the second method for the organization of new common-school districts. When proceedings are had to organize a new common-school district by the first of these methods, the notice prescribed in § 1148 of the Compiled Laws of 1913 shall be given, and the meeting of the county commissioners at which such petition is to be considered shall be the meeting specified in § 1147 of the Compiled Laws of 1913, being the July meeting of the board of county commissioners; and when proceedings are had in pursuance of the first method a failure to give such proper notice and hold such meeting at the proper place would affect the jurisdiction of what may be termed the quasi court, that is, the board of county commissioners and the county superintendent, to hear and determine the matters involved in such petition; but where proceedings to organize a new common-school district are had in pursuance of, and in agreement with, the second method, provided by chapter 135, when the notice is given specified in § 1148, it is immaterial whether such petition is decided upon at the July meeting or any other meeting of the board of county commissioners, so long as this meeting is held by the county commissioners and the county

superintendent of schools, acting together, and such board, or quasi court or board, as thus constituted, has full jurisdiction to hear and determine such petition for such new common-school district at any meeting of the board of county commissioners and county superintendent, acting together as such board, or quasi court, for the purpose of considering such petition.

The line of demarcation between the two methods of organizing new common-school districts under the law in question is definite and plain, the conditions required to exist by each method being entirely dissimilar. By the first method the petition must be signed by a majority of the school voters residing in the districts whose boundaries will be affected by the organization of the new district, and by at least three fourths of the residents of the territory to be included in the new district. The new district under this method and branch of the law shall have at least $20,000 assessed valuation, and twelve children of school age; and nothing is said as to the amount of assessed valuation which shall be left in the old district after the formation of the new. Under the second method or provision of this law, the necessity for the signatures of any petitioners is eliminated except in the territory which is to form the new district, where three fourths of the school voters are required to sign in order to confer jurisdiction upon the board of county commissioners and superintendent of schools, acting as such board, to organize such new school district. Another provision which is found in the law governing the second method is that the assessed valuation in the new district shall be at least $120,000, and have an area equal to a congressional township or major fraction thereof, and twelve children of school age, and that the old district must also be left with an area of at least a congressional township and $150,000 assessed valuation. It will be seen that there is a wide difference in the requirements of the two methods. It would seem from an inspection of the second method that the public necessity for such new district was so apparent, the old district being so very large, as is shown from the extent of territory required in the new district and the extent to be left in the old, and from the amount of the entire assessed valuation of the old district, and the amount of the assessed valuation required for the new, that it obviated the requirement for considering such petition only at the July meeting,

and permitted the hearing of the petition at any meeting of the board of county commissioners where such petition is presented and notice of the hearing of such petition having theretofore been given for the time required by law. Wherever a petition concerning any school district would show a condition complying with the requirements of the law, which is the foundation of the second method for the organization of common-school districts, public necessity for the welfare and education of the children in such new territory is so pressing that the public welfare and good demand the organization of such new district; and as the old district is left with a large territory and a large assessed valuation, they cannot be heard to complain, in the face of a patent pressing public necessity for better and more convenient educational facilities necessary for the convenience, use, and proper development of the children in the new district. The fact that the taxes will be higher in the remaining part of the old district, and that each taxpayer therein will have a somewhat heavier burden to bear than before, has no particular weight as an argument, as it does not take into consideration the proper education and welfare of the children in the new district and the public welfare and good of the public in general, and is based entirely upon selfish reasons. It is apparent from an inspection of the territory left in the old district in the case at bar, and from the amount of assessed valuation thereof, that if the new district were compelled, not only to have the consent of three fourths of the school voters in the new district, but in addition thereto the consent of a majority of the voters in what remains of the old district, that it would always be within the power of the school voters residing in the old district to prevent the organization of the new district and thereby prevent the convenience, benefits and facilities for education which the new district would enjoy if it also had a well-organized school, well and fully equipped in every respect, and thus be placed in a position to receive greater educational advantages. When the law in question was introduced into the house of representatives in 1915, the last part of the law was introduced which covered and defined what we have referred to herein as the second method. The law defining the first method was not a part of the bill, but when the bill went to the senate, the senate amended it so as to include in such bill the law governing the first method herein spoken of, which

amendment was accepted and the bill thus amended became law. It will be seen, therefore, that it was clearly the intention of the legislature to create two methods for the organization of new common-school districts where conditions existed which would warrant it. The two methods are entirely separate and distinct, and the procedure under each method is entirely separate and distinct; and, while the second method requires notice the same as required by the first method, the consideration of the petition need not be at the July meeting of the board of county commissioners, but may be had at any meeting, and the only requisites to organize a new school district under the second method are that the new district shall have at least a major fraction of a congressional township, $120,000 assessed valuation, and twelve children of school age, and leave the old district with not less than a congressional township and $150,000 assessed valuation; and when these conditions appear in the petition signed by three fourths of the voters of the new district, and when such petition is considered by the board of county commissioners and the county superintendent of schools, acting and sitting as such quasi court or board, and the conditions, requisites, and matters specified in such petition are found to be true, such board has full authority and jurisdiction to organize such new district at the July or any other meeting of the board of county commissioners.

The second and third assignments of error of the appellant herein may be considered together, as they each relate to the constitutionality of the law under consideration, and also include the question of whether or not the statute under consideration was special legislation. We will include the discussion of these questions all in the same analysis. The sections of the Constitution which it is claimed the law under consideration violates are: § 11, which is as follows: "All laws of a general nature shall have a uniform operation;" § 69: "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say, . . . 12. Providing for the management of common schools;" § 70: "In all other cases where a general law can be made applicable, no special law shall be enacted." Counsel for the appellant then cites numerous authorities to sustain these various propositions. For instance, that the authorities are agreed that a law "general in its form," but special in its operation, violates a constitutional inhibition

of special legislation as much as if special in form. The cases cited by the counsel sustain this proposition, and it is no doubt but such is a sound proposition of law; but such proposition of law cannot be applied in the case at bar, for the reason that the law under consideration in this case is a law general in its form and general also in its operation. It operates as law throughout the entire state and to every school district similarly situated, and the classification is by no means arbitrary, and is a proper, reasonable, and just classification.

Appellant uses the following language: "There has not been and cannot be any good reason why two civil townships—one a trifle less than a congressional township and the other a trifle bigger—should not have the same privileges, and why the smaller should have privileges the larger has not; nor any good reason why a civil township can secede from another one just because it has a trifle less than $150,000 assessed valuation, while the other with $150,000 assessed valuation cannot secede."

We think from an inspection of the law under consideration that the remaining part of the old district could have exercised the same power that the new district did exercise had it done so in time or cared to. The statement in the law that the new district shall have an assessed valuation of at least $120,000, and shall have an area of a congressional township or a major fraction thereof, means a minimum quantity, and is not a limit as to the maximum; that the real significance of such expression is that such new district shall have an assessed valuation of at least $120,000, and shall have an area at least equal to a congressional township or major fraction thereof, and shall have residing therein at least twelve children of school age. These are minimum quantities, but there is no restriction as to the maximum quantities. The law does not say that the new district may not have more than a congressional township nor more than $120,000 assessed valuation; and there is no doubt but that such new district might have more of assessed valuation and more territory, provided that it does not leave the old district with less than a congressional township, nor less than $150,000 assessed valuation. So long as the minimums are complied with, that is all that is necessary. When the minimums exist under the law the maximums may be as large as may be under the circumstances. We believe this is a proper construction of the language in this section, and, if so, the appellant's contention is without merit; but even without such con-

struction of the statute we think the classification therein reasonable, being based upon the amount of assessed valuation and territory included within the new district, and also taking into consideration the amount of territory remaining in the old district and the assessed valuation thereof. The advantages, if any, in the classification are with the old district, the amount of such valuation in the old district being larger than in the new district, and this in all probability for the reason that the expense of operating the old district, the keeping up of its present institutions, and its present amount of fixed expenses, may be larger than will be required in the new district. Its obligations are already created and exist; and the law in question took particular pains to protect it by a larger amount of assessed valuation as well as territory, and also fixed a minimum amount of such valuation and territory for the new district, both of which classifications seem to be just and reasonable, and each found to be in the greatest interest of the public welfare, education, and public necessity. The law under consideration has a general and uniform operation, and operates alike upon all school corporations in all parts of the state under the same circumstances and conditions, and this is quite sufficient to constitute it a general law, and not special legislation.

There is another branch of the case which we will discuss. The appellant, in addition to invoking the provisions of several sections of the state Constitution, has also cited a paragraph from the decision of Northwestern Mut. L. Ins. Co. v. State, 163 Wis. 484, 155 N. W. 609, 158 N. W. 328, but the reasoning in that case is not applicable to the one at bar. The meaning of Amendment 14 of the Constitution of the United States is that it guarantees equal protection of law to all persons, and relates to individual persons or private corporations in their dealings, contracts, personal affairs, and rights; but such provision of the United States Constitution does not extend to public corporations created by the legislative authority as public agencies for the purpose of facilitating and carrying on matters which are of interest to the state alone, and which are created by legislative power exclusively, and with which the state is in no way bound by contract; and there is no reciprocal stipulation between such agencies and the state; and the objects of their creation and the duties which they are authorized to perform do not have their origin in anything of the nature of a contract. Such

public institutions as counties or school districts are a part of the machinery of the state, invented by the state itself, and brought into existence by the authorities of the state for the purpose of executing and performing certain public duties in aid of the welfare of the state, and are invested with certain corporate powers by the state; and the powers which such corporations exercise, being entirely of a public nature and partaking in no degree whatever of private transactions, remain at all times subject to the will of the legislature, which may do any act regarding such public corporations as it deems to the best interests of the state; may increase or decrease their size, vest them with greater power, or deduct from their powers, and may do with them what is considered best for the state and its growth, development, and protection, without any consultation of the corporation so created; and the legislature may further do this in the manner which to it seems best even if the action of the legislature in this regard should be termed arbitrary. One of the leading cases which enunciates this principle is Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552, from which we quote the following: "Institutions of the kind, whether called counties or towns, are the auxiliaries of the state in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything in the nature of compact. Instead of that the constant practice is to divide large counties and towns and to consolidate small ones to meet the wishes of the residents or to promote the public interests as understood by those who control the action of the legislature. . . . Such corporations are the mere creatures of the legislative will; and inasmuch as all their powers are derived from that source it follows that those powers may be enlarged, modified, or diminished at any time without their consent, or even without notice. They are but subdivisions of the state, deriving even their existence from the legislature. Their officers are nothing more than local agents of the state; and their powers may be revoked or enlarged, and their acts may be set aside or confirmed, at the pleasure of the paramount authority, so long as private rights are not thereby violated."

The case just cited is approved in the case of Atty. Gen. ex rel.

Kies v. Lowrey, which was a case concerning school matters, and the decision of which case is found in 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27, wherein the Supreme Court of the United States reaffirms the doctrine laid down in the case from which we have just quoted. The constitutional questions involved in this case are also thoroughly discussed in the school-district division case entitled School Dist. v. King, 20 N. D. 614, 127 N. W. 515. The same rule is also sustained in Cooley's Constitutional Limitations, 6th ed., page 228, and in Valverde v. Shattuck, 19 Colo. 104, 41 Am. St. Rep. 208, 34 Pac. 947. There is no dispute but what a school district is a municipal corporation and a public agency in carrying on the business of the state, and that the officers of such corporation are public agents concerned in the execution of their duties entirely with public business, and all are subject to the will of the legislature.

We cannot discuss all the authorities cited by appellant, nor include in the body of the opinion all of the citations of the respondent; but from a thorough examination of the case, we are satisfied that the judgment of the District Court must be in all things affirmed, and the same is in all things affirmed, with costs.

ROBINSON, J. I concur in result.

HERMAN SHARK v. GREAT NORTHERN RAILWAY COMPANY.

(164 N. W. 39.)

Bill of lading — provisions of — claims for loss — time of making — delivery of goods — reasonable time.

1. The filing of a written claim four months after goods have been shipped from Devils Lake, North Dakota, to New York, is not a compliance with the requirement of a bill of lading to the effect that "claims for loss, damage, or delay must be made in writing within four months after delivery of the prop-

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NOTE.—Of general interest, see notes in 7 L.R.A.(N.S.) 1041, and L.R.A.1916D, 341, on reasonableness of time fixed in contract of shipment of live stock for presentation of claim for damages.

erty, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed."

Bill of lading — provisions of — claim for loss — time of filing — oral complaint — to shipping agent — failure to deliver — advice of agent — to claimant.

2. A provision in a bill of lading that a written claim of loss must be made within four months after a reasonable time for delivery has elapsed is not for the purpose of escaping liability, but to facilitate prompt investigation, and is *held* to have been sufficiently complied with when, prior to the expiration of the four months' period, oral complaint was made to the company's shipping agent of its failure to deliver, and the company acted on such complaint, and not only promised the shipper to send tracers and to make an investigation, but complied with its promise, and a month after such complaint the shipper was advised by the agent to wait a little longer, as he understood that the goods had been sold.

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

Action to recover on shipping contract.

Appeal from the District Court of Ramsey County, Honorable *C. W. Buttz,* Judge.

Affirmed.

Murphy & Toner and *Flynn & Traynor,* for appellant.

The shipment here in question is interstate, and comes under the Carmack amendment to the Hepburn Act, and the questions to be determined are controlled exclusively by the decisions of the United States courts. Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Hepburn Act, 34 Stat. at L. 584, Comp. Stat. 1916, § 8563; 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; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Bartels Northern Oil Co. v. Jackman, 29 N. D. 236, 150 N. W. 576; Cook v. Northern P. R. Co. 32 N. D. 340, L.R.A.1916D, 345, 155 N. W. 867; Wabash R. Co. v. Thomas, 222 Ill. 337, 7 L.R.A. (N.S.) 1041, 78 N. W. 777.

The conversations plaintiff had with defendant's local agent are wholly immaterial, and not binding on defendant. The bill of lading provides how and when a claim for loss must be made. It is the contract between the parties. The agent had no authority to say or do anything contrary to its provisions, and no such authority is attempted to be shown. If the agent had any such authority then what he and plaintiff agreed upon would constitute a new contract and this is not pleaded, and the evidence offered to establish same was inadmissible. Clegg v. St. Louis & S. F. R. Co. 122 C. C. A. 273, 203 Fed. 971; Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co. 34 N. D. 466, 159 N. W. 81; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Sullivan v. Mercantile Town Mut. Ins. Co. 20 Okla. 460, 129 Am. St. Rep. 761, 94 Pac. 676; Missouri, K. & T. R. Co. v. Kirkham, 63 Kan. 255, 65 Pac. 261, 10 Am. Neg. Rep. 263.

Plaintiff's agent, with full and ample authority, signed the bill of lading on behalf of plaintiff, and it is the only contract in this case. Jennings v. Grand Trunk R. Co. 52 Hun, 227, 5 N. Y. Supp. 140; Soumet v. National Exp. Co. 66 Barb. 284; Moriarty v. Harnden's Exp. 1 Daly, 227; Meyer v. Harnden's Exp. 24 How. Pr. 290; Craycroft v. Atchison, T. & S. F. R. Co. 18 Mo. App. 487; Nelson v. Hudson River R. Co. 48 N. Y. 498; Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162; Shelton v. Merchants' Dispatch Transp. Co. 59 N. Y. 258; Van Schaack v. Northern Transp. Co. 3 Biss. 394, Fed. Cas. No. 16,876; Cincinnati, H. & D. R. Co. v. Berdan, 22 Ohio C. C. 326, 12 Ohio C. D. 481; Wells, F. & Co's Exp. v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412.

Failure to read the bill of lading does not exonerate Chesapeake & O. R. Co. v. McLoughlin, 242 U. S. 142, 61 L. ed. 207, 37 Sup. Ct. Rep. 40.

The bill of lading provides that a claim for loss must be made within four months, and this is a reasonable and valid provision. 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; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 512, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Southern Exp. Co. v. Caldwell, 21 Wall. 268, 22 L. ed. 556; 6 Cyc. 505.

Siver Serumgard and *C. A. Conant,* for respondent.

The equities are clearly against the defendant. Its only defense is that plaintiff failed to give the notice required by the uniform bill of lading. This is merely technical. The question of reasonable notice is one of fact, to be determined from all the circumstances in the case. Wabash R. Co. v. Thomas, 7 L.R.A.(N.S.) 1041, note.

"Where the carrier by his own act rendered it impossible for the shipper to give notice within the time limited by the contract, it has been held that the failure to give such notice could not bar a recovery." Ibid.; Gulf, C. & S. F. R. Co. v. York, 2 Tex. App. Civ. Cas. (Willson) 718; Richardson v. Chicago & A. R. Co. 149 Mo. 311, 50 S. W. 782; Baker v. Missouri P. R. Co. 19 Mo. App. 321; Cook v. Northern P. R. Co. 32 N. D. 340, L.R.A.1916D, 345, 155 N. W. 867.

Service of the required notice may be waived, and it was waived in this case by the acts, statements, and conduct of defendant's local agent. Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335.

BRUCE, Ch. J. This is an action to recover damages for the loss or failure to safely carry and deliver, at New York, certain articles of clothing shipped by the plaintiff over the line of the defendant railway company.

The action is an action for the breach of a common carrier's contract of carriage. The complaint is as follows:

"That on the 9th day of October, 1913, for value, the defendant *agreed safely to carry to the city of New York* in the state of New York and there deliver to Rosenthal, Siegel, & Company certain goods, the property of the plaintiff, of the value of $48, consisting of six overcoats, which described goods the plaintiff then and there delivered to the defendant, who received the same *upon the agreement and for the purposes before mentioned.*

"That the defendant *did not safely carry and deliver the said goods pursuant to the said agreement,* but, on the contrary, so negligently conducted and so misbehaved in regard to the same *in his calling as carrier,* that they were wholly lost to the plaintiff, who is damaged in the sum of $48.

"Wherefore, plaintiff demands judgment against the defendant for the sum of $48, and for his costs and disbursements herein."

The defense of the railway company is:

"That said shipment was delivered by the plaintiff to the defendant and shipped by the defendant under an agreement with the said plaintiff in accordance with a uniform bill of lading in accordance with the regulations of the Interstate Commerce Commission, and particularly in compliance and under authority of the statute and laws of the United States with reference to interstate commerce under the Act of February 4, 1887, 24 Stat. at L. 379, chap. 104, as amended by the Act of June 29, 1906, 34 Stat. at L. 584, chap. 3591, Comp. Stat. 1916, § 8563, which uniform bill of lading contained a provision in effect that no liability would rest upon the said defendant for any loss occasioned under said contract, *unless a claim for damage thereunder was made within four months after the delivery of the property to the defendant, or in any event within four months after a reasonable time for delivery to the consignee* had elapsed, and the said shipment was made and accepted under said bill of lading and under the Federal law having reference thereto, the same being an interstate shipment.

"Alleges that the claim of the plaintiff for said alleged loss was not presented within four months after the delivery of the property to the defendant for shipment, nor within four months after a reasonable time for delivery to the consignee had elapsed, and that therefore no liability rests upon the carrier, the defendant, for the loss thereof, as provided by the uniform bill of lading, paragraph 3, under which said shipment was received and shipped."

The clause of the bill of lading referred to was as follows:

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

The evidence shows that the goods were shipped on August 7, 1913, and that no written claim was made until April 1, 1914. It also shows that no inquiry in regard to the goods was made of the railway company until about December 1, 1913, when complaint was made to

the local agent at the point of shipment, and he stated that he would have the goods traced. It does show, however, that the complaint or inquiry was made within four months after a reasonable time for the delivery had elapsed, and as soon as plaintiff became aware of the failure to deliver. The evidence, indeed, showed that the goods were articles of clothing which the plaintiff, a retail dealer, sought to return to his wholesaler or jobber in New York and to be allowed credit thereon, and that the plaintiff only became aware of the failure of delivery when, on receiving a bill or statement from New York, he found that no credit had been allowed to him.

Plaintiff testifies that at this time he went to see the local agent of the railway company, and told him that he had better trace the goods and see what was the matter, and that the agent stated that he would do so. He also testified that about a month later he "went down again. He (the agent) told me something I didn't understand about the goods being sold, and he said to wait a little longer, and so a month more and I went down and it was the same thing, and so finally he says, I will make a special effort to see the special agent that comes through here to look after this matter."

The plaintiff then testifies that he went away and "one day he (the agent) called me and said that the claim was filed too late, and so I turned the claim over to my attorneys, and they filed."

There is also evidence that on the 9th day of January, 1915, the railway company wrote to the plaintiff as follows:

I am returning papers in your claim, loss of coats, $48, which was presented April 1, 1914.

We cannot entertain this claim for payment, inasmuch as same was not filed within the four months' time limit for filing claims as required in paragraph 3 of § 3 on the back of the regular bill of lading.

We have endeavored to establish identity of the case of coats which checked over with this company and was sold. However, it develops that there is no connection between the two shipments. We have investigated this matter to some limit, endeavoring to identify this case as being the case shipped by your company, which is the cause of the delay in our handling the matter.

I trust that the matter is understood and that our files may remain closed.

Yours truly,
G. W. Perry,
F. C. A.

The evidence also discloses that C. A. Conant, one of the attorneys for plaintiff, was shown this letter, and, after reading it, went to see Murphy, the local agent of the company, and was then told by Murphy that "he had traced the goods and found they were sold at St. Paul by the Great Northern Railway Company," and that "the case of overcoats that was sold in St. Paul was a case containing six overcoats, and that inside the neck they had a label piece with Shark's name, and he had no doubt but that it was the same box of coats."

Even if these admissions of the agent are admissible as against his principal, and his "no doubt" can be considered as evidence against the positive statement contained in the letter from headquarters, they were made after the time for making the claim had expired and after the time when a recovery under the bill of lading could be had, unless the provisions of such bill of lading were and could be waived, or the notice given was in fact sufficient.

There is no proof, indeed, that this sale, if sale there was, took place prior to the expiration of the four months' period of time. The action at any rate is based upon the failure of the contract of delivery, and not on the conversion of the goods after the time for delivery had expired, and after the time for making claim therefor had elapsed, and the appeal must be considered from that viewpoint.

We are satisfied that the formal written claim was not filed within "four months after a reasonable time for delivery had elapsed." It was not filed until nearly eight months after the date of delivery to the initial carrier. This would leave four months for making the delivery, and this can hardly be deemed as reasonable time.

Nor, too, under the holdings of the Supreme Court of the United States in the cases of Georgia, F. & A. R. Co. v. Blish Mill Co. 241 U. S. 190, 197, 60 L. ed. 948, 952, 26 Sup. Ct. Rep. 541, and Missouri K. & T. R. Co. v. Ward, 244 U. S. 383, 61 L. ed. 1213, 37 Sup. Ct. Rep. 620, could the parties waive the requirement of notice, as such waiver

would amount to a discrimination, "would antagonize the plain policy of the Carmack amendment, and open the door to the very abuses at which the act was aimed."

Can it, however, be said and held that the requirements of the bill of lading as to the written notice within the four months' period was substantially complied with, and a recovery be justified on that fact? We think it can.

As far as we can learn, the two cases just cited as yet contain the only announcements of the Supreme Court of the United States upon the subject, though counsel for appellant also cites the case of Northern P. R. Co. v. Wall, 241 U. S. 87, 60 L. ed. 905, 36 Sup. Ct. Rep. 493. In the case of Northern P. R. Co. v. Wall, supra, however, no such question was considered or passed upon. All that the court considered was a stipulation in the bill of lading to the effect that the shipper, in case of loss or injury, should give notice in writing of his claim to some officer or station agent "of said company before the cattle were removed from the place of destination and mingled with other stock." All that the court really passed upon was the meaning of the word "said," and all that it held was that the bill of lading must be construed in connection with the Carmack amendment, which makes the initial carrier responsible for the whole journey, and the connecting carrier its agent for completing the transportation and delivering the property. It held that, since the connecting carrier was the agent of the first, a notice of the injury to the cattle could and should have been made to such second carrier before the stock was unloaded and mingled with other cattle, and that the failure to give such notice could not be excused by the mere fact that the Northern Pacific Railway Company did not run into the city of Chicago, and had no local or general agent there; and that, since no notice was either given to the C. B. & Q. R. Co., the connecting carrier, or to the Northern Pacific Railway Company, at the point of shipment, no recovery could be had.

But in the case of Georgia F. & A. R. Co. v. Blish Mill Co. supra, the point was passed upon, and the court held that telegraphic advice to the terminal carrier, of the defective condition of the property shipped, which was flour, and to the effect that the shipper made claim for its entire value at invoice price, on account of the damage, was a sufficient compliance with the requirement of a written claim. In speak-

ing of the requirement, it said: "The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier, by its contracts, should require reasonable notice of all claims against it, even with respect to its own operations." It held that the fact of this stipulation could not be avoided by the mere form of the action; that is to say, whether the action was in trover or for breach of the contract.

In speaking of the nature of the claim made, it, however, said:

"But, while this is so, we think that the plaintiff in error is not entitled to succeed in its ultimate contention under the stipulation, for the reason that it appears that notice of the claim was in fact given. It is true that in the statement made by the court of appeals it is said that so far as appears from the record 'no claim was filed by the shipper.' We must assume, however, that this was in effect a construction of the provision as requiring a more formal notice than that which was actually sent. For the court had already set forth the uncontroverted facts in detail, showing that the shipper (having made an investigation in response to the communication of the traffic manager of the railway company) had telegraphed to the latter, on June 7, 1910, only five days after the arrival of the goods at destination, as follows: 'We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment, as we cannot handle.' In the preceding telegrams, which passed between the parties and are detailed by the state court in stating the facts, the shipment had been adequately identified, so that this final telegram, taken with the others, established beyond question the particular shipment to which the claim referred, and was in substance the making of a claim within the meaning of the stipulation,—the object of which was to secure reasonable notice. We think that it sufficiently apprised the carrier of the character of the claim; for while it stated that the claim was for the entire contents of the car 'at invoice price,' this did not constitute such a variance from the claim for the value of the flour as to be misleading; and it is plain that no prejudice resulted. Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency, and it is to be construed in a practical way. The stipulation required that the claim should be made in writ-

ing, but a telegram which in itself or taken with other telegrams contained an adequate statement must be deemed to satisfy this requirement."

The case of Missouri, K. & T. R. Co. v. Ward, 242 U. S. 383, 61 L. ed. 1213, 37 Sup. Ct. Rep. 620, in no way questions this holding. And if we apply it to the case at bar we are of the opinion that here also there was a substantial compliance.

The proof, indeed, shows conclusively that, prior to the expiration of the four months, oral complaint was made to the railway company of its failure to deliver the goods, and that the railway company acted on this complaint, and not only promised the plaintiff to send tracers and to make investigation, but complied with its promise. The shipper made no written complaint, but the agent made it for him. The railway company had all the information and notice that it desired. The provision in the bill of lading was merely for the protection of such company, and to protect it against fraudulent claims and claims which were so stale that a proper investigation could not be had.

"The purpose of the stipulation," says the Supreme Court of the United States in the case of Georgia, F. & A. R. Co. v. Blish Mill Co. 241 U. S. 190, 197, 60 L. ed. 948, 952, 26 Sup. Ct. Rep. 541, "is not to escape liability, but to facilitate prompt investigation;" and, if this investigation is facilitated, all that is purposed by the provision is accomplished.

The judgment of the District Court is affirmed.

ROBINSON, J. (concurring). In this case the plaintiff sues to recover $48 as the value of six overcoats which he delivered to the defendant as a common carrier to be conveyed to Rosenthal, Seigel, & Company, New York city. In justice court and in the district court plaintiff recovered a judgment for $48 and costs, and the defendant appeals to this court.

As a conclusion of fact the district judge found as follows:

That on or about the 9th day of September, 1913, for value, the defendant agreed safely to carry to the city of New York and there deliver to Rosenthal, Seigel, & Company the property described in the complaint, of the value of $48, consisting of six overcoats, which were delivered to the defendant and which it received under said agreement.

That the defendant failed to deliver the goods, and that by its negligence and lack of care the goods were lost in transit and afterwards, before the commencement of this action, the defendant sold and converted the same to its own use at St. Paul, Minnesota, and retained the proceeds of the sale.

The findings are sustained by convincing evidence. Hence, it is needless to consider any other question. Regardless of anything in the bill of lading, the defendant must answer for its own wrongs and for the conversion of the goods.

The judgment is affirmed.

H. C. JENSEN v. M. K. BOWEN.

(164 N. W. 4.)

Agent to sell land — for another — commissions — collecting from both parties — cannot without their consent — public policy — against.

1. Where an agent is employed to sell land for another and to carry on negotiations in relation thereto, he cannot, without the consent of both parties, contract for or collect commissions from both parties. This rule is a rule of public policy.

NOTE.—The general rule is that a real estate broker employed to sell, purchase, or exchange property for a specified commission, who, in effecting the transaction, also received a commission from the other party, without disclosing that fact to his principal, is not entitled to recover commissions from his principal, especially where it is evident that reliance was placed upon his judgment and skill; but where a party employs him, with knowledge that he is also acting for the other party, he is entitled to his commissions from the first-named party, or he may recover commissions from both parties where he is employed merely to bring them together, they to make their own bargain, thus giving him no discretion or confronting him with a conflict of duties, but making him a mere middleman. The case of JENSEN v. BOWEN comes within the last exception, as will be seen by an examination of the cases in 45 L.R.A. 44, and 24 L.R.A.(N.S.) 659.

As to when real estate broker may recover compensation from both parties, see notes in 34 Am. St. Rep. 323, and 60 Am. Dec. 370.

Broker — employment — mere middleman — parties make their own bargains — compensation of — agreed upon — may recover from either or both — knowledge of parties — actual sale — intrusted with power — dual contract — must be with both.

2. A broker who is employed as a mere middleman to bring two parties together to make their own bargains may recover an agreed compensation from either or both, though neither may know that compensation is expected from the other. If, however, during the negotiations, he is intrusted with doing the actual bargaining, he must make his dual contract for commissions known to both parties.

Broker — to bring parties together — no other duty — taking part in closing deal — duties — price — fixing of.

3. A broker is simply a middleman within the meaning of the exception when he has no duty to perform but to bring the parties together, leaving them to negotiate and to come to an agreement themselves without any aid from him. If he takes, or contracts to take, any part in the negotiations, however, he cannot be regarded as a mere middleman, no matter how slight a part it may be. Nor does it make any difference that the price was fixed by his first employer.

Dual commissions — contract for — established by proof — burden of proof — middleman — inception of deal.

4. When a contract for double commissions is proved, the burden of proof is upon the broker to show that he was merely a middleman, and this not merely at the inception, but throughout the whole transaction.

Additional Syllabus. On Petition for a Rehearing.

Directed verdict — motion for — ruling on — counterclaim — appeal — reviewable on.

5. An erroneous ruling upon a motion for a directed verdict on a counterclaim is an error of law, and is reviewable on appeal from the judgment; and it is not necessary to such review that a motion for a new trial should have been made, or that on such motion or on appeal the particulars in which the evidence was insufficient to support such counterclaim should be specified.

Opinion filed July 9, 1917. Rehearing denied July 28, 1917.

Action for purchase price of grain. Counterclaim for commissions as real estate agent.

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

Judgment for defendant. Plaintiff appeals.

Reversed.

Statement of facts by BRUCE, Ch. J.

This is an action to recover $800 alleged to be the purchase price of grain sold to the defendant, M. K. Bowen. The defendant admits the

purchase, but claims that the amount agreed to be paid was only $600. He then alleges, as a counterclaim, that on or about the 15th day of July plaintiff and defendant entered into an agreement whereby the plaintiff agreed to pay to the defendant the sum of $800 on condition that the defendant should bring the plaintiff and one B. S. Davis, who was the owner of certain lands, together, so that the plaintiff and the defendant might make a deal for the sale by the said Davis, and the purchase by the said plaintiff of said tract of land upon terms acceptable to the said Davis and the plaintiff; that the defendant did bring said Davis and said plaintiff together, and that the said parties then and there on or about the 5th day of September, A. D., 1912, made a deal whereby the said Davis sold and transferred said real estate to the said plaintiff; that the defendant has given plaintiff credit in the sum of $600 for the purchase of the grain upon said brokerage of $800, and that there is now due to him the sum of $200, being the difference between the two amounts.

A verdict was rendered for the defendant for the sum of $1, and from the judgment entered thereon the plaintiff appeals.

Thomas H. Pugh and *Otto Thress,* for appellant.

The rule is that a broker cannot receive commissions from both parties to a land transaction unless they both agree to same. Langford v. Issenhuth, 28 S. D. 451, 134 N. W. 889.

A middleman is defined to be a person who merely brings the parties together and takes no part in making the bargain or closing the same. 27 Cyc. 487; Geddes v. Van Rhee, 126 Minn. 517, 148 N. W. 549.

An agent who represents the adverse party without his principal's consent not only loses his right to compensation from his principal, but he cannot recover pay from the other party on either an express or implied promise to pay. Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114; Clendenning v. Hawk, 10 N. D. 90, 86 N. W. 114; Van Dusen v. Bigelow, 13 N. D. 277, 67 L.R.A. 288, 100 N. W. 723.

An agent cannot be at the same time a party and agent of the opposite party, unless the latter knows and assents to it. Dull v. Royal Ins. Co. 159 Mich. 671, 124 N. W. 533.

His interest and his duty must not conflict. Hogle v. Meyering,

161 Mich. 472, 126 N. W. 1063; State v. State Journal Co. 77 Neb. 752, 9 L.R.A.(N.S.) 179, 110 N. W. 763, 111 N. W. 118; Larson v. Thoma, 143 Iowa, 338, 121 N. W. 1059; Webb v. Paxton, 36 Minn. 532, 32 N. W. 749.

He must use his best judgment and skill to promote the interest of his employer. He must not act for two persons whose interests are adverse. Hunter Realty Co. v. Spencer (Horner v. Spencer), 21 Okla. 155, 95 Pac. 757, 17 L.R.A.(N.S.) 622, also extensive note to above case; Rinebarger v. Weesner, 91 Kan. 303, 137 Pac. 969.

He cannot recover compensation from either without showing consent of both to his dual employment. Crawford v. Surety Invest. Co. 91 Kan. 748, 139 Pac. 481; Jeffries v. Robbins, 66 Kan. 427, 71 Pac. 852; Crawford v. Surety Invest. Co. 91 Kan. 748, 139 Pac. 481; Lynch v. Fallon, 11 R. I. 311, 23 Am. Rep. 458; Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66; Hoffhines v. Thorson, 92 Kan. 605, 141 Pac. 253; Young v. Hughes, 32 N. J. Eq. 372; Bookwalter v. Lansing, 23 Neb. 291, 36 N. W. 549; Hall v. Gambrill, 34 C. C. A. 190, 63 U. S. App. 740, 92 Fed. 32; McKinley v. Williams, 20 C. C. A. 312, 36 U. S. App. 749, 74 Fed. 94; Langford v. Issenhuth, 28 S. D. 451, 134 N. W. 889; Story, Agency, § 31; 19 Cyc. 207, 226; 31 Cyc. 1447; 1 Am. & Eng. Enc. Law, 2d ed. 1073; 4 Am. & Eng. Enc. Law, 2d ed. 984; 2 C. J. 763, and cases cited.

Motions for new trials are addressed to the sound discretion of the trial court. Aylmer v. Davis, 30 N. D. 514, 133 N. W. 419; First International Bank v. Davidson, 36 N. D. 1, 161 N. W. 281.

C. L. Waldron, T. F. Murtha, and *J. W. Sturgeon,* for respondent.

Dual agency, fraud, and all such matters must be specially pleaded and proved, if such defenses are claimed. No such issues were before the lower court, and they cannot be presented here for the first time. 1 Sutherland, Pl. § 516, note 207; Jain v. Griffin, 3 Colo. App. 90, 32 Pac. 80.

No motion was made for a directed verdict, and therefore a motion for judgment notwithstanding the verdict could not be entertained. Code, § 7643; Buchanan v. Occident Elevator Co. 33 N. D. 346, 157 N. W. 122.

Again, after such a motion is made and overruled, and the movant introduces evidence, he forfeits his rights in failing to renew his motion.

Landis Mach. Co. v. Konantz Saddlery Co. 17 N. D. 310, 116 N. W. 333; West v. Northern P. R. Co. 13 N. D. 231, 100 N. W. 254; Johns v. Ruff, 12 N. D. 79, 95 N. W. 440.

A motion based on the insufficiency of the evidence must point out wherein the evidence really is insufficient, or for what reasons it is so claimed. Code, § 7656; Updegraff v. Tucker, 24 N. D. 171, 139 N. W. 366; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; Flora v. Mathwig, 19 N. D. 4, 121 N. W. 63; Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446; Anderson v. Medbery, 16 S. D. 329, 92 N. W. 1087; Buchanan v. Occident Elevator Co. 33 N. D. 347, 157 N. W. 122; Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 366, 155 N. W. 861.

Where there is a conflict in the evidence, a motion for directed verdict is properly overruled. Pewonka v. Stewart, 13 N. D. 117, 99 N. W. 1080, 16 Am. Neg. Rep. 540; Severtson v. Northern P. R. Co. 32 N. D. 200, 155 N. W. 11; Dring v. St. Lawrence Twp. 23 S. D. 624, 122 N. W. 664; Edwards v. Chicago, M. & St. P. R. Co. 21 S. D. 504, 110 N. W. 832; Higgs v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 446, 15 L.R.A.(N.S) 1162, 114 N. W. 722, 15 Ann. Cas. 97; Houghton Implement Co. v. Vavrowski, 19 N. D. 594, 125 N. W. 1024; Grasinger v. Lucas, 24 S. D. 42, 123 N. W. 77.

In no event would plaintiff be entitled on this appeal to an order for judgment. Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436.

Defendant pleaded and proved that he was a mere middleman who simply brought plaintiff and the landowner together and allowed them to make their own deal. Upon such showing he is entitled to recover. Leathers v. Canfield, 45 L.R.A. 51, annotation; 19 Cyc. 234 (i); Clark v. Allen, 125 Cal. 276, 57 Pac. 985; Abel v. Disbrow, 15 App. Div. 536, 44 N. Y. Supp. 573; Geery v. Pollock, 16 App. Div. 321, 44 N. Y. Supp. 673; Litts v. Morse, 145 Wis. 472, 130 N. W. 460; King v. Reed, 24 Cal. App. 229, 141 Pac. 41; McLure v. Luke, 24 L.R.A.(N.S.) 659, 84 C. C. A. 1, 154 Fed. 647; Redmond Bros. v. Henke, 137 Iowa, 228, 114 N. W. 885; Wasser v. Western Land Securities Co. 97 Minn. 460, 107 N. W. 160; Darrow Invest. Co. v. Breyman, 32 Wash. 234, 73 Pac. 363; Langford v. Issenhuth, 28 S. D. 451, 134 N. W. 889.

Where the broker acts merely as a middleman it is wholly immaterial that either party is ignorant of the broker's employment by the other side. Montross v. Eddy, 94 Mich. 100, 34 Am. St. Rep. 323, 53 N. W. 916; Ranney v. Donovan, 78 Mich. 318, 44 N. W. 276; Leathers v. Canfield, 45 L.R.A. 51, annotation; 19 Cyc. 234; Green v. Southern States Lumber Co. 141 Ala. 680, 37 So. 670; Law v. Ware, 238 Ill. 360, 87 N. E. 308; Grasinger v. Lucas, 24 S. D. 42, 123 N. W. 77; Kilpinski v. Bishop, 143 Wis. 390, 127 N. W. 974; Tasse v. Kindt, 145 Wis. 115, 31 L.R.A.(N.S.) 1222, 128 N. W. 972; Friar v. Smith, 120 Mich. 411, 46 L.R.A. 633, 79 N. W. 633.

Defendant did not contract with either party for his skill, knowledge, and influence, and he stands entirely indifferent between them. Mechem, Agency, § 973; Ranney v. Donovan, 78 Mich. 318, 44 N. W. 276; Montross v. Eddy, 94 Mich. 100, 34 Am. St. Rep. 323, 53 N. W. 916; Rupp v. Sampson, 16 Gray, 398, 77 Am. Dec. 416; Orton v. Scofield, 61 Wis. 382, 21 N. W. 261.

There is no newly discovered, legal evidence. There is no showing of any such thing. There is only evidence of certain conversations which are only and really the legitimate aftermath of a lawsuit. Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; 29 Cyc. 881 (1); Wilson v. Seaman, 15 S. D. 103, 87 N. W. 577; Longley v. Daly, 1 S. D. 257, 46 N. W. 247; Fisk v. Fehrs, 32 N. D. 119, 155 N. W. 676; 29 Cyc. 911; State v. Raice, 24 S. D. 111, 123 N. W. 708; Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711; State v. Brandner, 21 N. D. 310, 130 N. W. 941; 29 Cyc. 918; Libby v. Barry, 15 N. D. 286, 107 N. W. 972; State v. Albertson, 20 N. D. 512, 128 N. W. 1122.

BRUCE, Ch. J. (after stating the facts as above). It is urged that the defendant, Bowen, was acting for Davis in the sale of the land; that Davis had promised him a commission for selling the same, and that since the proof shows that the plaintiff, Jensen, had also agreed to pay him a commission, and this fact was not known to Davis, no recovery can be had.

There can be no doubt of the correctness of this contention, provided that the proof does not also show that the defendant was merely a broker or middleman. The rule is one of public policy. "The rule is intended to be not only remedial of actual wrong, but preventive

of the possibility of it. . . . There can be no recovery from the party kept in ignorance, for as against him the broker has been guilty of a breach of faith and contract; inasmuch as it is a physical impossibility for him to render to more than one side, at one and the same time, his entire skill, judgment, and discretion as is bargained for by each employer in the absence of an express stipulation to the contrary. Nor can there be any recovery from the party who alone consented to the broker's acting in behalf of both, for he and the broker are equally guilty of the wrong committed against the other employer, and the law will not enforce an executory contract entered into in fraud of the rights of the latter." 4 R. C. L. 329; Rice v. Davis, 136 Pa. 439, 20 Am. St. Rep. 931, 20 Atl. 513; Scribner v. Collar, 40 Mich. 375, 29 Am. Rep. 541; Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528.

There is, however, an exception to this rule, and that is that "a broker employed as a mere middleman, or, in other words, one engaged not to negotiate a sale or purchase, but simply to bring two parties together and permit them to make their own bargain, may recover an agreed compensation from either or both, though neither may know that compensation is expected from the other." Montross v. Eddy, 94 Mich. 100, 34 Am. St. Rep. 323, 53 N. W. 916; Leathers v. Canfield, 45 L.R.A. 33 and note, (117 Mich. 277, 75 N. W. 612); 4 R. C. L. 330.

"A broker is simply a middleman, within the meaning of this exception, when he has no duty to perform but to bring the parties together, leaving them to negotiate and [to] come to an agreement themselves without any aid from him. If he takes, or contracts to take, any part in the negotiations, however, he cannot be regarded as a mere middleman, no matter how slight a part it may be." 4 R. C. L. 330; Montross v. Eddy, supra; Barry v. Schmidt, 57 Wis. 172, 46 Am. Rep. 35, 15 N. W. 24; Scribner v. Collar, 40 Mich. 375, 29 Am. Rep. 541; Leathers v. Canfield, supra.

In the case at bar there seems to be no proof that the defendant, Bowen, was actually employed to take any part in the negotiations. The question is, Did he take such a part? If he did, under the authorities cited, he can recover no commissions, for the question is one of public policy as well as of implied contract. Anderson v. First

Nat. Bank, 5 N. D. 80, 64 N. W. 114; Clendenning v. Hawk, 10 N. D. 90, 86 N. W. 114.

Nor does it make any difference that the price was fixed by his first employer. See Webb v. Paxton, 36 Minn. 532, 32 N. W. 749. Unless, indeed, he was a mere middleman, each party who employed him was entitled to the exercise of his discretion, skill, and judgment; and the mere fact that the price was fixed by one would not absolve him from the use of such skill and discretion in regard to the interest of the other. But was he employed to act and to negotiate, or did he negotiate, for both parties? The question being one of burden of proof, when the double agency was shown, did he overcome the presumption of bad faith occasioned thereby by proof that he was merely a middleman, and this not merely at the inception, but throughout the whole transaction? We believe he did not, and we believe that it was incumbent upon him to do so.

The defendant testifies that he was employed by Mr. Davis to sell the land under the following letter of employment:

"I want to sell as I bought more here lately. I am going to advertise mine for sale. Will sell it cheap too, as I want to get rid of it and get the money in here if possible. If you know anyone who has $10,000 in cash and will assume $900 due Fisher on Oscar's 160, I will make it an object to you. Will throw in my share of the crop on the place besides."

He also testifies that he showed this letter to the plaintiff, Jensen, and that Jensen "told me that if I would get him and Mr. Davis together that he would give me a dollar an acre."

He then testifies:

I got Mr. Jensen and Davis together and Jensen bought the land. The deal was closed up about the 1st of September, 1912.

Q. Now, Mr. Bowen, you were employed by Mr. Davis to sell this land for him, were you not?

A. Well, I don't think I was really employed by him. I don't know whether you would call it employed or not; it might be.

Q. This letter was dated July 12, 1912? Mr. Bowen, you say that shortly after that, along about the 1st of August, you saw Mr. Jensen and asked him if he wanted to buy this property?

A. I think it was around that time. It was sometime after I got this letter. I showed him that letter and told him what I could sell it to him for. He told me that if I would get him and Mr. Davis together that he would give me a dollar an acre.

Q. What else did he say?

A. Well, he didn't want to come through on the proposition that Mr. Davis submitted there, and he told me his proposition.

Q. Now, Mr. Bowen, I will ask you whether or not Mr. Davis ever paid you any commission for making this sale?

A. Yes, sir, he did. I owed Mr. Davis a note of $260. He gave me that note back and gave me $210.

Q. Now, Mr. Bowen, did you ever inform Mr. Davis that you had been employed by Mr. Jensen to buy this land from him?

A. I don't know whether Bruce ever knew it. I never told him. He knew the whole deal at the time he paid me the commission. He knew this along in December, 1912.

Q. And that is when he learned it?

A. I think that he knew about it before. He learned of it along in December.

Q. That is when he became aware of that fact, when you signed this receipt just shortly before this?

A. He knew what our agreement was, and what we had settled on according to his letter on the 5th day of September.

Q. You never told him that you were acting as agent of Mr. Jensen in purchasing this land?

A. I think I told him the day we settled up, the day we bought the crop. He couldn't help but know it, because Jensen was the man that was getting the land.

Q. You never told him that you were acting as agent of Mr. Jensen in purchasing this land?

A. No, I don't think I ever told him.

Q. Now, Mr. Bowen, I will ask you whether or not you sold this land to Mr. Jensen in accordance with Mr. Davis' letter to you?

A. No, sir, I didn't. I didn't sell it to him that way.

Q. You made this sale did you not, Mr. Bowen?

A. Well, the deal went through.

Q. Through you?

A. The deal went through.

Q. Didn't it come through you, Mr. Bowen?

A. I never owned the land.

Q. Through your efforts?

A. Well, I guess so.

Q. Did you ever communicate with Mr. Davis after you had received this letter from him telling you that he wanted to sell this land, and he would pay you for it if you sold it?

A. Yes, sir, I did.

Q. What did you write him?

A. I stated Mr. Johnson's terms. I didn't tell him at that time that Mr. Jensen was buying this land.

Q. Do you know whether Mr. Davis accepted this or made the sale in accordance with the terms of your letters to him?

A. Well, the deal finally went through on Mr. Jensen's terms.

Q. On the terms that he first offered you?

A. Not the first offer, no.

Q. Well, the second offer?

A. Well, he finally made up his mind what he would do.

Q. You never made Mr. Davis but one offer on this land, did you, Mr. Bowen, as agent for him that you had received from Mr. Jensen?

A. I think there were two propositions submitted to Mr. Davis.

Q. Both by Mr. Jensen?

A. Through me.

Q. Through you?

A. Yes, sir. The land was not sold on the first offer made by Mr. Davis or on the first offer made by Jensen, but they finally got together. I didn't draw up any contracts or sign any.

Q. Now, wasn't it through your efforts that you put out that Mr. Davis paid you for your efforts in selling this land to Jensen?

A. Why, he did as he agreed in the letter he wrote me. He paid me what he agreed to pay in the letter.

Mr. Davis testifies as follows:

Q. I will ask you whether or not you ever employed Mr. Bowen to sell this land for you?

A. Well, in writing him about other things I don't remember the exact words I used, but I told him that if he found a buyer for the

land at the stated price that I would make it right with him, or words to that effect anyway.

Q. Did Mr. Bowen ever find a buyer for you?

A. Yes, he did. I sold the land. He found Mr. Jensen. I think I first heard from Mr. Bowen in regard to the sale of this land in August or during the summer. In reply I think to a letter I had written him about other matters, he put up this proposition. I did not know who the party was or anything at the time, but this is the farm deal that went through later on. He didn't tell me that he was selling the land to Mr. Jensen.

Q. State whether or not, Mr. Davis, he told you that he had been hired by Mr. Jensen to buy this land from you?

A. No, there was nothing mentioned about any man at all any further than putting up the deal to him, no names mentioned at all.

Q. Now, at the time of this sale, Mr. Davis, did you have any knowledge that Mr. Jensen had employed Mr. Bowen to buy this land from you?

A. No.

Q. What did you pay him for selling this land?

A. A commission of $475.

Q. Now, I will ask you, Mr. Davis, whether or not the land was sold when you sold it exactly in conformity with the terms of Mr. Bowen's offer to you?

A. Yes, I think it was.

Q. Exactly?

A. Yes. When I wrote to Mr. Bowen to put it up to him it was to be a cash proposition. When he came to me with this deal it went through as he had written to me. It went through exactly as he had written to me. There was only this one offer made on his part. He didn't tell me that Jensen was buying it.

Q. And you didn't know until you closed the deal?

A. The first I knew about it was the telegram I received who to make warranty deed to.

Q. You didn't care, Mr. Davis, who you sold the land to as long as you got a customer who was willing to pay your price?

A. Why, no, not if I got the terms and everything was satisfactory.

The deal must have been satisfactory to me. I made it. I knew who was getting the land before I made the deed.

Q. Before you transferred the property?

A. Yes.

Q. Did you come down here yourself?

A. Yes, I was here for three or four days.

Q. To close up the deal with Mr. Jensen?

A. Well, in a way practically so, yes, but it was some time after that before it was finished on account of the abstract.

Q. Well, everything was closed when you were here except the transfer of the papers?

A. Yes.

Q. And, while the deal was not the same as written on the back of "exhibit A," you were willing to pay Mr. Bowen the $475?

A. I did and got a receipt from him. I paid that after the deal was closed up and after I knew who the buyer was; I think so.

Mr. Murtha: The defendant offers to show by this witness that he relied upon his own judgment in making the deal, and not upon the judgment or advice of the defendant.

Mr. Jones: Object to the offer as incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

Q. Wasn't there more than one proposition submitted to you?

A. Not to my memory, no.

Q. How long did the negotiations run along after they started in August?

A. Well, I don't know. It must have been February before the abstract was satisfactorily fixed.

Q. But I mean before you had everything all except the title papers?

A. I don't know, I came down here somewhere around the 1st of September and talked the matter over with Mr. Jensen.

Q. And you came to an agreement, settlement?

A. Well, I had practically agreed to that before I ever left home.

Q. You left the deed in one of the local banks here for delivery?

A. I don't remember.

Q. You didn't leave it with Bowen, Bowen didn't collect any of the money for you?

Mr. Jones: Object to that as incompetent, irrelevant, and immaterial.

The Court: Objection sustained.

Q. You never wrote to Bowen any other letter about employing him except the one that is in evidence here?

A. That's all, but I had written other letters to him. There was nothing more, I think, that I wrote about the terms of the employment save this.

Q. Has he ever written you anything about this deal other than you have testified to?

A. Well, yes, he wrote me in regard to the commission, he wanted to know what I was going to do about it. That is practically about all there was in the letter. Bowen never told me that Jensen was paying him anything.

H. C. Jensen, on being recalled, testified:

I never employed Mr. Bowen to buy this land from Mr. Davis. I never agreed to pay him anything if I was able to buy the land from Mr. Davis. I never hired him to get us together as he stated. I bought this land through Mr. Bowen.

Q. Of Mr. Davis?

A. Yes, that is who I got the deed from. He represented himself to be Mr. Davis' agent.

This testimony, to our minds, does not show the position of a middleman, and it was incumbent upon the defendant to prove that fact.

The judgment of the District Court is reversed and a new trial is ordered.

ROBINSON, J. (concurring). The plaintiff sues to recover $800 and interest for an undivided half interest in certain crops sold and delivered to the defendant in the year 1912. The answer is that defendant purchased the crop at the agreed price of $600, and that in August, 1912, the plaintiff agreed to pay defendant $800 for procuring the sale to him of certain lands, and he has not paid it. The jury found a verdict of $1,000 for defendant, and the plaintiff appeals from the judgment and from an order denying a new trial. The plaintiff moved for a directed verdict, claiming that there was no proof to sustain the counterclaim, or a payment of $600, which defendant admitted that

he agreed to pay for the crop. As an agreement to pay $600 was conceded, and the excess of $200 disputed, the motion for a directed verdict must have been for $600 and interest.

It fairly appears from convincing evidence that, in bargaining for the sale of land, the defendant acted for both the seller and the buyer so as to obtain a commission from both of them, and that neither one knew that he was taking a commission from the other. For that reason there is no proof to sustain the counterclaim, while defendant contends that plaintiff knew that he was a mere go-between and that each party knew he was to receive a commission from the other. It is certain defendant was first retained by B. S. Davis, the owner of the land, and from Davis he received a commission of $475, as appears from the receipt of defendant, and, of course, that was ample pay for his services. After accepting the offer of Davis to aid him in selling the land, the defendant went to the plaintiff and bargained with him for a commission of $1 an acre in case of sale to him. His claim is that Davis knew he was acting for the owner of the land, but, if the plaintiff knew that and then offered a commission, it was a bribe unless it was known and assented to by the owner of the land, and the proof is that Davis did not know it. The defendant was sworn as a witness, and in answer to the question that he never told Davis, the answer was, "No, sir;" and Davis himself testified that at the time of the sale he had no knowledge that Jensen had employed Bowen to buy the land.

Bowen wrote Davis and offered to purchase the land, not naming the purchaser, and the offer was accepted. The deal went through exactly as Bowen wrote it, and Bowen did not name the purchaser to Davis. As Davis testifies, the first he knew of the purchaser was by a telegram to make a warranty deed to H. C. Jensen. It is an old trick of real estate men to act for both the seller and buyer, and to keep the one in ignorance of the other; and it is a fraud on both parties. It is not credible that either party would have consented to pay such a commission if he had known that the other party was paying a commission. Jensen testified he did not employ Bowen to buy the land, and did not agree to pay him a commission; that he never hired Bowen to bring him in contact with Davis, and also that Bowen represented himself to be the agent of Davis; but all that is contra-

dicted and it is needless to consider it. The uncontradicted testimony of Bowen himself and of Davis shows that both parties did not know of the double dealing. And, hence, the defendant had no right to contract for a commission from the plaintiff, as the defendant himself testifies that he agreed to pay for a crop of $600, and has not paid it except by the alleged commission service. The judgment should be reversed and judgment entered in favor of the plaintiff and against the defendant for the sum of $600, with interest from December 1, 1912, and the costs.

On Petition for a Rehearing.

BRUCE, Ch. J. A petition for a rehearing has been filed, in which it is urged that the opinion in chief reversed the judgment of the trial court on the alleged insufficiency of the evidence to sustain the verdict, and that this question was not before the supreme court, and should not have been considered. It is claimed that no motion below was made for a directed verdict, and that the motion for a new trial made in the court below was accompanied by certain specifications of error, and that said specifications nowhere specified wherein the evidence was insufficient, as required by § 7656 of the Compiled Laws of 1913, and the cases of Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 366, 155 N. W. 861; Buchanan v. Occident Elevator Co. 33 N. D. 346, 157 N. W. 122; Updegraff v. Tucker, 24 N. D. 171, 139 N. W. 366; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841, and 11 N. D. 73, 95 Am. St. Rep. 705, 88 N. W. 1030, 11 Am. Neg. Rep. 336; and Flora v. Mathwig, 19 N. D. 4, 121 N. W. 63.

There is no merit, however, in these objections. The specifications of error which were made at the time of the motion for the new trial contained a specification to the effect that "the court erred in overruling plaintiff's motion for a directed verdict on the defendant's counterclaim, made at the close of defendant's case as follows:

"Comes now the plaintiff and moves the court for a directed verdict on the counterclaim, on the ground and for the reason that the admissions of the defendant, Bowen, conclusively show that he was an agent employed by Mr. Davis, and that by virtue thereof he was never employed by Mr. Jensen, and, if he was, a contract of that kind would

be void and against public policy and fraudulent, and that he can recover nothing on it."

The specifications also allege the error of the court:

"In denying plaintiff's motion for a directed verdict on defendant's counterclaim in his favor, made at the close of the entire case as follows:

"Mr. Jones: 'At this time, your Honor, we renew the motion heretofore made at the close of the defendant's case in full force and effect.' "

These specifications and these motions were all that was necessary. The errors assigned were errors committed in denying the motions for a directed verdict, not on the whole case, but on the counterclaim, and in such a case the counterclaim must be treated as a separate action. It may be that the defendant might have been entitled to have the issues, raised by plaintiff's complaint, submitted to the jury, but under the evidence in the case he was not entitled to have the issues raised by his counterclaim so submitted.

Under the holding in the case of Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 366, 155 N. W. 861, where a motion for a directed verdict is made on the ground of the failure of the evidence to support a pleading, a motion for a new trial is not necessary to obtain a review in the supreme court. An erroneous ruling upon a motion for a directed verdict, indeed, is an error of law and is reviewable on an appeal from the judgment.

The petition for a rehearing is denied.

ISABELLA McDOWELL v. SAMUEL McDOWELL.

(164 N. W. 23.)

Husband and wife — agreements of — with either — with third persons — contracts — torts — property — separate — rights.

Either husband or wife may enter into any agreement or transaction with

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NOTE.—On right of wife to sue husband for personal tort, see notes in 6 L.R.A. (N.S.) 191; 30 L.R.A.(N.S.) 1153; 52 L.R.A.(N.S.) 186.

On husband's right to sue wife for personal tort, see note in 23 L.R.A.(N.S.) 699.

On when suits between husband and wife are maintainable, see note in 73 Am. St. Rep. 268.

the other, or with any other person, respecting property, which the other might if unmarried. The wife after marriage has with respect to property, contracts, and torts the same capacity and rights and is subject to the same liabilities as before marriage.

Opinion filed June 2, 1917. Rehearing denied July 30, 1917.

Appeal from the District Court of Eddy County, Honorable *C. W. Buttz,* Judge.

Affirmed.

S. E. Ellsworth, for appellant.

A statute relied upon to afford a right of action in derogation of the common law will be strictly construed.

Statutes enabling the wife to sue and to be sued as a *feme sole* do not authorize either husband or wife to bring an action against the other. Comp. Laws 1913, § 4411; 21 Cyc. 1518; Alward v. Alward, 15 N. Y. Civ. Proc. Rep. 151, 2 N. Y. Supp. 42; McKee v. Reynolds, 26 Iowa, 582; Jones v. Crosthwaite, 17 Iowa, 393; Heacock v. Heacock, 108 Iowa, 540, 75 Am. St. Rep. 273, 79 N. W. 353; Decker v. Kedly, 79 C. C. A. 305, 148 Fed. 681; Perkins v. Blethen, 107 Me. 443, 31 L.R.A.(N.S.) 1148, 72 Atl. 574.

Plaintiff and defendant were equally and jointly liable for furnishing the family with the necessaries of life. Comp. Laws 1913, §§ 4410, 4414, subd. 2; Banner Mercantile Co. v. Hendricks, 24 N. D. 16, 138 N. W. 993.

A trial court, in charging the jury, must cover the law of the case at least in a general way, to the end that the jury may receive reasonable aid and enlightenment upon the essential and controlling question in controversy. Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224.

Maddux & Rinker, for respondent.

"Jurisdiction of valid judgments and decrees ceases with the close of the term at which they are given, unless authority over them is retained by motion or other appropriate proceedings." Huffman v. Huffman, 47 Or. 610, 114 Am. St. Rep. 943, 86 Pac. 593.

"The individual property of a married woman, not growing out of the marriage relation or the proceeds thereof, is not a proper subject

for adjudication in an action by her for divorce." Taylor v. Taylor, 54 Or. 560, 103 Pac. 524.

The wife may sue the husband for rent of her separate property, or maintain suit against him for other causes, the same as against a stranger. Niehaus v. Niehaus, 141 App. Div. 251, 125 N. Y. Supp. 1071; Taylor v. Taylor, supra; Heintz v. Heintz, 56 Tex. Civ. App. 403, 120 S. W. 941; Schultz v. Christopher, 65 Wash. 496, 38 L.R.A. (N.S.) 780, 118 Pac. 629; Rice v. Crozier, 139 Iowa, 629, 130 Am. St. Rep. 340, 117 N. W. 984; Heacock v. Heacock, 108 Iowa, 540, 75 Am. St. Rep. 273, 79 N. W. 353.

The husband must support himself and wife out of his property or by his labor. Comp. Laws 1913, § 4409; De Brauwere v. De Brauwere, 144 App. Div. 521, 129 N. Y. Supp. 587; Sodowsky v. Sodowsky, — Okla. —, 152 Pac. 390; Taylor v. Taylor, 54 Or. 560, 103 Pac. 524; Huffman v. Huffman, supra.

ROBINSON, J. This action is based on a written lease of certain lands dated, April 3, 1906, and signed by the plaintiff and the defendant. The plaintiff sues to recover rent for four years at $150 a year, and interest. The defendant appeals from a verdict and judgment for $612.50 and from an order denying a new trial. The defense is that the matters alleged in the complaint were adjudicated in an action between the same parties for a divorce and that in said action all matters here in difference were duly adjudicated; also, that when this action was commenced the parties were husband and wife, and that the wife had no legal right to maintain this action against her husband. To this latter defense the statute gives a plain answer. It is this: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which the other might, if unmarried. The wife after marriage has with respect to property, contracts and torts the same capacity and rights and is subject to the same liabilities as before marriage." Comp. Laws 1913, § 4411. Under this statute the wife had a perfect right to lease her land to her husband, and she must have a legal right to maintain an action to recover the rents. It were absurd for the law to give a person a right to make a legal contract, and to deny a legal remedy by due

process of law to enforce the contract. That point is not at all questionable or debatable.

In the divorce action, judgment was entered in June, 1911. This action was then pending, and it was brought to trial before Judge Coffey in March, 1913; and while this case was pending before Judge Coffey, *viz.*, on March 18, 1913, he made a document purporting to amend the divorce judgment which had been entered two years previously. The purpose of the amendment was to declare that the divorce judgment included all matters of dispute and liabilities existing between the plaintiff and the defendant; but the amendment was manifestly without jurisdiction, and for that reason Judge Coffey granted a new trial, and his order was affirmed on appeal. 27 N. D. 577, 147 N. W. 104.

The second trial was before Judge Buttz, and, in his memoranda denying a motion for a new trial, he says: "Upon the second trial before me, McDowell sought to introduce again the same amended decree in the divorce suit, to which I sustained an objection. I do not believe it was error to refuse to admit in evidence the amended decree of Judge Coffey, because that judge in his memoranda granting a new trial says he was in error in admitting these matters, and that the matters which he attempted to cover in the amended decree were never really before him, and that the amended decree was entered without authority of law." Then, in regard to his instruction to the jury that either spouse had a right to use the common property for the support of the family. Judge Buttz adds: "I concluded such instruction was right under the evidence in the case. I think it clear the parties were living together as husband and wife at the time it is claimed she took certain property and sold it for the use of the household, and such was the finding of the jury."

The appeal record presents nothing on which counsel for defendant relied more strenuously than the very strange proposition that the plaintiff has no right to maintain this case because she was the wife of defendant when the leasing contract was made. The record clearly shows that plaintiff is entitled to recover. There is no defense, and there never was a defense, and there never was any reason for insisting that the matter in dispute concerning the lease was adjudicated in the divorce suit. The judgment is affirmed.

THE FARMERS' BANK OF MERCER COUNTY v. KNIFE RIVER LUMBER & GRAIN COMPANY.

(163 N. W. 1053.)

Homestead — exemption — judgment — execution.

1. The homestead as defined in extent and value by § 5605, Compiled Laws of 1913, is exempt from judgment lien, execution, or forced sale except as provided in chapter 51. The defendant in this case is not within any of the exceptions provided in chapter 51.

Homestead — lien — redemption — husband and wife — mortgage by — default — foreclosure and sale — judgment creditor — cannot redeem — judgment not a lien — certificate of redemption — deed on — null and void.

2. Where the husband and wife were living and residing upon the homestead at the time they gave a valid mortgage, and were also living upon the homestead as such at the time a judgment was entered against them, and default was later made in the mortgage, and the same was foreclosed, and the husband and wife continued to reside upon such land throughout the period allowed by law for redemption from the sale by reason of the foreclosure of such mortgage, *held* that the judgment creditor could not make redemption from such foreclosure sale, for the reason that his judgment was no lien upon the homestead, and, having no lien against such land by reason of such judgment, he was not a redemptioner and not entitled to redeem, and a certificate of sale and sheriff's deed issued to such judgment creditor in an attempted redemption were null and void, and of no force and effect.

Homestead — selection — declaration — necessity for — extent and value.

3. Where the extent and value of the homestead does not exceed that fixed by law, there is no necessity for selection or declaration of homestead exemption.

Opinion filed July 9, 1917. Rehearing denied August 1, 1917.

Appeal from the District Court of Mercer County, *W. L. Nuessle*, Presiding Judge.

Affirmed.

Oliver Leverson (*Langer & Nuchols*, of counsel), for defendant.

Thorstein Hyland, for plaintiff.

GRACE, J. The action is one brought for the purpose of quieting title to the northeast quarter of section 14, township 145, range 89, Mercer

county, North Dakota. The complaint in the action alleges that plaintiff and defendant are both corporations organized and existing under the laws of North Dakota. The complaint also alleges that on the 19th day of December, 1912, Christian Weigum and Lydia Weigum were the owners and in possession of the land under consideration in this action, and on said date executed and delivered to the plaintiff, the Farmers' Bank of Mercer County, a mortgage to secure the payment of one note for $326.40, said mortgage containing a power of sale, and describing the land hereinbefore mentioned. The complaint further alleges a default in the conditions of said mortgage; the foreclosure of the same by advertisement in the manner prescribed by law; the sale of the premises pursuant to such foreclosure to the Farmers' Bank of Mercer County for $388.59, and the issuing to such purchaser of a sheriff's certificate of sale of said land on the 14th day of April, 1914. The complaint makes further allegation that the land in question has at all times been the homestead of the mortgagors, and that they have at all times occupied the same, and at the time of the bringing of this action occupied the same, and alleges that they were the owners of no other land. The complaint further sets up the recovery of a judgment by confession by the Knife River Lumber & Grain Company against Christian Weigum, said judgment being dated December 12, 1914, and docketed in Mercer county in the office of the clerk of the court, on the 12th day of December, 1914, for $283.26; and further alleges that the Knife River Lumber & Grain Company had attempted to make a redemption from the mortgage so foreclosed, basing its right to make such redemption upon the judgment before mentioned. The complaint concludes with the regular and ordinary prayer usually attached to a statutory action to quiet title to real property.

The defendant demurred to the complaint of the plaintiff, which demurrer was overruled, after which the defendant interposed its answer, among other things alleging ownership of the land in question, and basing its claim of ownership and title to said land upon the grounds that the defendant had recovered by confession a judgment against Christian Weigum on the 12th day of December, 1914, and claiming such judgment to be a lien upon the land in question, made redemption from the foreclosure sale of such mortgage by paying the sum of $435.22 into the hands of the sheriff of Mercer county, North

Dakota, with which to make such redemption, and to pay the plaintiff the amount for which such land was sold at foreclosure sale. That the sheriff admitted service of notice of redemption, and acknowledged receipt of the full amount of redemption money in favor of the plaintiff, and issued a sheriff's certificate of redemption to the defendant, which was duly filed for record in the office of the register of deeds of Mercer county on the 5th day of April, 1915, at 1:15 o'clock P. M., which was duly recorded. The answer further shows that on the 22d day of April, 1915, the sheriff of Mercer county, North Dakota, executed and delivered to the defendant a sheriff's deed covering and describing the property in question, said sheriff's deed being based upon the sheriff's certificate dated April 11, 1914, in the foreclosure of the mortgage made by Christian Weigum and Lydia Weigum to the plaintiff. The answer further alleges that on the 1st day of April, 1915, Christian Weigum and Lydia Weigum, his wife, had leased said land from the defendant, and denies that they claim any homestead right in said premises or any part thereof. The defendant denies that plaintiff has succeeded to the homestead right of Christian Weigum and Lydia Weigum. Defendant further denies that plaintiff has any right, interest, or title in and to said land or any part thereof. That since the 1st day of April, 1915, Christian Weigum and Lydia Weigum have been and still are the tenants of the defendant under contract, and have voluntarily paid the defendant its share of the crops for the use of the said premises. The answer concludes with an appropriate prayer asking, among other things, that the title of defendant be decreed superior to that of plaintiff; that plaintiff be forever barred and enjoined from asserting any right to the property described in the answer, being the property in dispute in this action.

The facts in the case are substantially as follows:

On September 19, 1912, Christian Weigum and Lydia Weigum, his wife, were the owners of and lived upon the northeast quarter of section 14, township 145, range 89, Mercer county, North Dakota, upon which they jointly executed and delivered a mortgage of $326.40 to the Farmers' Bank of Mercer County, which mortgage contained a power of sale. Default was made in the conditions of the mortgage, the same was foreclosed, the property therein described sold at a sheriff's sale, and a sheriff's certificate of sale issued to the Farmers' Bank of Mercer

County dated April 11, 1914, which was the date of the sale. Such certificate was duly filed for record in the office of the register of deeds of Mercer county, North Dakota, on the 11th day of April, 1914. On December 12, 1914, the Knife River Lumber & Grain Company obtained a judgment by confession against Christian Weigum for $283.-25, which was docketed in the office of the clerk of the court of Mercer county, North Dakota. On April 3, 1915, the defendant, Knife River Lumber & Grain Company, claimed to be redemptioner by reason of the said judgment, attempted to redeem from the said mortgage foreclosure, and served upon the sheriff of Mercer county its notice of redemption, affidavit for redemption, and a certified copy of the judgment, and paid the sheriff the amount due the holder of the sheriff's certificate, the Farmers' Bank of Mercer County. All of the redemption papers were recorded in the office of the register of deeds of Mercer county, but not filed in the office of the register of deeds. The sheriff of Mercer county forwarded the redemption money to the Farmers' Bank of Mercer county, which immediately returned said redemption money to the sheriff, and refused to recognize the defendant, the Knife River Lumber & Grain Company, as redemptioner, and refused to recognize the proceedings by the defendant in making such redemption. The mortgagors, the Weigums, lived upon the land at the time the mortgage was given and during all the time of the redemption period. The value of the said land did not exceed $5,000, and is not over 160 acres in extent, and is not within a town plat.

There are several questions presented in this appeal, all of which become immaterial and without any force or effect in this case upon the decision of one main question. That question is, Was the judgment obtained by the defendant against the Weigums ever a lien upon the land in question? It is conceded that the land was the homestead of the Weigums at the time of the execution of the mortgage, and that it remained their homestead during all the time while the mortgage was being foreclosed and during the whole of the year of redemption, and as such homestead it was exempt from any lien by way of judgment; that is, the judgment taken against the Weigums would not be a lien against their homestead, the land in question. So long as they continued to reside upon said homestead it was their homestead, and a judgment taken against them or either of them could not become a lien against

said land while so occupied. Section 5605, Compiled Laws of 1913, defines the extent and value of a homestead and specifically sets forth that such homestead shall be exempt from judgment lien and from execution or forced sale, except as provided in chapter 51. The defendant is not within any of the exceptions provided in chapter 51. Not only is the homestead exempt from the execution process or from lien of judgment, but the proceeds thereof, with few exceptions, are absolutely exempt from seizure by creditors except as specified in the statute. Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684. The homestead is not bound by lien of judgments against the owner. Dalrymple v. Security Improv. Co. 11 N. D. 65, 88 N. W. 1033. It therefore appears conclusively that a judgment is not a lien against a homestead. The testimony shows that the Weigums lived upon the land at the time of the execution of the mortgage, during its foreclosure, at the time the sheriff's certificate was issued, and during the entire period allowed by law for redemption; and where the extent and value of the homestead does not exceed that fixed by law, there is no necessity for selection or declaration of homestead. Peake v. Cameron, 102 Mo. 568, 15 S. W. 70; Davis v. Day, 56 Ark. 156, 19 S. W. 502; Comp. Laws 1913, § 5621. It appears, therefore, that the judgment which the defendant procured against Christian Weigum was not, nor ever did become, a lien upon such land; the same being a homestead and exempted from a lien of judgment. If the judgment never became a lien, which we held it did not on account of the homestead character of the land, the defendant had no right of redemption; for before one can become a redemptioner, whether by mortgage, judgment, or otherwise, he must have a lien upon the land to be redeemed before the right of redemption accrues to him. Section 8085, Compiled Laws of 1913, provides who are redemptioners. Subdivision 1 of such section provides: "The mortgagor or his successor in interest in the whole or any part of the property" may redeem. Subdivision 2 of said section provides: "A creditor having a lien by judgment or mortgage on the property sold or on some share or part thereof subsequent to that on which the property was sold," is a redemptioner. The judgment of the defendant never having become a lien upon the land in question, it had no right of redemption, and all its acts performed in seeking to make such redemption were of no effect and were without avail; and the certificate of

sale of such land issued to it by the sheriff, and the subsequent sheriff's deed issued to it by reason of such sheriff's certificate of sale, were each and all absolutely null and void, and of no legal force or effect. This being true, it is unnecessary to consider any of the other assignments of error, and, exclusive of the principal legal proposition which we have decided, all other questions raised in the appeal so far as this case is concerned are immaterial. The judgment of the District Court is in all things affirmed, with costs.

ROBINSON, J. (dissenting). In this case the equities are all against the bankers. In September, 1912, to secure $326, they took a mortgage on 160 acres of land in Mercer county, a quarter section worth $4,000. The mortgage was promptly foreclosed; the land was bid in by the bank for $388.59. That was April 11, 1914. Then, on September 12, 1914, the mortgagors confessed a judgment to the lumber company for $285.25, for lumber and material furnished them to improve the land. For this the lumber company had an equitable lien. The purpose of confessing judgment must have been to give the lumber company a right to redeem for the benefit of the mortgagors. On April 3, 1915, the company redeemed from the mortgage sale, paying to the sheriff of Mercer county $435.22. The sheriff accepted the same and made to the company a redemption certificate and a deed of the mortgaged land. The result was a discharge of the mortgage debt and the judgment, and the lumber company took title as trustee for the mortgagors, who continue in possession of the land. It claims only to hold as trustee for the security of the redemption money and the judgment, and this court would not approve or allow any other claim. But it seems the bankers refused to accept the redemption money and bring this suit to obtain title to the land. They want the land for about 10 or 12 per cent of its value. They insist that the lumber company had no right to redeem, because the land was a homestead, and not subject to the lien of a hostile judgment; and because the lumber company did not produce to the sheriff a certified copy of the docket entry of the judgment; and did not cause the register of deeds to retain and hold in his office the redemption notice. The company did produce to the sheriff and put on record a proper redemption notice, and did produce to the sheriff a certified copy of the judgment, and the sheriff had a

perfect right to waive, and did waive, little niceties and regulations for his own convenience. He had a perfect right to accept a certified copy of the judgment of the district court of Mercer county in lieu of a certified copy of the docket entry, which is always made at the time of entering the judgment.

The purpose of the redemption statute is to give proper notice to the sheriff and to subsequent redemptioners. It is not to give a mortgagee a chance to exact his pound of flesh; he has no right to demand more than his money. Is it possible that any Christian banker would take the homestead land for 10 or 12 per cent of its value? Is it possible that this court would allow the poor mortgagors to lose their homestead for even the mortgage and the judgment? No; not at all. The purpose of confessing judgment must have been to secure the lumber company and to give it a right to redeem for the benefit of the mortgagors, and of course it must hold the title as trustee for the mortgagors, and release and reconvey the same on being paid the judgment and the redemption money. The laws are made to secure honesty and fairness, and not to aid in robbing men of their property. The judgment should be reversed.

GENEVA U. CHAMBERS v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation.

(163 N. W. 824.)

Automobile — driver — negligence of — in operating machine — not imputable to guest.

1. The negligence of a driver of an automobile is not imputable to a guest who is not shown to have co-operated in running the car.

Note.—The great weight of authority is in accord with the case of CHAMBERS v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO. in holding that the negligence of the driver of an automobile is not imputable to a guest or passenger riding in the machine who has no authority or control over the machine or the driver, as will be seen by an examination of the notes in L.R.A.1915B, 953, and L.R.A.1917A, 543, on imputed or contributory negligence of passenger riding in automobile driven by another precluding recovery against third person for injury.

Automobile — owner and driver — trip at night — failure of lights to work — — repairing of — at earliest moment — bad roads — guest continuing as passenger — in rear seat — contributory negligence — not guilty of — matter of law.

2. Where, during a trip taken at night, the lights of an automobile fail, and the owner and driver avails himself of the earliest opportunity to improvise or repair an oil lamp attached to the dash, after which the journey is continued, the driver being an experienced driver and being accompanied and assisted by one who is familiar with the roads, and where the roads are muddy and the automobile is driven slowly,—*held*, that a guest continuing the journey as a passenger in the rear seat of the car is not, as a matter of law, guilty of contributory negligence.

Contributory negligence — proximate cause — questions for jury — verdict not disturbed — exceptions to rule — conclusions — reasonableness.

3. The questions of contributory negligence and proximate cause are questions of fact for the jury, and the verdict of a jury determining such facts adversely to the defendant will not be set aside, unless the evidence is such that, in the mind of the court, reasonable men would necessarily arrive at a different conclusion, and there is no reasonable basis for them to differ in this conclusion.

Railroad company — railroad — construction of — trail of roadway intersected — long used by public — cut — negligence — question for jury.

4. The defendant railroad company, in constructing its railroad, intersected a trail or roadway which had long been used by the public, constructed therein a deep cut, and failed to guard the same,—*held*, the question of negligence is one of fact for the jury.

Railroad company — roadway — intersected by — long used by public — cut therein constructed — no warning signals — such acts may amount to negligence — though not legal highway.

5. Where it is shown that a railroad company had intersected a roadway

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Generally, as to imputed negligence of driver of vehicle to passenger, see notes in 8 L.R.A.(N.S.) 597 and L.R.A.1915A, 761.

As to whether negligence of driver of a vehicle can be imputed to a passenger or guest riding therein, see notes in 101 Am. St. Rep. 842 and 57 Am. Rep. 483.

On duty of operator of automobile as to lights, see note in 38 L.R.A.(N.S.) 489.

On liability for operating automobile on highway without a license, see notes in 23 L.R.A.(N.S.) 561; 25 L.R.A.(N.S.) 734; 35 L.R.A.(N.S.) 699; 41 L.R.A.(N.S.) 308; 52 L.R.A.(N.S.) 801; L.R.A.1915D, 628; and L.R.A.1916E, 1225.

Generally on the question as to defects in highway as proximate cause of injury, see notes in 13 L.R.A.(N.S.) 1252 and 20 L.R.A.(N.S.) 737.

As to method of authenticating mortality tables, see note in 17 L.R.A.(N.S.) 1138.

long used by the public, and constructed therein a cut, without providing warning signals of any sort, its acts in so doing may amount to negligence even though the roadway is not a legally established highway or street.

Automobiles — lights — front — rear — statutory requirements — failure to meet — guest riding in car — contributory negligence — none.

6. Noncompliance with a statutory requirement that automobiles should be supplied with two lights at the front of the car does not, as a matter of law, amount to contributory negligence on the part of a guest riding in the car.

Automobiles — owner and driver — guest riding in — death of — damages — failure to renew license — does not preclude recovery.

7. The failure of an owner and driver of an automobile to renew his license from the state does not preclude a recovery of damages for negligence of the defendant which caused the death of an occupant.

Life — probable duration of — evidence — absence of — standard — judicial notice — Carlisle tables of mortality — statute.

8. In the absence of evidence going to establish the probable duration of life or expectancy of one whose death resulted from the negligent act of another, the court may take judicial notice of any standard mortality tables and instruct the jury as to the facts stated therein. While the statute makes the Carlisle mortality tables admissible as evidence of such fact, it does not preclude the court from taking judicial notice of such tables as are generally used to establish life expectancy.

Opinion filed March 26, 1917. Rehearing denied June 16, 1917.

Appeal from Ramsey County, *Chas. M. Cooley,* Special Judge.

Flynn & Traynor (*A. H. Bright* and *John L. Erdall,* of counsel), for appellant.

When request is made it is proper for the jury, under directions of the court, to view the premises where the accident occurred even though things have been changed to some extent since the accident. Osgood v. Chicago, 154 Ill. 194, 41 N. E. 40; Springer v. Chicago, 135 Ill. 552, 12 L.R.A. 609, 26 N. E. 514; Northwestern Mut. L. Ins. Co. v. Sun Ins. Office, 85 Minn. 65, 88 N. W. 272; Spurrier Lumber Co. v. Dodson, 30 Okla. 412, 120 Pac. 934; 38 Cyc. 1313.

The appellate court has power to revise the trial judge's action upon a motion for a view by the jury. Rodgers v. Hodge, 18 Ann. Cas. 732, note; Beck v. Staats, 80 Neb. 482, 16 L.R.A.(N.S.) 768, 114 N. W. 633; South Covington & C. Street R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742.

Where the court's instructions to the jury as to the application of the annuity and mortality tables are not accurate, they either mislead or confuse the jury. Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 9 L.R.A.(N.S.) 769, 56 S. E. 1006, 9 Ann. Cas. 553; Ruehl v. Lidgerwood Rural Teleph. Co. 23 N. D. 6, L.R.A.—, —, 135 N. W. 793, Ann. Cas. 1914C, 680; Rofer v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22.

The remarks of counsel with reference to "his opinion" as to the admissibility of certain evidence and the wrongful admission of evidence in the first place are not offset or cured by the court thereafter striking out such evidence. The damage has been done. Crisp v. State Bank, 32 N. D. 263, 155 N. W. 78.

Questions asked a witness touching former and different statements from his present testimony are proper, and their disallowance is error. 7 Enc. Ev. 67; Taugher v. Northern P. R. Co. 21 N. D. 111, 129 N. W. 747; Ashton v. Ashton, 11 S. D. 610, 79 N. W. 1001; 40 Cyc. 2714.

"Every such automobile or motorcycle shall also be provided with lights, the automobile to carry not less than two lights in front of such machine, one of which to be on either side, and the motorcycle to carry at least one light." Comp. Laws 1913, §§ 2973, 2976; Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. L.R.A.1915B, 953, 133 C. C. A. 9, 216 Fed. 506.

A failure to comply with this statute was clearly such negligence as to prevent a recovery on the part of those in charge of the car. Lauson v. Fond du Lac, 141 Wis. 57, 25 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629.

Running an automobile without sufficient light was negligence in itself, regardless of any statute sufficient to defeat a recovery. Giles v. Ternes, 93 Kan. 140, 143 Pac. 491; Newcomb v. Boston Protective Dept. 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555; Feeley v. Melrose, 205 Mass. 329, 27 L.R.A.(N.S.)) 1156, 137 Am. St. Rep. 445, 91 N. E. 306; Chase v. New York C. & H. R. R. Co. 208 Mass. 137, 94 N. E. 377; Zoltovski v. Gzella, 159 Mich. 620, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752, 124 N. W. 527; Fenn v. Clark, 11 Cal. App. 79, 103 Pac. 944; Griffith v. Baltimore & O. R. Co. 44 Fed. 574; Morris v. Chicago, M. & St. P. R. Co. 26 Fed. 22; Cable v. Spokane

& I. E. R. Co. 150 Wash. 619, 23 L.R.A.(N.S.) 1224, 97 Pac. 744; Donnelly v. Brooklyn City R. Co. 109 N. Y. 16, 15 N. E. 733; Nelson v. Spokane, 45 Wash. 31, 8 L.R.A.(N.S.) 636, 122 Am. St. Rep. 881, 87 Pac. 1048, 13 Ann. Cas. 280.

To drive an automobile of great weight and power at night in the dark, under such circumstances and such conditions that an obstruction or excavation cannot be avoided within the distance lighted by the lamp or lamps on the car, is negligence such as will bar recovery by those in the car. It was a violation of the law. Comp. Laws 1913, § 2976(b); Feeley v. Melrose, 205 Mass. 329, 27 L.R.A.(N.S.) 1156, 137 Am. St. Rep. 445, 91 N. E. 306; Chase v. New York C. & H. R. R. Co. 208 Mass. 137, 94 N. E. 377; Dudley v. Northampton Street R. Co. 202 Mass. 443, 23 L.R.A.(N.S.) 561, 89 N. E. 25.

The right to operate such machines is not an unrestricted right, but it is a privilege which can be exercised only in accordance with the legislative restrictions. Ex parte Kneedler, 243 Mo. 632, 40 L.R.A. (N.S.) 622, 147 S. W. 983, Ann. Cas. 1913C, 923; Doherty v. Ayer, 197 Mass. 241, 14 L.R.A.(N.S.) 816, 125 Am. St. Rep. 355, 83 N. E. 677; Banks v. Highland Street R. Co. 136 Mass. 485; Holden v. McGillicuddy, 215 Mass. 563, 102 N. E. 923; Dean v. Boston Elev. R. Co. 217 Mass. 495, 105 N. E. 616; Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. L.R.A.1915B, 953, 133 C. C. A. 9, 216 Fed. 506; Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Union P. R. Co. v. Lapsley, 16 L.R.A. 800, 2 C. C. A. 149, 4 U. S. App. 542, 51 Fed. 174; Winona v. Botzet, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321, 21 Am. Neg. Rep. 445; Dyer v. Erie R. Co. 71 N. Y. 229, 12 Am. Neg. Cas. 347; Brickell v. New York C. & H. R. R. Co. 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449; Covington Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558, 12 Am. Neg. Cas. 461; Wabash, St. L. & P. R. Co. v. Shacklet, 105 Ill. 364, 44 Am. Rep. 791; Davis v. Chicago R. I. & P. R. Co. 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 159 Fed. 10; Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577; Dean v. Pennsylvania R. Co. 129 Pa. 524, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718.

Where, with full knowledge of all such facts, plaintiff still remained in the car, no recovery can be had. Plaintiff could have avoided the

danger. Shultz v. Old Colony Street R. Co. 193 Mass. 323, 8 L.R.A. (N.S.) 597, 118 Am. St. Rep. 502, 79 N. E. 873, 9 Ann. Cas. 402; Partridge v. Boston & M. R. Co. 107 C. C. A. 49, 184 Fed. 211; Davis v. Chicago, R. I. & P. R. Co. 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 159 Fed. 10; Monongahela River Consol. Coal & Coke Co. v. Schinnerer, 117 C. C. A. 193, 196 Fed. 382.

The circumstances and conditions coming to plaintiff's notice at the time and after the lights went out were such as to indicate danger and gave him an opportunity to avert it, and he should not have proceeded further, and in such case negligence is just as strongly imputed to him as to the driver. Reynolds v. Great Northern R. Co. 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808; Lawrence v. Fitchburg & L. Street R. Co. 201 Mass. 489, 87 N. E. 898; Jefson v. Crosstown Street R. Co. 72 Misc. 103, 129 N. Y. Supp. 233.

His acts really amount to an acquiescence in the driver's carelessness, and render him chargeable therewith, and defeat his right to recover for injuries sustained. Read v. New York C. & H. R. R. Co. 123 App. Div. 228, 107 N. Y. Supp. 1068; Pouch v. Staten Island Midland R. Co. 142 App. Div. 16, 126 N. Y. Supp. 738; Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577; Brickell v. New York C. & H. R. R. Co. 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449; Stone v. Northern P. R. Co. 29 N. D. 480, 151 N. W. 36; Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 128, L.R.A.1915A, 761, 147 N. W. 791, Ann. Cas. 1916E, 683; Lightfoot v. Winnebago Traction Co. 123 Wis. 479, 102 N. W. 30; Beaucage v. Mercer, 206 Mass. 492, 138 Am. St. Rep. 401, 92 N. E. 774.

The wife may be denied a recovery because of the negligence of her husband while riding with him. Yahn v. Ottumwa, 60 Iowa, 429, 15 N. W. 257; Donnelly v. Brooklyn City R. Co. 109 N. Y. 16, 15 N. E. 733.

Plaintiff was "conscious of the danger" of riding in the automobile without lights. He "made no objection or effort to avoid the danger," and he was guilty of contributory negligence. Omaha & R. Valley R. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599; Hanson v. Manchester Street R. Co. 73 N. H. 395, 62 Atl. 595; New York, C. & St. L. R. Co. v. Robbins, 38 Ind. App. 172, 76 N. E. 804; Lake Shore & M.

S. R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; Brannen v. Kokomo, G. & J. Gravel Road Co. 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202; McDonald v. Yoder, 80 Kan. 25, 101 Pac. 468; Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315; Bush v. Union P. R. Co. 62 Kan. 709, 64 Pac. 624; Holden v. Missouri R. Co. 177 Mo. 456, 76 S. W. 973; Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316; Lynn v. Goodwin, 170 Cal. 112, L.R.A.1915E, 588, 148 Pac. 927, 9 N. C. C. A. 915; Flynn v. Chicago City R. Co. 250 Ill. 460, 95 N. E. 449; 29 Cyc. 460; Texas Co. v. Voloz, — Tex. Civ. App. —, 162 S. W. 377; Platte & D. Canal & Mill. Co. v. Dowell, 17 Colo. 376, 30 Pac. 68; Osborne v. Van Dyke, 113 Iowa, 557, 54 L.R.A. 367, 85 N. W. 784; Klatt v. N. C. Foster Lumber Co. 97 Wis. 641, 73 N. W. 563; Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; Burk v. Creamery Package Mfg. Co. 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793, 18 Am. Neg. Rep. 62; Tvedt v. Wheeler, 70 Minn. 161, 72 N. W. 1062; Kelley v. Anderson, 15 S. D. 107, 87 N. W. 579; Smith v. Milwaukee Builders' & T. Exch. 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; Richardson v. El Paso Consol. Gold Min. Co. 51 Colo. 440, 118 Pac. 982; Chicago, R. I. & P. R. Co. v. Pitchford, 44 Okla. 197, 143 Pac. 1146; Beaver v. Mason, E. & Co. 73 Or. 36, 143 Pac. 1000; Connell v. Harris, 23 Cal. App. 537, 138 Pac. 949; Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N. E. 365, Ann. Cas. 1917A, 474, 7 N. C. C. A. 724; Scragg v. Sallee, 24 Cal. App. 133, 140 Pac. 706; Morgan v. Bross, 64 Or. 63, 129 Pac. 118; Fox v. Barekman, 178 Ind. 572, 99 N. E. 989; Westover v. Grand Rapids R. Co. 180 Mich. 373, 147 N. W. 630; Schaar v. Conforth, 128 Minn. 460, 151 N. W. 275, 8 N. C. C. A. 1079; Amberg v. Kinley, 214 N. Y. 531, L.R.A.1915E, 519, 108 N. E. 830, 9 N. C. C. A. 552; Morrison v. Lee, 16 N. D. 377, 13 L.R.A.(N.S.) 650, 113 N. W. 1025; Pizzo v. Wiemann, 149 Wis. 235, 38 L.R.A.(N.S.) 678, 134 N. W. 899, Ann. Cas. 1913C, 803, 3 N. C. C. A. 149; Pittsburgh, C. C. & St. L. R. Co. v. Reed, 44 Ind. App. 635, 88 N. E. 1080; Peterson v. Standard Oil Co. 55 Or. 511, 106 Pac. 337, Ann. Cas. 1912A, 625; Carter v. Caldwell, 183 Ind. 434, 109 N. E. 355; Westover v. Grand Rapids R. Co. 180 Mich. 373, 147 N. W. 630.

Where the speed statute is violated no recovery for injuries can be

had. It constitutes negligence. 29 Cyc. 436, 605; Wilson v. Northern P. R. Co. 30 N. D. 456, L.R.A.1915E, 991, 153 N. W. 429; Brickell v. New York C. & H. R. R. Co. 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449; Meehan v. Great Northern R. Co. 43 Mont. 72, 114 Pac. 781, 3 N. C. C. A. 556; Lake Shore & M. S. R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; Pereira v. Star Sand Co. 51 Or. 477, 94 Pac. 835; Brannen v. Kokomo, G. & J. Gravel Road Co. 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202; Hunter v. Montana C. R. Co. 22 Mont. 525, 57 Pac. 141; Cummings v. Helena & L. Smelting & Reduction Co. 26 Mont. 434, 68 Pac. 852; Cleveland, C. C. & St. L. R. Co. v. Coffman, 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179; Chicago, B. & Q. R. Co. v. Featherly, 64 Neb. 323, 89 N. W. 792, 11 Am. Neg. Rep. 607.

Where plaintiff in his testimony has stated facts from which the jury could find that his own negligence had contributed to the injury, the rule that the burden to prove negligence is on defendant has no application. Durrell v. Johnson, 31 Neb. 796, 48 N. W. 890; Chicago, B. & Q. R. Co. v. Featherly, 64 Neb. 323, 89 N. W. 792, 11 Am. Neg. Rep. 607; Missouri, K. & T. R. Co. v. Merrill, 61 Kan. 671, 60 Pac. 819, 7 Am. Neg. Rep. 620; Beach, Contrib. Neg. § 427; Smith v. Chicago, M. & St. P. R. Co. 4 S. D. 71, 55 N. W. 717.

Where the evidence discloses contributory negligence defendant is entitled to a directed verdict. Silcock v. Rio Grande Western R. Co. 22 Utah, 179, 61 Pac. 565, 8 Am. Neg. Rep. 166; Derringer v. Tatley, 34 N. D. 43, L.R.A.1917F, 187, 157 N. W. 811; Dewald v. Kansas City, Ft. S. & G. R. Co. 44 Kan. 586, 24 Pac. 1101, 3 Am. Neg. Cas. 447; Hunter v. Montana C. R. Co. 22 Mont. 525, 57 Pac. 141; Cummings v. Helena & L. Smelting & Reduction Co. 26 Mont. 434, 68 Pac. 852; Evansville v. Christy, 29 Ind. App. 44, 63 N. E. 867; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; Morrison v. Lee, 16 N. D. 377, 13 L.R.A.(N.S.) 650, 113 N. W. 1025; Cumming v. Great Northern R. Co. 15 N. D. 611, 108 N. W. 798; Gast v. Northern P. R. Co. 28 N. D. 118, 147 N. W. 793; Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 128, L.R.A.1915A, 761, 147 N. W. 791, Ann. Cas. 1916E, 683; Haugo v. Great Northern R. Co. 27 N. D. 268, 145 N. W. 1053; Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 390; Umsted v. Colgate Farm-

ers Elevator Co. 22 N. D. 242, 133 N. W. 61; Grand Forks v. Paulsness, 19 N. D. 293, 40 L.R.A.(N.S.) 1158, 123 N. W. 878; Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997; Braatz v. Fargo, 19 N. D. 538, 27 L.R.A.(N.S.) 1169, 125 N. W. 1042; Reynolds v. Great Northern R. Co. 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808; Costello v. Farmers Bank, 34 N. D. 131, 157 N. W. 982.

Where plaintiff shows that a cut made along the highway, and left by defendant company without protection of the public by a guard or other structure, and relies upon this as one of the reasons for his injuries, he must go further and show that the requirement of the statute in this respect was for his benefit. Was it defendant's duty to erect a guard or fence in front of this cut? Menut v. Boston & M. R. Co. 207 Mass. 12, 30 L.R.A.(N.S.) 1196, 92 N. E. 1032, 20 Ann. Cas. 1213; Chase v. New York C. & H. R. R. Co. 208 Mass. 137, 94 N. E. 377.

"A property owner owes no duty to a trespasser or a mere licensee on his premises to protect him from injury other than to refrain from wilfully and wantonly inflicting injuries to such person." Costello v. Farmers Bank, 34 N. D. 131, 157 N. W. 982; Parker v. Portland Pub. Co. 69 Me. 173, 31 Am. Rep. 262; Rooney v. Woolworth, 74 Conn. 720, 52 Atl. 411; Bedell v. Berkey, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308; Bentley v. Loverock, 102 Ill. App. 166; Lackat v. Lutz, 94 Ky. 287, 22 S. W. 218; Daley v. Kinsman, 182 Mass. 306, 65 N. E. 385, 13 Am. Neg. Rep. 95; Campbell v. Abbott, 176 Mass. 246, 57 N. E. 462; Massey v. Seller, 45 Or. 267, 77 Pac. 397, 16 Am. Neg. Rep. 553; Steger v. Immen, 157 Mich. 494, 24 L.R.A.(N.S.) 247, 122 N. W. 104; Reed v. Axtell, 84 Va. 231, 4 S. E. 587, 10 Am. Neg. Cas. 346.

The court's instruction to the jury, that a public road such as would require defendant to guard is "a way open to all people, without distinction, for passage and repassage at their pleasure," is erroneous. Comp. Laws 1913, §§ 1918–1920; Burleigh County v. Rhud, 23 N. D. 362, 136 N. W. 1082; Reynolds v. Great Northern R. Co. 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808; Shelby County v. Castetter, 7 Ind. App. 309, 33 N. E. 986, 34 N. E. 687; Cole v. Minnesota Loan & T. Co. 17 N. D. 409, 117 N. W. 354, 17 Ann.

Cas. 304; Poole v. Lake Forest, 238 Ill. 305, 23 L.R.A.(N.S.) 809, 87 N. E. 320; Roche Realty & Invest. Co. v. Highlands Co. 29 S. D. 169, 135 N. W. 684; Highway Comrs. v. Kinahan, 240 Ill. 593, 88 N. E. 1044; Bitney v. Grim, 73 Or. 257, 144 Pac. 490.

It seems ridiculous to say that any person exercising any degree of care would have mistaken this old trail for a public road, one year after the cut was made. The "trial" had been abandoned. Heller v. Cahill, 138 Iowa, 301, 115 N. W. 1009; Lucas v. Payne, 141 Iowa, 592, 120 N. W. 59; Pitts v. Pierce County, 78 Wash. 238, 138 Pac. 885; 37 Cyc. 199 (e).

Cowan & Adamson and *H. S. Blood,* for respondent.

The roadway obstructed was a traveled highway, and defendant owed a duty, even to a licensee, upon this traveled roadway, to guard this cut which defendant had made in the roadway. 21 Am. & Eng. Enc. Law, 2d ed. 470 to 472; 28 Cyc. 1384; DeLong v. Oklahoma City, — Okla. —, L.R.A.1915E, 597, 148 Pac. 701; Whart. Neg. § 349; Graves v. Thomas, 95 Ind. 361, 48 Am. Rep. 727; Carskaddon v. Mills, 5 Ind. App. 22, 31 N. E. 559; Gagg v. Vetter, 41 Ind. 228, 13 Am. Rep. 322; Allison v. Haney, — Tex. Civ. App. —, 62 S. W. 933; Nolan v. Bridgeton & M. Traction Co. 74 N. J. L. 559, 65 Atl. 992; Phillips v. Library Co. 55 N. J. L. 307, 27 Atl. 478; Lepnick v. Gaddis, 72 Miss. 200, 26 L.R.A. 686, 48 Am. St. Rep. 547, 16 So. 213; Hurst v. Taylor, L. R. 14 Q. B. Div. 918, 54 L. J. Q. B. N. S. 310, 33 Week. Rep. 582, 49 J. P. 359; Morrison v. Carpenter, 179 Mich. 207, 146 N. W. 106, Ann. Cas. 1915D, 319.

Contributory negligence on the part of the plaintiff's intestate, riding as a guest in the car, cannot be established by seeking to establish negligence on the part of the driver and imputing it to Chambers. Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 128, L.R.A.1915A, 761, 147 N. W. 791, Ann. Cas. 1916E, 683; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; 7 Am. & Eng. Enc. Law, 2d ed. 447 and 448; Farley v. Wilmington & N. C. Electric R. Co. 3 Penn. (Del.) 581, 52 Atl. 543; Metropolitan Street R. Co. v. Powell, 89 Ga. 601, 16 S. E. 118; Chicago City R. Co. v. Wall, 93 Ill. App. 411; Lake Shore & M. S. R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; Nesbit v. Garner, 75 Iowa, 314, 1 L.R.A. 152, 9 Am. St. Rep. 486, 39 N. W. 516; Leavenworth v. Hatch,

57 Kan. 57, 57 Am. St. Rep. 309, 45 Pac. 65; Cahill v. Cincinnati, N. O. & T. P. R. Co. 92 Ky. 345, 18 S. W. 2; Baltimore & O. R. Co. v. State, 79 Md. 335, 47 Am. St. Rep. 415, 29 Atl. 518, 12 Am. Neg. Cas. 1; Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763, 10 Am. Neg. Rep. 106; Alabama & V. R. Co. v. Davis, 69 Miss. 444, 13 So. 693; Dickson v. Missouri P. R. Co. 104 Mo. 481, 16 S. W. 381; Consolidated Traction Co. v. Hoimark, 60 N. J. L. 456, 38 Atl. 684; Flanagan v. New York C. & H. R. R. Co. 70 App. Div. 505, 75 N. Y. Supp. 225; Robinson v. Metropolitan Street R. Co. 91 App. Div. 158, 86 N. Y. Supp. 442, 179 N. Y. 593, 72 N. E. 1150; Duval v. Atlantic Coast Line R. Co. 134 N. C. 331, 65 L.R.A. 722, 101 Am. St. Rep. 830, 46 S. E. 750; Carlisle v. Brisbane, 57 Am. Rep. 483, and note, 113 Pa. 544, 6 Atl. 372; Dean v. Pennsylvania R. Co. 129 Pa. 514, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718; Hydes Ferry Turnp. Co. v. Yates, 108 Tenn. 428, 67 S. W. 69; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127; Missouri, K. & T. R. Co. v. Rogers, 91 Tex. 52, 40 S. W. 956; Atlantic & D. R. Co. v. Ironmonger, 95 Va. 625, 29 S. E. 319; Union P. R. Co. v. Lapsley, 16 L.R.A. 800, 2 C. C. A. 149, 4 U. S. App. 542, 51 Fed. 174; The Bernina, L. R. 12 Prob. Div. 58, L. R. 13 App. Cas. 1.

Did Chambers, by remaining in the car, act as an ordinarily prudent person would have acted? This was a question for the jury by all the facts shown in the case. Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Bennett v. Northern P. R. Co. 3 N. D. 91, 54 N. W. 314; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 122; Severtson v. Northern P. R. Co. 32 N. D. 200, 155 N. W. 11; Felton v. Midland Continental R. Co. 32 N. D. 223, 155 N. W. 23.

The owner of premises cannot be guilty of active or affirmative negligence as regards a mere licensee, and escape liability. There is a distinction between such negligence and mere passive or permissive negligence. Brinilson v. Chicago & N. W. R. Co. 144 Wis. 614, 32 L.R.A.(N.S.) 359, 129 N. W. 664; Morrison v. Carpenter, 179 Mich. 207, 146 N. W. 106, Ann. Cas. 1915D, 319; Sylvester v. Grand Rapids Bookcase Co. 169 Mich. 340, 135 N. W. 337; Felton v. Aubrey, 20 C. C. A. 436, 43 U. S. App. 278, 74 Fed. 350, 7 Am. Neg. Cas. 405; 21 Am. & Eng. Enc. Law, 470 to 472; 28 Cyc. 1384; DeLong

v. Oklahoma City, — Okla. —, L.R.A.1915E, 597, 148 Pac. 701; 2 Elliott, Roads & Streets, 1138; Kingfisher v. Altizer, 13 Okla. 121, 74 Pac. 107, 15 Am. Neg. Rep. 173; 2 Dill. Mun. Corp. 4th ed. 1009; Oklahoma City v. Meyers, 4 Okla. 686, 46 Pac. 552; Burnham v. Boston, 10 Allen, 290; Orme v. Richmond, 79 Va. 86.

A city is bound to use all necessary measures to guard against the injury of persons entering its streets from private ways and adjoining streets. Dennis v. Elmira Heights, 59 App. Div. 404, 70 N. Y. Supp. 312; Omaha v. Randolph, 30 Neb. 699, 46 N. W. 1013; Covington v. Bryant, 7 Bush, 248; Kirkham v. Kansas City, 89 Kan. 651, 132 Pac. 160; O'Malley v. Parsons, 191 Pa. 612, 71 Am. St. Rep. 778, 43 Atl. 384; Whart. Neg. § 349; Graves v. Thomas, 95 Ind. 361, 48 Am. Rep. 727.

There is an elementary and fundamental principle of law which is based upon and coeval with the right to own and control property, that a man must so use his own rights and property as to do no injury to those of his neighbor. Gagg v. Vetter, 41 Ind. 228, 13 Am. Rep. 322; Allison v. Haney, — Tex. Civ. App. —, 62 S. W. 933; Nolan v. Bridgeton & M. Traction Co. 74 N. J. L. 559, 65 Atl. 992; Phillips v. Library Co. 55 N. J. L. 307, 27 Atl. 478; Lepnick v. Gaddis, 72 Miss. 200, 26 L.R.A. 686, 48 Am. St. Rep. 547, 16 So. 213; Hurst v. Taylor, L. R. 14 Q. B. Div. 918, 54 L. J. Q. B. N. S. 310, 33 Week. Rep. 582, 49 J. P. 359; Clampit v. Chicago, St. P. & K. C. R. Co. 84 Iowa, 71, 50 N. W. 673; Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485; Morrison v. Carpenter, 179 Mich. 207, 146 N. W. 106, Ann. Cas. 1915D, 319; Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. L.R.A.1915B, 953, 133 C. C. A. 9, 216 Fed. 503.

The negligence of the driver of an automobile is not imputable to a guest riding with him in the rear seat of the car. Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676.

This is the general and accepted law. 7 Am. & Eng. Enc. Law, 2d ed. 447 and 448; Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 128, L.R.A. 1915A, 761, 147 N. W. 791, Ann. Cas. 1916E, 683.

The car was not being run without lights. The driver provided the best lights obtainable, and one of the persons with the driver had been very familiar with that road for years. Felton v. Midland

Continental R. Co. 32 N. D. 223, 155 N. W. 23; Severton v. Northern P. R. Co. 32 N. D. 200, 155 N. W. 11; Bennett v. Northern P. R. Co. 3 N. D. 91, 54 N. W. 314; Detroit & M. R. Co v. Van Steinburg, 17 Mich. 122; Van Vechten v. Pruyn, 13 N. Y. 553; Sweet v. Salt Lake City, 43 Utah, 306, 134 Pac. 1167, 8 N. C. C. A. 922; Holland v. Boston, 213 Mass. 560, 100 N. E. 1009; Newcomb v. Boston Protective Dept. 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555; Quinette v. Bisso, 5 L.R.A.(N.S.) 303, 69 C. C. A. 503, 136 Fed. 825; Hughes v. Atlanta Steel Co. 136 Ga. 511, 36 L.R.A.(N.S.) 547, 71 S. E. 728, Ann. Cas. 1912C, 394, 1 N. C. C. A. 429; Wright v. Crane, 142 Mich. 508, 106 N. W. 71, 19 Am. Neg. Rep. 336.

An inexperienced guest may rely upon an experienced chauffeur, and whether or not he is negligent in so doing must be decided by the jury. Chadbourne v. Springfield Street R. Co. 199 Mass. 574, 85 N. E. 737; Clarke v. Connecticut Co. 83 Conn. 219, 76 Atl. 523; Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763.

The jury may be permitted to view the premises when, in the opinion of the court, it is proper for them to do so. Code, § 7622; Stewart v. Cincinnati, W. & M. R. Co. 89 Mich. 315, 17 L.R.A. 539, 50 N. W. 852.

BIRDZELL, J. This action was brought to recover damages occasioned by the death of plaintiff's husband, George C. Chambers, in an automobile accident. At the trial in the district court of Ramsey county judgment was rendered in favor of the plaintiff for $8,000, and from this judgment and from the order denying a motion for a new trial the defendant appeals to this court. The facts are as follows: On the night of April 26, 1913, Charles Doyon, John McLean, Charles Rebillard, and George C. Chambers, husband of the plaintiff, made a trip from Church's Ferry to Devils Lake in an automobile. As the party approached Devils Lake along an old road or trail which will be more fully described hereinafter, the automobile fell into an unguarded cut on the right of way of the defendant railroad company, throwing the occupants out and inflicting injuries upon Chambers, from which he died before he could be removed to the hospital. The automobile belonged to Doyon, who drove the car, and the remaining members of the party were riding as his guests. McLean and Rebillard had, during

the day, arranged with Doyon to ride with him from Church's Ferry to Devils Lake, while Chambers asked permission that evening to accompany them on the trip.

The party left Church's Ferry at about 7:45 P. M., just as it was getting dusk, and when they had driven about 7 miles the lights gave trouble and finally went out altogether, about 6 miles from Grand Harbor. After an unsuccessful attempt to borrow a lantern at a farmhouse, they drove on to Grand Harbor without lights, and there obtained a wick and oil for the oil lamp attached to the car, on the left side of the dash. A robe was so placed over the windshield as to prevent the direct rays from the lamp striking the eyes of the driver, Doyon, who sat on the side of the car opposite the lamp. McLean occupied the front seat with Doyon, while Rebillard and Chambers occupied the rear seat.

Doyon was an experienced driver, who estimated that he had driven an automobile about 100,000 miles. McLean was the sheriff of Ramsey county and had resided in Devils Lake for many years. He was thoroughly familiar with all the roads leading to and from the city. On the night of the accident the roads were heavy, being somewhat muddy, and the night was dark. From Church's Ferry to the place of the accident, they had driven a distance of about 21 miles. Most of the way they were driving in low gear and the remainder of the time in intermediate gear. The oil lamp furnished a dim light which served to light the way ahead for 6 or 8 feet on the average, and sometimes as far as 20 or 25 feet, according to the testimony of Doyon. McLean rode with one foot on the running board and the other in the car, in order to look ahead and assist Doyon in keeping the car on the road.

The road traversed from Grand Harbor to Devils Lake runs in a southeasterly direction, parallel with the Great Northern Railroad. At a point just beyond the city limits of Devils Lake the road leaves the line of the railroad and runs due east on the section line between sections 28 and 33. As this section road nears the city proper there are roads or trails branching off it and running in a southeasterly direction, connecting with Ninth, Tenth, Eleventh, Twelfth, and Fourteenth streets of the city. One of the main trails or roads branching off the section-line trail or road turns off at a point some 249 feet west

of the section corner common to sections 28, 33, 27, and 34, and within the city limits.

During the spring and summer prior to the accident, the defendant railroad, in constructing its line into Devils Lake, intersected the section-line road or trail which, prior to that time, had continued due east to Minnewaukan avenue, one of the principal streets in the city. The railroad intersected this trail at a point some distance east of the section corner above referred to, crossing the road diagonally in a southeasterly direction as viewed from the west. Where the railroad crossed the road there was a cut 30 feet wide and about 15 feet deep through the road, which cut was unguarded and devoid of warning signals of any character. There is a telephone line running along the section-line roadway, extending beyond the intersection to Minnewaukan avenue, the poles being north of the section line and of the traveled road. The section-line road or trail was not graded, nor were any of the roads or trails branching off the same graded at the time. There was no change in the level of the section-line road that would indicate a cross-road, or mark the point where the roads or trails branched off to the southeast. This is true even of the crossing of the section-line road that comes down from the north and intersects the east and west road at a point a little way east of the turn where the last southeast trail leaves the section-line road to connect with Fourteenth street.

The evidence establishes that the road upon which the party was traveling had been used for many years as a roadway leading to the city of Devils Lake, and there is abundant evidence of its use as such, not only to the point where the various roads or trails branch off to the southeast, connecting with Ninth, Tenth, Eleventh, Twelfth, and Fourteenth streets, but also beyond such points and east of the railroad intersection to Minnewaukan avenue. While the appellant raises a question as to whether the road extending from the place where the last southeasterly branch leaves to connect with Fourteenth street is or ever was a legally established public road or street, we regard the fact upon which the existence of such legal highway would depend, as well as the legal conclusion to be drawn from such facts, to be immaterial to a determination of any issue involved in this case. The action was started originally against both the defendant and the city of Devils Lake, but it was subsequently dismissed as to the city.

It further appears, according to the evidence of Mr. Doyon, that as they traveled along the section-line road they kept toward the north side of the roadway, because the wheeling was better, and that he was guided partly by the telephone poles.

When about 40 or 50 feet from the cut, it appears that the automobile veered to the south, leaving the main trail a distance of perhaps a rod or more. Doyon accounts for this deviation from the main trail by his inclination in driving to bear toward the right. It appears that McLean saw a large rock ahead of the car; and, while his impressions seemed to be indistinct as to whether he had told Doyon to turn to the left in order to get back to the trail before he saw the rock, or whether it was his impulse to avoid a collision with the rock that led him to tell Doyon to turn to the left, it is nevertheless a fact that Doyon did steer sharply to the left, at McLean's command, thereby avoiding the rock. Immediately thereafter the car fell into the cut, striking it at right angles.

Though there are many assignments of error, the appellant urges two principal questions for consideration. First, the question as to whether or not Chambers was guilty of contributory negligence; and, second, as to whether the defendant was guilty of any actual negligence in failing to guard or protect the cut in any way. The principal argument is addressed to the first question. We will therefore consider it fully before passing to the second question and to the other specifications of error. Section 2973 of the Compiled Laws of 1913 requires every owner of an automobile to provide the same with not less than two lights in front of such machine, one of which shall be on either side. Section 2976 of the Compiled Laws of 1913 makes a violation of the above regulation a misdemeanor. It is argued that Chambers was guilty of contributory negligence as a matter of law in remaining in an automobile being driven upon a public highway when not provided with proper lights as required by law, and in such circumstances as to render at least the driver of the car liable to punishment for the commission of a misdemeanor. It is a well-established proposition that the negligence of a driver is not imputable to a passenger, and this rule applies whether the conveyance is a public conveyance or a private one. Berry, Automobiles, 2d ed. § 318; 2 R. C. L. 1207; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Rebillard v.

Minneapolis, St. P. & S. Ste. M. R. Co. L.R.A.1915B, 953, 133 C. C. A. 9, 216 Fed. 503–506; Wilson v. Puget Sound Electric R. Co. 52 Wash. 522, 132 Am. St. Rep. 1044, 101 Pac. 50; Beach v. Seattle, 85 Wash. 379, 148 Pac. 39; 7 Am. & Eng. Enc. Law, 2d ed. 447, 448.

Any negligence of which Doyon and McLean, as the operators of the car, under the circumstances in question may be guilty, is therefore not to be attributed to Chambers, and recovery of damages for causing his death is not to be denied unless he was guilty of contributory negligence. Since it is clear that he had no part in the operation of the car, the negligence, if any, which would preclude a recovery by the plaintiff, must consist in the fact that Chambers voluntarily remained in the automobile with a knowledge of dangers incident to its operation under the circumstances disclosed by the facts in this case. Briefly stated the question is, Was Chambers guilty of contributory negligence as a matter of law in remaining in the back seat and riding in the car, knowing that the light was probably insufficient to enable the driver to discover a dangerous condition of the highway ahead, and equally insufficient to enable him to readily detect landmarks and turns which would enable him to know at all times whether he was upon the proper road?

Ordinarily, the question of contributory negligence is one of fact to be determined by the jury; and the determination of this question by the jury is as binding upon the court as is a verdict upon any other question properly submitted to it. The verdict can only be set aside where the evidence is such that, in the mind of the court, reasonable men would necessarily infer negligence from the facts proved, and where there is no reasonable basis for them to differ in this conclusion. Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 128, L.R.A.1915A, 761, 147 N. W. 791, Ann. Cas. 1916E, 683; Severtson v. Northern P. R. Co. 32 N. D. 200, 155 N. W. 11; Felton v. Midland Continental R. Co. 32 N. D. 223, 155 N. W. 23. In deciding whether or not Chambers, in remaining in the automobile, was guilty of contributory negligence as a matter of law, we must look to all the circumstances in which he continued his journey as a passenger in the car. Chambers was the editor of a newspaper in Church's Ferry, and was personally acquainted with both

Doyon and McLean. It might be reasonably inferred that he knew that Doyon was an experienced driver, and that McLean was thoroughly familiar with the roads leading from Church's Ferry to Devils Lake. The roads were muddy and the car traveled slowly. When the light gave out, another was improvised which would be reasonably sufficient to guard against the danger of collision. McLean, who was most familiar with the roads, placed himself in such a position as to be able to keep a lookout, thereby assisting the driver to keep on the road. In view of all these facts and of the reasonable impressions they would make upon the mind of one occupying the position of Chambers at the time of the accident, we think that the question as to whether or not the deceased acted with a due regard for his own safety in remaining in the car under the circumstances was a question proper for the consideration of the jury. While reasonable men might well differ as to the propriety of his conduct under the circumstances in question, we cannot say that it was so clearly his duty to adopt the other alternative, and get out of the car and either walk or stop overnight in a farmhouse or a village hotel before arriving at his destination, as to remove from the jury the determination of the question of contributory negligence. In fact we believe that most men of ordinary prudence would have regarded themselves as reasonably safe if placed in the circumstances of Chambers, and would have continued the journey just as he did.

It is by no means clear that the accident would have been avoided had the automobile been provided with the lights required by statute, or even with lights that would have been perfect in their efficiency; so that, if it be assumed that the operators of the car were negligent in failing to provide proper lights and the deceased negligent in remaining in the car, it does not necessarily follow that the questions of contributing and proximate causes could be decided by the court as matters of law. The statute in regard to the lighting of automobiles at night would be satisfied by the furnishing of two lights, regardless of their candle power, and there is no requirement as to reflectors of any sort. Two dash lights would not have lighted the road any greater distance ahead than one light. The law does not purport to fix an exclusive standard of due care in the matter of providing lights, and if the statutory requirement is violated it does not follow that the

one so violating the statute, or one riding in an automobile with knowledge that the statute is being violated in this particular, is necessarily precluded from recovering damages. There are still the questions of proximate cause and contributory negligence. The supreme court of Utah in dealing with such a situation uses the following language: "Whether the lights are of the character required by the statute must ordinarily be determined from the evidence, and in case they do not conform to the statutory requirements, the question still remains whether the absence of sufficient lights was the proximate cause of the accident or not. These are questions of fact. The same may be said with regard to the speed." Sweet v. Salt Lake City, 43 Utah, 306–325, 134 Pac. 1167, 8 N. C. C. A. 922. Owing to the condition of the road, the automobile was traveling along the north side; and, there being no change in the grade at the various points where other roads branched off or intersected, the driver might well have passed them without being aware that he had done so. Furthermore it appears that the land, from the point of the last branching trail to within about a rod or two of the cut sloped slightly upward, and that, after reaching the crest of the gradual incline, the ground sloped the other way, the east bank of the cut being lower than the west bank. This condition would necessarily tend to obscure the cut when approached from the west. While, traveling at the rate they were, they might have been able to stop the car within 10 or 15 feet, still had they approached the cut with efficient lights going, the driver, acting with reasonable care for his own safety and the safety of the occupants, would not necessarily have seen the cut in time to have avoided the accident. Viewing the circumstances as they appear from the evidence of the plaintiff's witnesses, we do not see how it could be said as a matter of law that the negligence of the plaintiff's intestate in remaining in the car, if he were guilty of such negligence, and the negligence of Doyon in operating the car without more efficient lights, were either the proximate or the contributory causes of the accident. It must be borne in mind that the roads did not admit of fast travel, and that the occupants of the car were not bound to anticipate pitfalls such as that constructed by the defendant. In our opinion these questions, under the evidence in this case, were clearly for the jury. See Super v. Modell

Twp. 88 Kan. 698, 129 Pac. 1162; Abbott v. Wyandotte County, 94 Kan. 553, 146 Pac. 998; Beach v. Seattle, 85 Wash. 379, 148 Pac. 39.

In the case of Super v. Modell Twp. supra, the driver of an automobile which was properly equipped and lighted approached a crossing at 10 o'clock in the evening, from which a bridge had recently been washed away by flood. He was unable, after he saw that the bridge was gone, to stop his automobile within sufficient distance to prevent being precipitated into the stream below. In that case, as in the instant case, the approach was on the upgrade, which fact caused the lights to be thrown upward and prevented the driver from observing that the bridge was gone until the car was at the bank. The jury found that the car was going at the rate of from 12 to 15 miles an hour, and that the driver was exercising ordinary prudence under the circumstances. The court held that, though the driver was aware of the fact that he was approaching the bridge, and though he had failed to notice a turn to the north which would have taken him upon a road leading to a temporary bridge, he was not guilty of contributory negligence as a matter of law.

In the case of Abbott v. Wyandotte County, 94 Kan. 553, 146 Pac. 998, the driver of an automobile missed a bridge as he approached at night. It was alleged that the bridge was out of line with the road, and was not supplied with guards to indicate the proper line of approach. In answer to the argument that an automobile driver should not drive so fast at night that the entire distance he could see was required for stopping the automobile, the court said: "The deceased had no occasion to anticipate stopping. He was on the right-hand side of a broad highway, and could see far enough to turn aside if confronted by visible objects. If a barrier had been extended a few feet from the corner of the bridge he could have made the turn necessary to put him in line with the bridge and the road beyond without reducing speed at all." The jury found that, though the driver was driving at the rate of 25 miles an hour as he approached the bridge, the rate of speed was not too great, considering the surrounding circumstances, and the court held the question of contributory negligence to be one of fact for the jury.

In weighing the argument of counsel on the second proposition, that the defendant was not guilty of any actual negligence in failing to guard

or protect the cut in any way, we have carefully considered not only the testimony and the exhibits, but have considered as well the decision in the companion case arising out of the same accident, in which Rebillard sued for personal injuries. In that case the Federal circuit court of appeals for the eighth circuit affirmed a judgment for the defendant, based upon an instructed verdict. Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. L.R.A.1915B, 953, 133 C. C. A. 9, 216 Fed. 503. Trieber, District Judge, speaking for the court, uses language which would indicate that there was considerable doubt as to whether the road in question had been used to any appreciable extent as a public road. The learned judge even had doubts as to whether the trail itself indicated that it had been used to any considerable extent as a public road. There is ample evidence in this case from which the jury could infer that the road had long been used as a public highway and to considerable extent. Furthermore an examination of exhibit II., the same being a photograph of the road or trail in question, taken toward the end of the summer following the accident, when the prairie grass and weeds had attained their full growth, convinces us, as we believe it would convince anyone familiar with the prairie roads in North Dakota, that the trail had long been used by the public. While we do not know what evidence was submitted on this point in the companion case, it appears from the opinion above referred to that the evidence was conflicting, and that the circuit court of appeals was influenced by the fact that the trial judge had made an ocular inspection of the place from which he must have derived impressions which it was impossible to incorporate in the record, or convey to the appellate tribunal.

There is no doubt in our minds as to the defendant's negligence, under the evidence disclosed in this record, being a question for the jury to decide. There was sufficient evidence here that the road or trail had been used for a long period of time to warrant the jury in drawing the inference of negligence, even though appellants are right in their contention that the road at the intersection was not a street or a public highway. The duty to safeguard the cut was owing to licensees as well as it would have been to lawful users of the way in question, considered as a legal highway. Bills v. Kaukauna, 94 Wis. 310, 68 N.

W. 992; Morrison v. Carpenter, 179 Mich. 207, 146 N. W. 106, Ann. Cas. 1915D, 319; Omaha v. Randolph, 40 Neb. 699, 46 N. W. 1013.

Counsel for appellant argues that the trial judge erred in his instructions to the jury in stating the life expectancy of Chambers according to the American mortality table. It appears that the plaintiff requested the court to take judicial notice of the mortality tables, without specifying what tables. Section 7922 of the Compiled Laws of 1913 provides that, in all cases in which probable duration of the natural life of any person is material, the statistical tables known as the Carlisle tables of mortality are competent evidence of such probable duration or expectation of life. In the case of Ruehl v. Lidgerwood Rural Teleph. Co. 23 N. D. 6–19, L.R.A.—, —, 135 N. W. 793, Ann. Cas. 1914C, 680, this court held that it would take judicial notice of standard tables according to which the life expectancy of an individual may be determined, and it was said that it would have been competent for the court to have instructed the jury as to the fact of the contents of such mortality tables.

In the case of Rober v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22, this court, in affirming a judgment for damages where there was no proof of expectancy, took judicial notice of the Carlisle tables and sustained the judgment. While the statute provides affirmatively that the Carlisle tables shall be admissible, it does not purport to control or restrict in this particular the application of the doctrine of judicial notice. In disposing of this assignment of error, it need only be said that we adhere to the rule laid down in the case of Ruehl v. Lidgerwood Rural Teleph. Co. supra. Furthermore, even assuming that the court, if it took judicial notice at all, was bound to instruct according to the Carlisle tables, it is not shown wherein any prejudice resulted from the court's instruction on this point.

The appellant also argues that the plaintiff cannot recover in this action because at the time the accident occurred Doyon had not obtained from the secretary of state an automobile license for the year 1913. From this fact it is urged that the automobile and the occupants of the same were all trespassers on the highway, and that consequently no duty was owing to them by the defendant. In our opinion there is no merit in this contention. The statutory requirement which makes it incumbent upon owners of automobiles to secure licenses from the state does

not have the effect of making such owners, much less the guests of such owners riding with them, outlaws and as such subject to bear without remedy injuries which are in no way connected with the unlawful act.

Appellant in this appeal has set forth forty-five specifications of error, all of which have been carefully considered. Such of them as have merit are fully disposed of in the foregoing opinion.

The judgment is affirmed.

ROBINSON, J. (dissenting). I dissent. I think that when a person goes in an automobile without a light, over unknown roads on a dark night, he is guilty of gross negligence. A railroad company should not have to pay for an accident resulting from recklessness or foolhardiness.

On Petition for Rehearing.

BIRDZELL, J. In their petition for rehearing counsel for appellants urge upon the attention of the court some of the assignments of error, which they refer to as having been inadvertently overlooked in the original opinion. These assignments were not overlooked; it was thought that they were not of sufficient merit to warrant discussion. In the petition, chief reliance seems to be placed upon the alleged error committed in sustaining objections to certain questions asked of witnesses Doyon and McLean for the evident purpose of laying foundations for direct impeachment by proof of contradictory statements made by *them* as witnesses in the trial of the Rebillard case growing out of the same accident, and in the rejection of a certain offer of proof. The witness Doyon, in response to a question asking whether in the daytime there would be any possibility of his mistaking that old trail, answered, "I don't know," and, in response to a question asking whether or not, using ordinary gas lights, he would immediately see the difference between the old trail and the other road (referring to the road leading to the southeast and connecting with Fourteenth street), he said, "I don't know as I would." At that point he was reminded of his testimony given in the Rebillard case, wherein, in response to the question as to there being any possibility of mistaking the road in the daylight, he had answered, "There might not," and in answer to the question

asked with reference to his ability to distinguish between the old trail and the other road in the nighttime with ordinary gas lights, he had answered: "Well, I think possibly I would; but still at that time of the year they look very similar. I did not realize I had gone off to any different part of the road." When asked whether or not he had testified as last stated, he gave the following answer, which went in without objection: "I do not remember. If that is the record, I will concede that I testified that way."

He testified further as follows:

Q. You don't know?

A. I know I testified, but I don't know what I testified to.

Q. I asked you to look at the record and refresh your memory.

(Mr. Cowan) That is objected to as an improper method of refreshing his memory.

The Court: Sustained.

Q. You admitted, Mr. Doyon, did you not, during the trial of the Rebillard case, that there might not be any possibility of your mistaking the road and taking this old trail in the daytime?

(Mr. Cowan) That is objected to as hearsay, incompetent, not a proper impeaching question, and no foundation laid, and calling for a conclusion of the witness.

The Court: Sustained.

Q. You testified, did you not, at the time of the Rebillard trial, to the following: That if you had ordinary gas lights that you thought it possible that you would have known the difference between the old trail and the other road?

(Mr. Cowan) That is objected to on the grounds urged in the last objection.

The Court: Sustained.

It is very apparent that the foregoing rulings of the trial court were in no way prejudicial. Not only did the witness admit that, if the record in the Rebillard case was as stated to him by counsel, it was no doubt correct, and that he would concede that he testified that way, but a comparison of the testimony given upon cross-examination in this case, prior to the asking of the impeaching questions, with the testimony quoted by counsel from the transcript in the Rebillard case, discloses

that there is no substantial conflict, but merely a difference in phraseology. It may be true that the answers upon the points covered by the foregoing questions are slightly stronger in this case than those given in the Rebillard case. But, however this may be, Doyon admitted the correctness of the transcript in the Rebillard case, and the jury had the benefit of any inconsistency so disclosed.

In the cross-examination of the witness McLean, he was asked the following question:

Q. Wasn't the road you were looking for to get into town the road turning off at the section line and connecting with Fourteenth street?

A. I don't know as to that.

Q. I call your attention, Mr. McLean, and ask you if it is not a fact that, on the trial of the Rebillard case in the United States district court in December, 1913, at Devils Lake, the following questions were asked you by a juryman, to which you gave the following answers?

"Q. Were you looking for that road leading off from the section line toward Fourteenth street?

"A. That was the road I was looking for."

(Mr. Cowan) That is objected to as incompetent, irrelevant, and not a proper impeaching question, and not binding on the plaintiff in this case.

The Court: Sustained.

Later on, an offer of proof was made, the rejection of which is also assigned as error. The offer was made in the absence of the jury and pertains to the probability as to whether or not McLean would have directed Doyon to take the road leading to the southeast and connecting with Fourteenth street, if he had seen it. The proof offered was a portion of the transcript in the Rebillard case, embracing the above question and answer, which counsel asked leave to verify by submission to the witness McLean.

With respect to the impeaching question put to McLean while on the witness stand, it need only be observed that the answer with which the former statement was inconsistent was elicited on the cross-examination, and pertained to a subject not covered in the examination in chief. If the fact is as testified to in the former case, it has no bearing upon

the liability of the defendant to the plaintiff, and the examination went solely to the credibility of the witness. The record discloses that ample latitude for cross-examination generally was allowed; and, even though it might have been technically proper to have permitted an answer to the impeaching question, it was not reversible error to sustain an objection to it.

The avowed object of the offer of proof was to establish the probability that McLean would have given Doyon a direction to take the southeast road, had he seen it; but the evidence tendered was clearly hearsay as to this fact, and, in the view that we take of the case, the fact itself, if one's contingent determination of conduct may be called a fact, is inadmissible. Under the principles of our original opinion, the defendant is not absolved from liability to this plaintiff by reason of the failure of McLean to detect or take the safe road. But it is altogether likely that the evidence was offered for the purpose of impeachment, for which purpose alone it was competent. In making the offer, however, the evidence being inadmissible generally, it should have been stated that it was offered for the specific purpose of impeachment. The court and the plaintiff's attorneys might well have been misled,—indeed the objection to the offer of proof does not cover its inadmissibility for purposes of impeachment. Even assuming that error was committed in sustaining the objection to the offer of proof, since it goes only to the question of the credibility of the witness McLean, we do not deem the error, if any, of sufficient consequence to warrant a reversal of the judgment.

Again, after testifying rather inconclusively as to the point of time at which the witness had given Doyon the direction or command to steer back onto the road, with reference to his observation of the large rock which appeared ahead of the car, he was asked the following question:

"Q. Did you testify at the trial of the Rebillard case in the United States district court at Devils Lake, in December, 1913, that it was when you saw the rock that you shouted to Mr. Doyon to turn to the left?"—which question was objected to as being an improper impeaching question, and the objection sustained.

A little later impeaching questions, covering the same ground and referring specifically to the testimony given by McLean in the Rebil-

lard case, were asked him, in response to which he testified that he presumed that it was a fact that the questions and answers quoted from the transcript were given; but he further testified that it seemed to him that he had given Doyon the command before he had seen the rock; so the jury had the full benefit of such impeachment of the witness upon this point as was afforded by the testimony in the Rebillard case.

Appellants also argue that the refusal of the trial court to permit an inspection of the premises by the jury amounts to a prejudicial error. This is a matter which is largely within the discretion of the trial court. Considering the length of time that had elapsed between the happening of the accident and the time of the trial, the season of the year, and the changes that might have taken place in the general appearance of the premises during this period, together with the facilities for presenting the facts to the minds of the jurors, there is no merit in the contention that the trial court abused its discretion.

The petition for rehearing also urges misdirection of the jury as a ground for reversal. Appellants extract the following portion of the instruction:

"The defendant railway company was bound to use reasonable care in the construction and maintenance of its cut in a reasonably safe condition for travel upon the road which it crossed; and if it failed to do so, and constructed and maintained this cut in an unsuitable and unsafe condition, it is liable for injuries sustained in consequence of such failure."

The objection made to the foregoing instruction makes no allowance whatever for the intelligence of the jury. It is said that it tells the jury in substance that it was the duty of the railroad company to maintain the cut so that it could be traversed over on the old trail. A careful reading of the entire instruction, or even of the part complained of, leaves no doubt in our minds that the jury could not have derived the impression that defendants were to be held liable in damages for causing the death of the plaintiff, because of their failure to construct a bridge over the cut, or to provide some other means of crossing the right of way at the point in question.

The petition for rehearing is denied.

E. I. DONOVAN v. W. B. DICKSON et al.

(164 N. W. 27.)

Land — contract for sale of — warranty deed — action to cancel contract — restoration of everything of value — received under contract — offer to restore — unable to place each other in same position — refusal to do so.

1. Where one brings an action to cancel a contract for the sale of certain land and the warranty deed given in pursuance of such contract, he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable or absolutely refuses to do so.

Mortgage lien — action to foreclose — Statute of Limitations — when begins to run against.

2. An action to foreclose a real estate mortgage lien is not barred by the Statute of Limitations until ten years have expired from the date when such mortgage becomes due.

Equity — payment of purchase price — action to determine — whether same has been paid — entry of judgment — date of — Statute of Limitations — begins to run from.

3. Where an action in a court of equity is necessary to determine whether or not a party who has paid a portion or all of the purchase price of a tract of land has a lien upon such land for such purchase price, the Statute of Limitations would not commence to run until the termination of such action and the entry of final judgment therein.

Opinion filed July 9, 1917.

Appeal from the District Court of Cavalier County, *C. M. Cooley,* J. Affirmed.

Thomas Devaney and *W. B. Dickson,* for appellants.

A judgment or decree is *res judicata* pending an appeal. No proceedings under a judgment or decree shall be stayed unless supersedeas bond is filed, and no appeal or stay shall vacate or affect such judgment or order. Watson v. Richardson, 110 Iowa, 698, 80 Am. St. Rep. 331, 80 N. W. 416, and cases cited.

The debtor upon whom rests the ultimate obligation to discharge the debt cannot by his payment acquire any right of subrogation. A

purchaser cannot be subrogated to the benefit of an encumbrance which he has agreed to pay. Birke v. Abbott, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485; Sheldon, Subrogation, § 46; Pom. Eq. Jur. § 1016, and note; Carlton v. Jackson, 121 Mass. 592; Willson v. Burton, 52 Vt. 394; Heim v. Vogel, 69 Mo. 529; Harris, Subrogation, pp. 111, 112, §§ 151, 815, and notes; Guckenheimer v. Angevine, 81 N. Y. 394; Curtiss v. Howell, 39 N. Y. 215; Cobb v. Hatfield, 46 N. Y. 533, and cases cited.

"A tort-feasor cannot make his own wrongful act the basis of an equity in his own favor." Rowley v. Towsley, 53 Mich. 329, 19 N. W. 20.

"The fact that the loss of one who seeks to be protected by the application of the doctrine of subrogation arose from his own negligence will be fatal to his claims." Sheldon, Subrogation, 2d ed. ¶ 43; Conner v. Welch, 51 Wis. 431, 8 N. W. 260; Rice v. Winters, 45 Neb. 517, 63 N. W. 830; German Bank v. United States, 148 U. S. 573, 37 L. ed. 564, 13 Sup. Ct. Rep. 702; United States Casualty Co. v. Bagley, 129 Mich. 70, 55 L.R.A. 616, 95 Am. St. Rep. 424, 87 N. W. 1044, and cases cited; Lewis v. Holdrege, 56 Neb. 379, 76 N. W. 890.

"A valid judgment for plaintiff finally negatives every defense that might and should have been raised against the action for the purpose of every subsequent suit between the parties and their privies in reference to the same matter."

"The assignees of a contract are barred by the rule of res judicata." Isensee v. Austin, 15 Wash. 352, 46 Pac. 394; Hansbrough v. Peck, 5 Wall. 497, 18 L. ed. 520, 524, and Rose's Notes to same; Southern P. R. Co. v. Allen, 112 Cal. 455, 44 Pac. 796; Way v. Johnson, 5 S. D. 237, 58 N. W. 552.

"Where the original declaration fails to state a cause of action and by amendment a new cause of action is introduced after the time fixed by the Statute of Limitations for bringing suit has expired, a plea of the Statute of Limitations is good." Lake Shore & M. S. R. Co. v. Enright, 227 Ill. 403, 81 N. E. 374; Bahr v. National Safe Deposit Co. 234 Ill. 101, 84 N. E. 717; Walters v. Ottawa, 240 Ill. 259, 88 N. E. 651; Powers v. Badger Lumber Co. 75 Kan. 687, 90 Pac. 254.

After the statute has run, an amended complaint which for the first

time states a cause of action cannot escape the bar of the statute by being filed as an amendment. Missouri, K. & T. R. Co. v. Bagley, 3 L.R.A.(N.S.) 259, and note, 65 Kan. 188, 69 Pac. 189; Clark v. Oregon Short Line R. Co. 38 Mont. 177, 99 Pac. 298.

An amendment, though properly allowed, does not relate back to the date of bringing the suit for the purpose of determining questions of limitations. An amendment which introduces a cause of action barred is ineffectual to avoid the bar of the statute. Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Melvin v. Hegadorn, 87 Neb. 398, 127 N. W. 139; Box v. Chicago, R. I. & P. R. Co. 107 Iowa, 660, 78 N. W. 694; Pratt v. Davis, 105 Mich. 499, 63 N. W. 506; Nugent v. Adsit, 93 Mich. 462, 53 N. W. 620; Wingert v. Carpenter, 101 Mich. 395, 59 N. W. 662; Flint & P. M. R. Co. v. Wayne Circuit Judge, 108 Mich. 80, 65 N. W. 583; Atchison, T. & S. F. R. Co. v. Schroeder, 56 Kan. 731, 44 Pac. 1093; Shane v. Peoples, 25 N. D. 188, 141 N. W. 737.

In view of the law as laid down by our own supreme court, the plaintiff is now estopped to say that there was a failure of consideration, but on the other hand he himself has failed. Rev. Codes 1899, § 3932; Block v. Donovan, 13 N. D. 1, 99 N. W. 72; Comp. Laws 1913, § 6865; Civ. Code, § 3050; 3 Pom. Eq. Jur. 1260, and note; Merrill v. Merrill, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; Way v. Johnson, 5 S. D. 237, 58 N. W. 552.

"Rescission destroys the contract *ab initio* and leaves the parties in the same situation as if no contract had ever been made. Under these circumstances there can be no lien." Davis v. William Rosenzweig Realty Operating Co. 20 L.R.A.(N.S.) 175, and note on p. 181, 192 N. Y. 128, 127 Am. St. Rep. 890, 84 N. E. 943; Satterlee v. Cronkhite, 114 Mich. 634, 72 N. W. 616.

"Proceedings subsequent to the record are not before the court, and cannot be considered." Edwards v. Eagles, 15 N. D. 150, 107 N. W. 43; Weicker v. Stavely, 14 N. D. 278, 103 N. W. 753; 2 Standard Enc. Proc. 248; Murry v. Burris, 6 Dak. 170, 42 N. W. 25; J. L. Gates Land Co. v. Olds, 112 Wis. 268, 87 N. W. 1088; O'Toole v. State, 105 Wis. 18, 80 N. W. 915; Finn v. Walsh, 19 N. D. 61, 121 N. W. 766; Berger v. Discher, 146 Wis. 170, 131 N. W. 444; Stolt-

man v. Lake, 124 Wis. 462, 102 N. W. 920; Miltimore v. Hoffman, 125 Wis. 558, 104 N. W. 841.

George M. Price, for respondent.

"Payments made by the defendant under his contract will stand as obligations against the plaintiff of the same character as when the contract was made." Donovan v. Dickson, 28 N. D. 229, 148 N. W. 547.

We claim in this case that payments made by appellant under the contract are obligations resting against the respondent. Comp. Laws 1913, subd. 2, §§ 5936, 7208; 6 Cyc. 306, 312, 313, 315; 18 Enc. Pl. & Pr. 772, 773, 858; 39 Cyc. 1345, 1355, 1377, 1378, 1380, 2028–2031; Warren v. Ward, 91 Minn. 254, 97 N. W. 886; Miller v. Shelburn, 15 N. D. 182, 107 N. W. 52; Reiger v. Turley, 151 Iowa, 491, 131 N. W. 868; Lowry v. Robinson, 3 Neb. (Unof.) 145, 91 N. W. 174; Gillet v. Maynard, 5 Johns. 85, 4 Am. Dec. 329; Heilig v. Parlin, 134 Cal. 99, 66 Pac. 187; State v. Blize, 37 Or. 404, 61 Pac. 736.

The rule at law that a party must lose all advantage gained by fraud, as well as the money which may have been paid out by him, does not apply in equity cases, where the party asking to set aside his purchase has been benefited by a discharge of encumbrances and the payment of debts. White v. Trotter, 14 Smedes & M. 30, 53 Am. Dec. 112.

In such cases the vendee who has paid out money and removed and paid encumbrances on the land has a lien upon the land for such amounts of money so paid. Griffith v. Depew, 3 A. K. Marsh. 177, 13 Am. Dec. 142; 6 Cyc. 343, and cases cited; Joyce v. Dauntz, 55 Ohio St. 538, 45 N. E. 900; Stewart v. Stewart, 90 Wis. 516, 48 Am. St. Rep. 949, 63 N. W. 887; Johnson v. Tootle, 14 Utah, 482, 47 Pac. 1033; 37 Cyc. 378, 445; Comp. Laws 1913, § 6865.

Appellant in this case received the land with the benefit of the respondent's payments, and he is in the same position as he would be if respondent had paid the mortgage in full, instead of only in part. Code, § 7966.

"The rule that 'acquiescence in error takes away the right of objecting to it' is applicable to error of procedure. One who consents to an irregular method of amending a pleading cannot thereafter urge the

irregularity as error." Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359.

"In considering the granting or refusing of amendments, the test is not whether the cause of action is changed in a technical sense, but whether the amendment should be allowed in furtherance of justice." Kerr v. Grand Forks, 15 N. D. 294, 107 N. W. 197.

The Statute of Limitations in such actions does not begin to run until the date of the final entry of judgment in the former action. 25 Cyc. 1200; First Nat. Bank v. Avery Planter Co. 69 Neb. 329, 111 Am. St. Rep. 541, 95 N. W. 622; Grant Twp. v. Reno Twp. 107 Mich. 409, 65 N. W. 377; Kennedy v. Stonehouse, 13 N. D. 232, 100 N. W. 259, 3 Ann. Cas. 217.

"A cause of action accrues when the person owning it first had legal right to sue upon it." McPherson v. Swift, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 77; Elling v. Harrington, 17 Mont. 322, 42 Pac. 851; Lawrence v. Doolan, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159.

One who believes he has title to lands, and under such belief and in good faith puts valuable and permanent improvements upon it, will be protected to the extent of such improvements. Hunter v. Coe, 12 N. D. 505, 97 N. W. 872; Parker v. Vinson, 11 S. D. 381, 77 N. W. 1023; Meadows v. Osterkamp, 13 S. D. 571, 83 N. W. 625; Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875; Luton v. Badham, 127 N. C. 96, 53 L.R.A. 338, 80 Am. St. Rep. 783, 37 S. E. 143; Herring v. Pollard, 4 Humph. 362, 40 Am. Dec. 653; Jackson v. Loomis, 4 Cow. 168, 15 Am. Dec. 565; McKelway v. Armour, 10 N. J. Eq. 115, 64 Am. Dec. 446; Valle v. Fleming, 19 Mo. 454, 77 Am. Dec. 557; Scott v. Dunn, 21 N. C. (1 Dev. & B. Eq.) 425, 30 Am. Dec. 181; Whitledge v. Wait, Sneed (Ky.) 335, 2 Am. Dec. 721; Dorer v. Hood, 113 Wis. 607, 88 N. W. 1010; Zwietusch v. Watkins, 61 Wis. 615, 21 N. W. 823; 39 Cyc. 1400, 1401; Shuman v. Willetts, 19 Neb. 705, 28 N. W. 301.

"One who pays to the owner any part of the price of real property under an agreement for the sale thereof has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back in case of the failure of consideration." Comp. Laws 1913, § 6865.

"So, too, the vendee's lien may attach where the contract has been

mutually rescinded or rescinded by the vendor or by the purchaser under his right to do so." 39 Cyc. 39, 2032, 2034, 2039.

The Statute of Limitations did not begin to run as to the right to sue for lien for payments, until final decision in the former case. First Nat. Bank v. Avery Planter Co. 69 Neb. 329, 111 Am. St. Rep. 541, 96 N. W. 622; Grant Twp. v. Reno Twp. 107 Mich. 409, 65 N. W. 377; Kennedy v. Stonehouse, 13 N. D. 232, 100 N. W. 259, 3 Ann. Cas. 217; McPherson v. Swift, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 77; Elling v. Harrington, 17 Mont. 322, 42 Pac. 85; Lawrence v. Doolan, 68 Cal. 309, 9 Pac. 159, 5 Pac. 484.

A person cannot affirm a contract in part and disaffirm it in part; a person cannot rescind in part; he cannot take advantage of those parts of a judgment favorable to him and stand in court, within the rule of equity, and disaffirm those parts unfavorable. Reiger v. Turley, 151 Iowa, 491, 131 N. W. 866.

GRACE, J. Appeal from the district court of Cavalier county, Honorable Charles M. Cooley, judge of the first judicial district of North Dakota, acting by written request of Judge Kneeshaw, judge of the seventh judicial district.

The action is one to have certain mortgages, mechanics' liens, and taxes which were at a prior time valid and subsisting liens against the southeast quarter of section 8, township 161, range 60, Cavalier county, North Dakota, and which were paid by the plaintiff in this action, declared and adjudged to be liens upon such premises; and the complaint in such action is really one to have such mortgages and liens which were paid by the plaintiff declared to be liens upon such premises, and that the premises be sold for the satisfaction of all of such liens; and further that the value of the improvements made by the plaintiff upon the premises be adjudged a valid lien upon such premises, and the premises sold to satisfy the same in the same manner as a sale is made with reference to such mortgages and liens.

Dickson, one of the answering defendants, by way of defense, sets forth several defenses denying the good faith of the plaintiff in making any of the payments of the mortgages and liens which he did pay, and alleges that he purchased said land from Ezra Block, the original owner, in good faith for a full, adequate, and valuable consideration,

and relying upon the judgment of the district court of Cavalier county and its affirmance by the supreme court of this state in an action wherein Ezra Block was plaintiff and E. I. Donovan defendant, in which action a certain warranty deed executed and delivered by Ezra Block, conveying to E. I. Donovan the premises in question, was by the order for judgment and judgment of such district court on the 24th day of May, 1902, canceled and set aside, and the plaintiff in that action, Ezra Block, declared to be entitled to the possession of said premises.

For a further defense the answering defendant pleads, sets forth, and relies upon the Statute of Limitations.

In addition to the foregoing defenses, a general denial is pleaded in such answer.

The facts in the case are substantially as follows: In February, 1901, Ezra Block was the owner of the land involved in this litigation. He, on the 19th day of February, 1901, by an oral agreement agreed to sell the land to Donovan. On the 19th day of February, 1901, the admissions in the pleadings and the testimony show that there were the following encumbrances against said land: A first mortgage to the Canadian & American Mortgage Company, $800; accrued interest thereon, $19.85. A mortgage to the Citizens Bank of Langdon for $220; accrued interest, $32.95. Mortgage to James McPhail, $164.35; accrued interest, $24.20. Mechanics' lien in favor of Mahon & Robinson; total principal and interest, $126.60. Mechanics' lien in favor of Liebeler & Finerty; total principal and interest, $85. Taxes for 1900, $17.90, which were estimated at the time of making the deed at $25.25, making a total due upon the various liens and mortgages mentioned on February 19, 1901, of $1,498.20.

Of these various amounts the admissions in the defendant's answer or testimony show payment by Donovan of the following amounts:

Citizens Bank mortgage, paid by Donovan February 23, 1901	$252.95
McPhail mortgage, paid by Donovan February 23, 1901	188.55
Liebeler & Finerty lien, paid by Donovan October 5, 1901	85.00
Mahon & Robinson lien, paid by Donovan February 28, 1902	126.60
1900 taxes, paid by Donovan February 20, 1902	17.90
1901 taxes, paid by Donovan November 28, 1902	28.75
1902 taxes, paid by Donovan December 1, 1903	29.72
Principal and interest on first mortgage, paid by Donovan October 30, 1901	264.00
1902 interest on first mortgage, paid by Donovan November 1, 1902	48.00

All of these amounts paid by Donovan were obligations against the land in question, which amounts were owing by Block, and which amounts were secured by mortgages upon the land or by mechanics' liens, excepting the taxes, which were liens under the provisions of law relating thereto. The different mortgages and mechanics' liens above referred to were to be paid by Donovan as part of the purchase price for the land which he bought from Block. The agreed purchase price of the same was $1,500.

In the original case which was brought by Block as plaintiff against Donovan, this court said in that decision: "We do not understand that the decree goes further than to cancel the deed. As to other matters, it leaves both of them practically in the same positions they were in when the contract was made. The defendant owns the bank and McPhail notes, which are amply secured on the land. We think this is a more equitable decree than would be one allowing him to now come in and specifically perform his contract." [13 N. D. 8, 99 N. W. 72.]

The meaning of such language is that it was the intention of the court by such decree that Block should again have his land in the same condition it was at the time he deeded it to Donovan; that the warranty deed which he gave Donovan of such land was canceled; and that the intention of the decree in that case was to leave them both in the position they were at the time when the contract was made. This would give Block the land back subject to all the mortgages, liens, or encumbrances of whatever nature or kind which were against it at the time when he made the contract to sell such land to Donovan. This is more clearly shown by the further opinion of the court on rehearing, where this court said: "The payments made by defendant under the contract will stand as obligations against the plaintiff of the same character as when the contract was made."

That clause means that if the defendant Donovan, under his contract or while the contract was in force, and by reason of the contract and the covenants in said contract, had paid any mortgage or mortgages, mechanics' liens, interest, or taxes, notwithstanding such payments and notwithstanding the satisfaction of record of the instruments evidencing such indebtedness, where such instruments were of such nature that they could be satisfied of record, nevertheless all such payments so made by Donovan were by the terms of the decree in such action made

obligations against the plaintiff, which he in equity was in duty bound to pay as a condition of his right to the rescission of the contract and the cancelation of the deed. The language of the decree, "they would remain as obligations against the plaintiff of the same character as when the contract was made," when construed in the light of prior and pending litigations and the issues involved and the character of the relief demanded, means simply that for all the payments which Donovan had made of whatsoever nature, if they were made in pursuance of the covenants of his contract, he was entitled to be reimbursed for all such payments, and was entitled to a lien upon the land in question for all such payments until he had been reimbursed and paid for all the payments which he had made by way of paying mortgages, mechanics' liens, taxes, or interest. This being true, Donovan had such rights of action to enforce such obligations as the nature of such obligations permitted. Thus, if the mortgages and mechanics' liens by such decree of the court were to be and remain subsisting liens by way of mortgages and mechanics' liens, Donovan would have the right to proceed and foreclose such mortgages and such mechanics' liens, and to sell such land in such foreclosure proceeding for the purpose of reimbursing himself for such payments made, and realizing upon such mortgages and mechanics' liens or other liens for which a decree for the sale of said land might be had. Donovan's right to reimbursement for mortgages and liens which he paid under his contract has been recognized in three prior decisions of this court. First, in the case of Block v. Donovan, 13 N. D. 1, 99 N. W. 72, from which we have already quoted. In Donovan v. Block, 17 N. D. 408, 117 N. W. 527, this court said: "The conclusion we have arrived at in no way conflicts with what was said in Block v. Donovan of Donovan's right to payment of the notes taken over by him while holding title to the land." In Donovan v. Dickson, 28 N. D. 232, 148 N. W. 537, the court said: "As we view the facts, which, for the purpose of the demurrer, are deemed to be true, plaintiff [Donovan] is clearly entitled to the relief prayed for to the extent at least of the claims held by the various persons against Block, and which appellant [Donovan] either paid or purchased pursuant to his agreement with Block, with the purpose and intent of satisfying the same as a part consideration for the deed executed and delivered by Block to him. Whether appellant's acts in tak-

ing up these claims constituted in law a payment or merely a purchase of assignments thereof is not very material, as we view it. To the extent of the moneys he thus distributed either as buyer or purchaser of these claims, they manifestly were disbursed because of the purchase of the land by the appellant from Block and with the ultimate intention of satisfying the same as to Block. They should therefore be treated in the nature of a payment *pro tanto* of the agreed consideration for the deed from Block to appellant. In so far as plaintiff's right to recover any of these items is concerned, it is not material what the nature of the action brought by Block against Donovan was, whether to rescind an executed grant of the real property, or, as intimated by respondent, to declare a forfeiture of an executory contract. In either event, *appellant's right to assert a claim against the land for reimbursement for such expenditures* was expressly recognized by this court in its decision of the case of Block v. Donovan, and his equitable rights were accordingly therein protected in the following language: 'Payments by defendant under the contract would stand as obligations against the plaintiff of the same character as when the contract was made.' "

It seems, therefore, that it has been well settled by this court in such decisions that Donovan has a valid and legal right to reimburse himself out of the land for any and all payments which he made under the contract to take up mortgages or liens against such land. This being true, the plaintiff's cause of action herein is a true and just one, and he should be allowed to recover for all the payments hereinbefore set forth which he made under such contract, unless, as the defendant claims, he is prevented from doing so by reason of the Statute of Limitations, which subject will be considered hereafter in this opinion.

In order to more clearly understand the matters under consideration in this case, it is necessary to examine with some degree of particularity the original action of Block v. Donovan, supra. That action was an action in equity brought by Block against Donovan for the purpose of rescission of the contract which he had made with Donovan to sell him the land in question, on the ground of no consideration, and for the purpose of canceling the deed which Block had delivered to Donovan in pursuance of such contract, being the land in question. This being the nature of the action which was maintained by Block against Donovan, it is necessary to determine at the outset what powers

courts of equity may exercise in that class of actions for the purpose of determining whether or not the court had the power to make the decree which it did make, and declare "payments made by defendant under the contract would stand as obligations against the plaintiff of the same character as when the contract was made," the meaning of which is that Donovan should have a lien upon the land for the payments which he had made, for the reason that the payments which he did make were payments of liens then against the land, such as mortgages and mechanics' liens, and under the decree they were to stand as liens of the same character as when the contract was made.

Concerning the power of the court to grant such relief as was granted in the case of Block v. Donovan: The legislative branch of our state government has spoken in regard to some powers the court may exercise in adjudging the rescission of a contract. Section 7208 of the Compiled Laws of 1913 reads as follows: "Compensation May Be Required. —On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other party which justice may require." Section 3408 of the Civil Code of the state of California is exactly the same in its language as § 7208, Compiled Laws of 1913. Under this section the court has full power to determine the amount which is owing or which must be paid by way of compensation from the party maintaining the action for a cancelation of the contract to the party against whom the action is brought. Goodrich v. Lathrop, 94 Cal. 56, 28 Am. St. Rep. 91, 29 Pac. 329. Section 5934, Compiled Laws of 1913, provides when rescission of a contract is permitted. Section 5936 prescribes the rules governing the rescission of contracts, subdivision 2 of which section is as follows: "He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so. Section 5933, Compiled Laws of 1913, provides that "a contract is extinguished by this rescission." Rescission of contracts and cancelation of deeds are left to courts of equity. Thompson v. Hardy, 19 S. D. 91, 102 N. W. 299. Where a party brings an action to rescind a contract he must offer to restore everything of value received thereunder. Maddock v. Russell, 109 Cal. 417, 42 Pac. 139. Return of value received

or offer to return the same is a condition precedent to the right to maintain the action for rescission of contract. Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837.

Where one brings an action for rescission and cancelation of contract for the nonpayment of the purchase money by a given date, he must return or offer to return money received on account of the contract. Wilson v. Sturgis, 71 Cal. 226, 16 Pac. 772.

It seems to be clear that where one brings an action to rescind a contract, and to procure a cancelation thereof or of some instrument connected therewith, a precedent condition to the right to maintain such action is that they restore all value received under such contract, and that the party against whom such action is brought must be placed in *status quo*. As to the necessity of restoring benefits received under a contract on rescission thereof, see Moline Plow Co. v. Bostwick, 15 N. D. 658, 109 N. W. 923; Sullivan v. Bromley, 26 S. D. 147, 128 N. W. 526; Sweeney v. United Underwriters' Co. 25 S. D. 1, 124 N. W. 1107; Englebert v. Troxell, 40 Neb. 195, 26 L.R.A. 177, 42 Am. St. Rep. 665, 58 N. W. 852; Timmerman v. Stanley, 123 Ga. 850, 1 L.R.A.(N.S.) 379, 51 S. E. 760; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057; Stackpole v. Dakota Loan & T. Co. 10 S. D. 389, 73 N. W. 258.

In the case of Block v. Donovan, the action was for a rescission of the contract and a cancelation of the deed. It was incumbent upon Block, therefore, to put Donovan in *status quo;* that is, to reimburse for any and all payments which he had made to take up any encumbrances which were against the land in question. It is a well-settled maxim of equity that he who seeks equity must do equity, and the decrees of the courts of equity are based largely upon this maxim. The court had this maxim in mind when by its decree it said that all payments made by Donovan would remain as obligations against the plaintiff of the same character as when the contract was made. That part of the decree of the court in such case meant that Block would be required to do equity. Courts of equity refuse to recognize and protect equitable rights unless such rights are based on conscience and good faith. They are among the foundation stones upon which the temple of equity is built. So firmly established is the rule that conscience and good faith are the cardinal rules of equity, in fact the

very foundation upon which equity rests, that even where a person in peaceable possession under claim of lawful title has in good faith paid assessments and made permanent improvements, the one seeking the aid of equity will be compelled to reimburse the occupant for his expenditures. Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271; Galbraith v. Tracy, 153 Ill. 54, 28 L.R.A. 129, 46 Am. St. Rep. 867, 38 N. E. 937; Pratt v. Thornton, 28 Me. 355, 48 Am. Dec. 492; Bausman v. Kelley, 38 Minn. 197, 8 Am. St. Rep. 661, 36 N. W. 333.

It has been held that if a borrower of money on usurious interest seeks relief from such contract in a court of equity, the court will not interfere except on the terms that he pay the lender what is really and legally due him. Ziegler v. Scott, 10 Ga. 389, 54 Am. Dec. 395; American Freehold Land & Mortg. Co. v. Jefferson, 69 Miss. 770, 30 Am. St. Rep. 587, 12 So. 464; Morgan v. Schermerhorn, 1 Paige, 544, 10 Am. Dec. 449. The rule will be different if the lender comes into equity to assert and enforce his own claims under a usurious instrument.

There had been a dispute between Block and Donovan over a certain item of $97.25, which dispute ripened into the suit of Block v. Donovan. The court had permitted the cancelation of the deed which had been delivered from Block to Donovan, but it also provided for the reimbursement of Donovan for all the payments which he had made, and provided that such payments should remain obligations of the same character as when the contract was made. The obligations which Donovan did pay were mortgage liens or mechanics' liens, and the court by such decree intended that Donovan should be reimbursed out of the land itself for all the liens that existed against the land at the time of the contract which Donovan had paid. The case of Block v. Donovan, being purely a proceeding in equity brought for the rescission of a contract and the cancelation of a deed, must proceed through all its history and to its termination in accordance with the rules of equity applicable thereto. In order, therefore, for the rescission of the contract and the cancelation of the deed to be effective, Donovan must be placed in *status quo* by the same action. All benefits, payments, or reduction of indebtedness of which Block got the benefit must have been restored, or an offer made to restore them to Donovan

as a matter of equity, before Block would be in position to demand equitable relief. Block was bound to place Donovan in the same position he was in at the time of making such contract so far as payments made by Donovan were concerned. One cannot bring an action to rescind a contract unless he returns that which he has received under it, or the benefits which have accrued to him by reason of the contract. It is true the deed was canceled by the judgment of the court, but it is also true that all payments made by Donovan were to stand as obligations of the same character as when the contract was made, and they would stand as obligations of the same character by the decree of the court so far as it is possible for that to be effective. In the case of taxes paid, they could not again stand as taxes, but the amount thereof could stand as a lien in connection with the mortgages and mechanics' liens by reason of the decree of the court of equity.

A court of equity has wide and extensive powers. If there were no provisions in the statutes speaking upon the powers of the court of equity, such court would nevertheless have, and does have, inherent power to grant such relief in cases in which the equitable power of the court is invoked, as to the court shall seem proper in order to do justice between the parties, and has the right under the exercise of its equitable powers of decreeing what shall be done to place the parties in *status quo* and do equity between them. The cardinal principle in an action for rescission and cancelation of a contract is a restoration to the party against whom the action is brought of everything of value received from him by reason of the contract asked to be rescinded. Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057; Stackpole v. Dakota Loan & T. Co. 10 S. D. 389, 73 N. W. 258; Lake Shore & M. S. R. Co. v. Richards, 30 L.R.A. 44, note. There must be mutuality of remedy to avail of equity jurisdiction. Winn v. Garland, 19 Ark. 23, 68 Am. Dec. 190; Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97; Jones v. Williams, 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353; Eckstein v. Downing, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

The next question for our consideration is the question of the Statute of Limitations. It seems that the judgment in the original case of Block v. Donovan was entered about May 24, 1902. An appeal was taken from such judgment of the district court of Cavalier county to

the supreme court of this state, but no supersedeas bond was filed in such appeal, so that the force and operation of such judgment was not suspended; but it did not become a final judgment until May 24, 1905. An execution might have been taken, but all such matters would have been subject to any modification which the supreme court of the state might make concerning such judgment or the rights of the parties to such action. The decision of the supreme court in such appeal did affect the rights of the parties, and it did in its opinion make such a decision as resulted in the modification of the judgment, and which judgment when so modified became the final judgment in the case, and was of date April 11, 1905. The following words found in such opinion of the supreme court were in the concluding paragraph thereof in the case of Block v. Donovan: "The payments made by the defendant under the contract would stand as obligations against the plaintiff of the same character as when the contract was made," and were incorporated into and became a part of the final judgment in the case as entered in the district court below. It would seem that this is the point of time when the judgment became final in that case.

Under § 7383, Compiled Laws of 1913, an action is commenced as to each defendant when the summons is served on him, or when the summons is delivered to the sheriff or other officer of the county in which the defendant resides with the intent that it shall be served. Where an attempt to serve the summons is made, but the same is not served, the first publication of the summons must be made within sixty days after the attempt to serve the same. In the commencement of this action Block was not made a party. It is very doubtful whether in this action he was ever a necessary party. He has no beneficial interest in the land in question. The debts which Donovan paid for him which were secured by liens against the land under the decree of the court still remain liens; that is, they remain obligations of the same character as when the contract was made. They were liens when the contract was made, with the exception of the taxes, and they are still liens by decree of the court. The payments made as interest were a part of the mortgage debts, and in a discussion of the interest they will be considered as part of the mortgage debts, upon which debts such interest accrued.

Upon a demurrer to the complaint in the action based upon a

defect of parties, the court ordered that Block, who had not been made a party in the inception of the action, be made a party, and that the summons and complaint be amended to this effect. The summons and complaint were amended and constructive service thereof made upon Block. He made no appearance. The defendant Dickson appeared and answered in the case, and has taken part in all the proceedings of this litigation, and has made a general appearance in every respect thereto, and the court had full jurisdiction over both of such parties and the subject-matter of the action.

If the payments made by Donovan were to remain of the same character as when the contract was made, they will still remain liens by way of mortgage and mechanics' liens, as all of such payments, with the exception of the taxes, were thus secured. Taking this view of the case, the statute would not run against the mortgage, if at all, until ten years from the time they became due. At the time the mechanics' liens under consideration against the land in question were filed, there was no law limiting the time when an action might be commenced to foreclose a mechanics' lien, unless perhaps the general law. The mechanics' liens in question being filed, and being liens at the time when there was no time specially limited in which an action *must* be commenced to foreclose them, the law at that time is the law which governs. The present law limiting the time within which to commence the foreclosure of a mechanics' lien was not passed until long after the filing of the liens in question, the present law being passed and became a law in the year 1903. It is thus clear that neither the mortgage liens nor mechanics' liens were outlawed. Rights of action upon them had not been tolled by the Statute of Limitations. Whether the right of action accrued to Donovan to maintain actions to have such mortgages and mechanics' liens declared liens in his favor, and foreclosed immediately after he had paid the same, or whether the right accrued to him at the termination of the litigation between Block and him, in either event it is plain that the Statute of Limitations had not commenced to run against such actions.

The defendant in this action at all times had full knowledge and notice of all the matters involved in the litigation herein. He was attorney for the plaintiff Block in the original action against Donovan. The entry of such judgment in the district court was appealed from, and

did not become final until after the determination of the appeal to the supreme court therefrom, and any reliance placed by the defendant upon the judgment of the district court was with the knowledge and notice that such judgment might be changed and modified by the appeal therefrom and the determination of the supreme court thereon. The defendant is not in position to claim any benefits for the reason of being a good-faith purchaser; for it appears of record that he must have had full knowledge of all proceedings and therefore notice, and his purchase of the land was therefore subject to any rights which Donovan had therein or liens which Donovan had thereon.

Under § 6865, Compiled Laws of 1913, the plaintiff would have a right to recover in this action. Such section reads as follows: "One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back in case of a failure of consideration." In the case at bar there was a sale of real estate under an agreement. Donovan was to pay the encumbrances against the land in question to an amount equal to the purchase price of the land, which was $1,500. In pursuance and by virtue of such contract, the plaintiff did pay such encumbrances, and such encumbrances were part of the purchase price. The section just quoted gives him a special lien for any such payments. Again, applying the rules of equity, the plaintiff in the original action of Block v. Donovan having brought an action for a rescission and cancelation of the contract and deed, he was in duty bound to restore all the payments or benefits received under the contract, and the court of equity has full power to enter a decree declaring a lien upon such land for all of such payments, and to do full equity between the parties. If the purchaser is entitled to recover the purchase money paid under the contract, the purchaser is also entitled to a lien in those jurisdictions where a purchaser's lien is recognized. 39 Cyc. 2039. As to the improvements made upon the land by Donovan, that is, the house, which he claims cost $800, we are of the opinion that that is balanced by Donovan receiving interest upon the payments which he made since the time he made them, and by rent or profits which he has received from the products of the land in question. We think all the equities between the plaintiff and defendant have been about as

properly balanced by the judgment of the district court as is possible. We are of the opinion that the District Court analyzed thoroughly and fully all the equities between the plaintiff and defendant, and that its decree therein is an equitable and just decree, and that the same should be in all things affirmed, and the judgment of the District Court is affirmed, with costs.

NATHAN A. RHOADS v. FIRST NATIONAL BANK OF CARRINGTON, NORTH DAKOTA, and G. S. Newberry.

(163 N. W. 1046.)

Malicious prosecution — action for damages — attorney's lien — evidence of filing — admission of — prejudicial error.

1. In an action for damages for malicious prosecution, it is prejudicial error to permit the defendant to introduce testimony concerning the filing of an attorney's lien for $2,500 by one Stillman, one of the plaintiff's attorneys, such testimony being incompetent, irrelevant, and not tending to prove any of the issues involved in the case, and manifestly tending to prejudice the jury.

Statutes — "wilfully" — meaning of — personal property — lien upon — removal — destruction, concealment, or selling — by person knowing of lien — bad purpose — evil intent.

2. Under § 10248, Compiled Laws of 1913, providing among other things, "Every person having in his possession or under his control any personal property upon which there is known to him to be a subsisting lien either by operation of law or by contract, who *wilfully* destroys, removes from the county, conceals, sells, or in any manner disposes of otherwise than as prescribed by law," it is *held* that the word "wilfully" means not only intentionally, but in criminal law also means with a bad purpose or evil intent.

Note.—On acquittal or discharge on a criminal charge as evidence of want of probable cause in an action for malicious prosecution, see notes in 64 L.R.A. 475 and 3 L.R.A.(N.S.) 929.

On advice of counsel as defense to action for malicious prosecution, see notes in 18 L.R.A.(N.S.) 49 and 39 L.R.A.(N.S.) 207.

On advice of counsel as defense in action for malicious prosecution, see note in 9 Am. St. Rep. 837.

Officers — committing magistrate — preliminary hearings — complaint indorsement of discharge on — mandatory — must be for reason assigned by statute.

3. Section 10609, Compiled Laws of 1913, specifies what the committing magistrate shall indorse upon the complaint when the accused is discharged, which is as follows: "There being no sufficient cause to believe the within named ——— guilty of the offense within mentioned, I order him discharged." *Held* that a different record or discharge than that provided by law, which assigns a different reason for the discharge than that required by law to be indorsed on such complaint, is incompetent and inadmissible as evidence, especially where it assigns other reasons for the discharge of the defendant from custody than *insufficiency of cause* to believe the defendant guilty of the offense with which he is charged.

Opinion filed July 14, 1917.

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

Reversed.

Geo. H. Stillman and *T. F. McCue,* for appellant.

Where plaintiff has shown a good and valid cause of action for malicious prosecution, his good faith or bad faith in instituting the action cannot be questioned. Pierce v. Pierce, 16 Cal. App. 375, 117 Pac. 580; McNamara v. McAllister, 150 Iowa, 243, 130 N. W. 26, Ann. Cas.1912D, 463; Flinn v. Frederickson, 89 Neb. 563, 131 N. W. 934; Pollitz v. Wabash R. Co. 150 App. Div. 715, 135 N. Y. Supp. 789; Ball v. Tolman, 119 Cal. 358, 51 Pac. 646.

Evidence, the only purpose of which is to prejudice the minds of the jury, should be excluded. McKay v. State, 90 Neb. 63, 39 L.R.A. (N.S.)714, 132 N. W. 741, Ann. Cas.1913B, 1034; Deitz v. Providence Washington Ins. Co. 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50.

There was no evidence to connect plaintiff with the removal of the property. Krol v. Plodick, 77 N. H. 557, 94 Atl. 261, Ann. Cas. 1916A, 1124.

Mere belief of defendant in plaintiff's guilt, however strong, sincere, or honest, will not constitute probable cause unless founded upon circumstances sufficient in reason to warrant it. Shaul v. Brown, 28 Iowa, 37, 4 Am. Rep. 151; Donnelly v. Burkett, 75 Iowa, 613, 34 N. W.

330; Spalding v. Lowe, 56 Mich. 366, 23 N. W. 46; Vansickle v. Brown, 68 Mo. 627; Eggett v. Allen, 119 Wis. 625, 96 N. W. 803.

The word "wilfully" in this statute, like every other criminal statute, means not merely a known voluntary removal, but a removal from the county of the property, with an evil, bad intent. Potter v. United States, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144; Galvin v. Gualala Mill Co. 3 Cal. Unrep. 869, 33 Pac. 94, 30 Am. & Eng. Enc. Law, 2d ed. 530 and cases cited; Brooks v. Bradford, 4 Colo. App. 410, 36 Pac. 303; Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574; Johnson v. Miller, 63 Iowa, 529, 50 Am. Rep. 758, 17 N. W. 34.

"An agreement to give plaintiff's attorney part of the recovery is valid, and defendant cannot offer evidence of such fact in evidence; nor can he so use an attorney's lien, if one is filed. It is prejudicial error to permit it." Sussdorff v. Schmidt, 55 N. Y. 319; King v. New York C. & H. R. R. Co. 72 N. Y. 607; Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, L.R.A.—, —, 151 N W. 879.

The general rule is that such contracts cannot be admitted in evidence. They are wholly immaterial to the issues, and tend not to prove any issue in the case, but rather to confuse and prejudice the jury. Burnes v. Scott, 117 U. S. 591, 29 L. ed. 994, 6 Sup. Ct. Rep. 865; Allison v. Chicago & N. W. R. Co. 42 Iowa, 280, 3 Am. Neg. Cas. 330; Sibley v. Alba, 95 Ala. 198, 10 So. 831; Small v. Chicago, R. I. & P. R. Co. 55 Iowa, 582, 8 N. W. 437; Chamberlain v. Grimes, 42 Neb. 701, 60 N. W. 948; Aultman v. Waddle, 40 Kan. 195, 19 Pac. 730; Gage v. DuPuy, 127 Ill. 216, 19 N. E. 878; Brinley v. Whiting, 5 Pick. 348; Courtright v. Burns, 2 McCrary, 60, 13 Fed. 317; Noble v. White, 103 Iowa, 352, 72 N. W. 556; Watson v. Watson, 53 Mich. 168, 51 Am. Rep. 111, 18 N. W. 605.

It is the duty of a committing magistrate after a full examination of the facts, if he believes the evidence fails to show that a public offense has been committed and that there is no probable cause to hold the defendant, to promptly discharge him, and to give or indorse his reason for such discharge on the complaint, as the statute requires. United States v. Lumsden, 1 Bond, 5, Fed. Cas. No. 15,641; People v. Evans, 72 Mich. 367, 40 N. W. 473.

A justice of the peace should enter judgment, or other findings, at

the close of the trial. Comp. Laws 1913, § 9100; Harper v. Albee, 10 Iowa, 389.

The mere fact that one about to start criminal proceedings against another goes to the state's attorney or other proper officer and makes a full, fair statement of all the facts within his knowledge, is not enough. He must go further and investigate as to all the facts and circumstances he could have ascertained by the exercise of reasonable diligence. Merchant v. Pielke, 10 N. D. 52, 84 N. W. 574; Schneider v. Shepherd, 192 Mich. 82, L.R.A.1916F, 399, 158 N. W. 182.

It was error for the court to omit to so instruct the jury. Miller v. Chicago, M. & St. P. R. Co. 41 Fed. 898; Tucker v. Cannon, 28 Neb. 196, 44 N. W. 440; Manning v. Finn, 23 Neb. 511, 32 N. W. 314; Boyd v. Mendenhall, 53 Minn. 274, 55 N. W. 45.

"Malice" consists of a "wish" or "desire" to vex, annoy, or injure another person, or an intent to do a wrongful act to such person. Comp. Laws, 1913, § 10,360.

The omission of any material fact by design or otherwise will render the advice of counsel nugatory as a defense, and where there is a want of probable cause, advice of counsel is no defense. Cooper v. Utterbach, 37 Md. 283; Block v. Meyers, 33 La. Ann. 776; Wuest v. American Tobacco Co. 10 S. D. 394, 73 N. W. 905.

In such relation the burden of proof was on defendants. Davis v. McMillian, 142 Mich. 391, 3 L.R.A.(N.S.) 928, 113 Am. St. Rep. 585, 105 N. W. 862, 7 Ann. Cas. 854; Whitehead v. Jessup, 2 Colo. App. 76, 29 Pac. 916; Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282; Manning v. Finn, 23 Neb. 511, 37 N. W. 314; Roy v. Goings, 112 Ill. 656; Scrivani v. Dondero, 128 Cal. 31, 60 Pac. 463.

Edward P. Kelly, for respondents.

"Where an attorney proffers himself as a witness, voluntarily gives testimony in a case in which he admits having a contingent fee, he should be required to answer on cross-examination as to the amount of such fee." New Omaha Thomson-Houston Electric Light Co. v. Johnson, 67 Neb. 393, 93 N. W. 778, 13 Am. Neg. Rep. 546.

"The admission of testimony which is incompetent as the case then stands, but which is afterwards made competent by the introduction of other evidence, is not ground for setting aside the verdict." Eastman v. Amoskeag Mfg. Co. 44 N. H. 143, 82 Am. Dec. 201.

"The record of a court in which plaintiff was tried, showing his arrest, hearing, and acquittal, is admissible." 8 Enc. Ev. 418.

"If such record contained any matters not pertinent to the issues, the proper method of procedure would have been to object to its reading before the jury, or to ask that the jury be instructed to disregard it." Granger v. Warrington, 8 Ill. 299; Cooney v. Chase, 81 Mich. 203, 45 N. W. 833.

"That a verdict of acquittal was reached only after deliberation by a petit jury, and that such body entertained doubts about the evidence, is evidence in favor of the existence of probable cause for prosecution." Grant v. Deuel, 3 Rob. (La.) 17, 38 Am. Dec. 228.

And where the jury disagree it is prima facie evidence of probable cause. Johnson v. Miller, 63 Iowa, 529, 50 Am. Rep. 758, 17 N. W. 34; Sherwood v. Reed, 35 Conn. 450, 95 Am. Dec. 284.

Where a person gives to the prosecuting attorney a full and fair statement of all the facts within his knowledge, or of which he had reasonable grounds to believe existed, he is not required to make any fuller or greater investigation. Johnson v. Miller, 69 Iowa, 562, 58 Am. Rep. 231; Van Meter v. Bass, 40 Colo. 78, 18 L.R.A.(N.S.) 49, 90 Pac. 637.

"Harmless error in admitting incompetent evidence is not ground for reversal." Anderson v. First Nat. Bank, 6 N. D. 497, 72 N. W. 916.

Or where there is no reasonable probability that the result would have been different. Haugen v. Chicago, M. & St. P. R. Co. 3 S. D. 394, 53 N. W. 769.

Or where the judgment is clearly right. John A. Tollman Co. v. Bowerman, 5 S. D. 197, 58 N. W. 568; Hudson v. Archer, 9 S. D. 240, 68 N. W. 541; 1 Hill's Dig. p. 158; Numerous cases cited in Webster v. Webster, 66 Am. Dec. 711, note.

"Upon the undisputed facts the court should have found, as a matter of law, that the defendants had probable cause for bringing the criminal action." Krause v. Bishop, 18 S. D. 298, 100 N. W. 434; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558; Smith v. Nunich, 65 Minn. 256, 68 N. W. 19; Frowman v. Smith, 12 Am. Dec. 266, note; 2 Greenl. Ev. 456.

"Whether the proof of certain facts constituted probable cause is

a question of law, and it is error to submit such question to the jury." Traverse v. Smith, 1 Pa. St. 234, 44 Am. Dec. 125.

"It is well established that it is a good defense in an action for malicious prosecution that the defendant in such action, in good faith relied upon the advice of counsel in instituting criminal proceedings." Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574; Krause v. Bishop, 18 S. D. 298, 100 N. W. 434; Van Meter v. Bass, supra.

GRACE, J. The action is one for damages for malicious prosecution. The complaint alleges the corporate character of the defendant under the National Bank Laws of the United States of America, and alleges that G. S. Newberry is cashier. That on or about the 6th day of November, 1914, the defendants maliciously and falsely conspired together with the intent to injure the plaintiff in his good name and credit, and wilfully and maliciously instructed the then sheriff of Foster county, North Dakota, to take steps to detain the plaintiff and deprive him of his liberty until the defendants could make a complaint and formal charge against him. Pursuant to said instructions the said sheriff of Foster county, North Dakota, through the sheriff of Plymouth county, Iowa, without warrant and authority in law, wantonly and maliciously and at the instigation of the defendants, apprehended the plaintiff and confined him in the county jail of said Plymouth county, Iowa, upon suspicion, and that plaintiff was so held and confined in the said county jail of Plymouth county, Iowa, on said false, unfounded, and malicious charge at the instance and instigation of the defendants from and including the 6th day of November, 1914, until and including the 10th day of November, 1914. That pursuant to said malicious and false conspiring together, the defendants appeared before one Robert R. Pryor, police magistrate of the city of Carrington, Foster county, North Dakota, and maliciously and falsely and without probable cause made complaint under oath before said magistrate, charging that plaintiff unlawfully, wilfully, and feloniously on or about the 1st day of November, 1914, removed from the county of Foster, North Dakota, certain chattels subject to a subsisting lien in the nature of a chattel mortgage known to plaintiff, to wit, a certain Velie automobile, well knowing such charge to be false, malicious, and unfounded, and maliciously and without probable cause procured said magistrate to

issue a warrant for the arrest of plaintiff upon the said false, malicious, and unfounded charge. That said magistrate on the 7th day of November, 1914, issued said warrant and placed the same in the hands of the sheriff of Foster county, North Dakota, who proceeded to Le Mars, Plymouth county, Iowa, therewith, and placed plaintiff under arrest thereunder, and removed said plaintiff from the said county jail of Plymouth county, Iowa, to the county jail of Foster county, North Dakota, on November 11, 1914. That plaintiff was confined and was deprived of his liberty, in the said county jail of Foster county, North Dakota, from and including the 11th day of November, 1914, until and including the 15th day of December, 1914. On the 15th day of December, 1914, plaintiff was examined before one S. J. Malen, a justice of the peace of Foster county, North Dakota, which justice found there was no probable cause to believe the defendant guilty of said crime or of any crime, and the plaintiff was discharged by said justice, since which time said plaintiff has not prosecuted said defendant further. Plaintiff further alleges that the said complaint and the allegations that plaintiff had committed a crime under the laws of the state of North Dakota, and against the peace and dignity of such state, are and were wholly false, untrue, and malicious, and were known to be false, untrue, and malicious by the defendants at the time said charge and complaint were preferred by them. That the said charge and arrest and confinement of the plaintiff in said county jails were extensively advertised in several newspapers in Foster county, and, as plaintiff is informed and believes, at the instance of defendants. Plaintiff further claims injury in person and health by reason of confinement in said said jails, and was prevented from attending to his business as auto liveryman, that he lost his business, and was put to large, excessive, and unsual expense in caring for his property, and many persons hearing of his arrest and detention in jail, and believing him therefrom to be a criminal, refused to do business with him.

The defendants' answer is in substance as follows: That the plaintiff did on or about the 1st day of November, 1914, commit the crime of unlawfully, wilfully, and feloniously removing from the county of Foster, state of North Dakota, a certain chattel, to wit, a Velie automobile upon which there was then a subsisting lien in the nature of a chattel mortgage. That the First National Bank of Carrington is a

banking corporation, and that G. S. Newberry is the qualified and acting cashier. That prior to the 1st day of November, 1914, the plaintiff and one G. C. Olsen were indebted to the First National Bank of Carrington and secured such indebtedness by the execution of their certain chattel mortgage covering, among other things, a certain Velie automobile. That such chattel mortgage was accepted by said defendants and placed on file in the office of the register of deeds of Foster county. That said indebtedness has not been paid, and that said indebtedness, together with the chattel mortgage aforesaid, was during all of the time alleged in plaintiff's complaint, and now, unpaid, unsatisfied, and in full force and effect, and that said chattel mortgage was during all of the time a subsisting lien upon the aforesaid described Velie automobile. That plaintiff herein on or about November 1, 1914, without the consent or knowledge of the defendant bank, or its cashier, took and removed the said Velie automobile, upon which there was a lien as aforesaid, from the county of Foster, and state of North Dakota; and that defendants were informed that the plaintiff was taking such automobile out of the state of North Dakota, to the state of Florida. That information was given to the defendants that the plaintiff, in company with another person, in possession of and driving a Velie automobile, being the Velie automobile covered by the mortgage aforesaid, were under arrest in the county of Plymouth and state of Iowa.

Defendants further allege that G. S. Newberry, as cashier of the First National Bank, called upon C. B. Craven, the qualified and acting state's attorney for the county of Foster and state of North Dakota, and stated to such state's attorney all the facts hereinbefore set forth, in good faith, and stated all the facts connected with said transaction to such state's attorney fully and fairly, and stated to such state's attorney all the facts, circumstances, and conduct of said plaintiff of which the defendants had been informed; and that thereupon said state's attorney informed said G. S. Newberry that there was sufficient ground for procuring a warrant causing the arrest of said plaintiff for the commission of the crime of removing property upon which there was a subsisting lien from the county of Foster, and state of North Dakota, being the county and state wherein said property was at the time of the execution of the said chattel mortgage or lien. That thereupon the said C. B. Craven, state's attorney as aforesaid,

prepared and drafted the criminal complaint upon which the warrant hereinbefore referred to was issued, and presented the same to the defendant G. S. Newberry for his signature, oath, and verification, and thereupon the criminal warrant for the arrest of the plaintiff, which is the same arrest that this plaintiff now complains of, was issued. The defendants further allege that, upon causing the arrest of the plaintiff herein, these defendants acted in good faith upon the advice and counsel of C. B. Craven, state's attorney, and that such arrest was caused in good faith, without malice, and in the honest belief that said plaintiff had committed the crime charged and alleged in the criminal complaint heretofore and in plaintiff's complaint referred to and described; and further allege that the above acts are the same of which plaintiff now complains. Defendants for a further defense, both as in justification and mitigation, reallege all and singly the matters hereinbefore stated, and further allege that all of the acts of these defendants in reference to the criminal complaint herein, the warrant, and arrest, as set forth in and complained of by the plaintiff in his complaint, were performed by these defendants in good faith and without malice, and believing that the plaintiff was guilty of the crime and offense set forth and charged in the criminal complaint referred to and described in the plaintiff's complaint herein.

The facts in the case appear to be substantially as follows: The appellant and one G. C. Olson were engaged in the business of running an automobile garage during the year of 1914, at Carrington. They purchased the garage from W. B. Hoopes for $1,315, giving their promissory notes for the purchase price. The First National Bank of Carrington became the owner by indorsement from Hoopes of the promissory notes given by appellant and his partner for such purchase price. On or about the 10th day of August, 1914, the First National Bank took a chattel mortgage from the appellant and his partner to secure such indebtedness, which chattel mortgage covered and described three automobiles, as follows: A model C Velie, 30 h. p.; one model F Velie, 40 h. p.; and one Rambler touring car; and in addition to these certain tools, appliances, and repairs in the gargage. G. C. Olson, appellant's partner, took care of the business of the partnership, and the appellant was the mechanic. In the month of September, 1914, Olson, together with G. S. Newberry, sold the garage and everything

in connection with it, except the three automobiles above referred to. At this time the indebtedness of the copartnership which was secured by the chattel mortgage on the three automobiles was reduced to the sum of $40.60. The Velie car was worth about $275; the Rambler car, about $150; and the Velie 40, about $450; and all remained and stood as security for the balance of the indebtedness owing to the First National Bank, which was $40.60. During the time the appellant and his partner ran the garage, they did quite an extensive automobile livery business, using the cars mentioned in the chattel mortgage for the purpose of carrying on their business and driving wherever their business required. After the garage was closed, G. C. Olson took the automobile, Velie 40, to Medina, in the state of North Dakota, the Rambler car, of the value of $150 stood in the garage across the street from the First National Bank of Carrington. The latter part of October, 1914, the appellant made an arrangement whereby he was to take one Malloy from Carrington to St. Louis, Missouri, at the agreed price of $10 a day and expenses on the trip. For the purpose of making such trip he took the Velie car, model C 30 h. p., which was owned by Olson and himself in partnership, and drove from Carrington to Oberon in this state, from there to Minnewaukon, from there to Devils Lake, and from there to Fargo, stopping at the hotels and registering at all times under his own name. From Fargo he went to Minnesota and stopped at several towns in Minnesota, registering in his own name and making no attempt to cover up his identity. He had no trouble until he arrived at Remsen, Plymouth county, Iowa, where it seemed that the night previous to his coming to Plymouth county, some automobiles had been stolen, and the appellant and his passenger were suspicioned by the authorities, and were detained under suspicion and brought to Le Mars, the county seat of Plymouth county, Iowa. When the appellant was first detained he was told by the sheriff of Plymouth county that he was detained for running an automobile with only one license tag. The appellant advised the sheriff of Plymouth county, Iowa, that he could call up Carringon and identify him, and gave the sheriff of Plymouth county the name of the chief of police of Carrington and the name of the sheriff of Foster county, North Dakota. He also told the sheriff at Le Mars that the First National Bank at Carrington at one time had a mortgage upon the car, and

they could identify the car. No answer was received to the message. Later the appellant caused the sheriff of Plymouth county, Iowa, to communicate with the sheriff of Foster county, North Dakota, over the long-distance telephone. The sheriff of Foster county, after hearing from the sheriff of Le Mars, Iowa, took the matter up with the defendant, the First National Bank. The First National Bank of Carrington instructed the sheriff at Le Mars, Iowa, to hold the appellant, for the reason that he was wanted in Carrington for unlawfully removing from the county and state an automobile covered by a mortgage. Shortly thereafter Newberry swore to a criminal complaint, charging the appellant with the crime of wilfully removing property covered by a mortgage from the county of Foster, and on the 7th day of November a warrant was issued for the arrest of the appellant. After the sheriff of Foster county had received such warrant he went from Carrington to Le Mars, Iowa, and brought back the appellant to Carrington and placed him in the county jail, where he remained for some time. On the 15th day of December the appellant had a preliminary hearing before S. J. Malen, a justice of the peace in Carrington, and was discharged by such justice of the peace, and the criminal proceedings ended.

It seems from the testimony that the justice of the peace did not write up his docket until some time after such preliminary hearing, and in such docket, written up after the preliminary hearing some days, the said justice set forth the following: "After hearing the testimony for the state and the defendant N. A. Rhoads, and hearing the arguments of T. F. McCue, Esq., for defendant and C. B. Craven, Esq., for the state, it is the opinion of this court that probable cause to hold the defendant N. A. Rhoads to district court exists, but for the reason that he has already been confined in the county jail for about a month awaiting a preliminary hearing and being unable to furnish any bond for his appearance in district court, I am unwilling to order the defendant confined in the county jail for five months more to await trial at the first regular term of district court, which convenes in May, 1915. For the above reasons the defendant N. A. Rhoads is hereby discharged."

Either of the automobiles described in the chattel mortgage was sufficient in value to satisfy the balance of the indebtedness which

was due respondent, to wit, $40.60. The respondent in his brief concedes this fact. Before consulting the state's attorney, Newberry had also consulted with the private counsel of the bank, and claims to have communicated to him all of the facts of which he had knowledge, and was advised by such private counsel that it was his duty or business to confer with Mr. Craven, the state's attorney of Foster county, and to act upon Mr. Craven's advice.

The appellant has made several assignments of error; but, for the purpose of disposing of this appeal, we find no necessity to consider more than two of them.

The first assignment of error relates to the admission of testimony concerning evidence of the notice of attorney's lien for $2,500, such notice of a lien being served by Attorney Stillman, who appeared as one of the attorneys for the plaintiff in this action. All such testimony was incompetent, irrelevant and immaterial, and had no relation whatever to any issue involved in the case. The question of the good faith of the attorneys and the plaintiff in bringing this action is not an issue, and any testimony admitted with reference thereto is incompetent, irrelevant, immaterial, and prejudicial. If plaintiff believed he had a cause of action against the defendant, he had a perfect right to employ attorneys to prosecute such action, and had a further right to make a contract to pay them for their services, either a stated sum or a contingent fee. The further testimony complained of under this assignment of error is the admission of testimony received under objection from Newberry regarding a check of W. A. Malloy, about which the Bank of Oberon phoned to the First National Bank of Carrington, upon which bank the check was drawn, the First National Bank of Carrington replying to the Bank at Oberon, stating that Malloy's check was no good. Such testimony could have no relation to the issues in this case. It was highly incompetent, irrelevant, immaterial, and prejudicial. The objection to all of such testimony should have been sustained, and it was reversible error not to sustain the objection to such immaterial and prejudicial testimony.

The second error to which we allude, being error assigned as number 3, relates to the admitting in evidence of "exhibit 5," being the record of S. J. Malen, Justice of the Peace, before whom the preliminary hearing was had, at which preliminary hearing the defendant,

who is the plaintiff in the case at bar, was discharged. Section 10,609 of the Compiled Laws of 1913 specifies what a committing magistrate shall *record or find upon the termination of the preliminary hearing,* where defendant is discharged and is as follows:

"Procedure. Accused Discharged.—After hearing the evidence on behalf of the respective parties, if it appears either that a public offense has not been committed, or that there is no sufficient cause to believe the defendant guilty thereof, the magistrate must order the defendant to be discharged by an indorsement on the complaint over his signature to the following effect: 'There being no sufficient cause to believe the within named ——— guilty of the offense within mentioned, I order him discharged.' "

This is the law as to what the committing magistrate shall do, and the section is mandatory as to what shall be indorsed on the complaint, for the section says *"must order the defendant to be discharged by an indorsement on the complaint over his signature to the following effect. . . ."* Then follows the words which the committing magistrate is required to indorse on the complaint. The committing magistrate in the case at bar discharged the defendant at such preliminary hearing, but did not make the indorsement required by the above section upon the criminal complaint as he should have done, and which is mandatory upon him to do. The committing magistrate was without authority to make any other indorsement or record with reference to the dismissal of the charge of which defendant stood accused, except the record made mandatory by § 10,609. The entry made by the justice of the peace at the close of the hearing, or several days afterwards, which set forth a great deal of matter, all of which was unlike and of a different nature than that required by § 10,609, was incorrect and contrary to law, and it was prejudice to admit as evidence that part of exhibit 5 which related to the reasons for the discharge of the defendant on such preliminary hearing, and the further part where it is stated that "it is the opinion of this court that probable cause to hold the defendant to the district court exists, but for the reason that he has already been confined in the county jail for about a month awaiting a preliminary hearing; and, being unable to furnish any bond for his appearance in district court, I am unwilling to order the defendant confined in the county jail for five months more to await trial at the first regular term of the

district court, which convenes in May, 1915." The admission of such record, which is wholly unauthorized by law, was prejudicial and constitutes reversible error.

The appellant and one G. C. Olson were indebted to the First National Bank in the sum of $1,315, which was represented by a note and chattel mortgage upon certain property hereinbefore described. The bank had purchased such paper from W. E. Hoopes. It is conceded that the debt had all been paid except $40.60. Any one of the automobiles mentioned were worth several times the amount due upon the debt, to wit, $40.60. Addressing ourselves to the question of whether or not Newberry stated all the facts of the case in which he made the criminal complaint to his attorneys, or whether he admitted to such attorneys any of the facts in the case, is a question of fact for the jury, upon which we express no opinion. It is the province of the jury to determine this question upon all the testimony adduced relative thereto.

The appellant in this case, who was the defendant in the criminal prosecution, was arrested and charged with the offense set forth in § 10,248, which is as follows: "Every person having in his possession or under his control any personal property upon which there is known to him to be a subsisting lien either by operation of law or by contract, who *wilfully* destroys, removes from the county, conceals, sells, or in any manner disposes of, otherwise than as prescribed by law, or materially injures such property or any part thereof, without the written consent of the then holder of such lien, is guilty of: 1st. A misdemeanor if the value of the property does not exceed $100; or, 2d. A felony, if the value of the property exceeds such sum."

In the foregoing law any of the acts complained of must have been done *wilfully* in order to constitute a crime. There are several things which the section says will be a crime if done, such as destroying, removing from the county, concealing, or selling, or in any manner disposing of, property upon which there is a lien. One of the crimes specified in such section is *wilfully* removing from the county property upon which there is a subsisting lien. The meaning of the word *"wilfully"* therefore becomes quite important. In penal statutes the word "wilfully" means not only that the act is done knowingly and intentionally, but it must also be done with an evil intent or with a bad purpose. See Galvin v. Gualala Mill Co. 98 Cal. 268, 33 Pac. 93; Potter v. United

States, 155 U. S. 446, 39 L. ed. 217, 15 Sup. Ct. Rep. 144. A wilful act has also been defined as one that is done knowingly and purposely with the direct object of injuring another. Hazle v. Southern P. Co. 173 Fed. 431. It has also been held that "maliciously" was equivalent to the word "wilfully." Chapman v. Com. 5 Whart. 427, 34 Am. Dec. 565. See also Bouvier's Law Dictionary defining the word "wilfully." "The word 'wilfully,' " says Chief Justice Shaw, "in the ordinary sense in which it is used in statutes, means not merely voluntarily, but with a bad purpose." Com. v. Kneeland, 20 Pick. 220. "It is frequently understood," says Bishop, "as signifying an evil intent without justifiable cause." 1 Bishop Crim. Law, § 428. In the case of Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; the court stated: "In fact, the gravamen of the offense consists in the evil design with which the misapplication is made and a count which should omit the word 'wilfully,' etc., and 'with intent to defraud' would be clearly bad." We think, therefore, that the word "wilfully" means more than knowingly or intentionally, and that there must be an evil design or bad purpose also present. A great deal of the personal property of many of the citizens of the state of North Dakota is under a lien or chattel mortgage; and while it is so under a lien, it is often taken beyond the confines of the county in which the chattel mortgage is filed for record, and it is also true that when anyone so situated goes outside of the county limits and with him takes such chattels against which there is a subsisting lien, for instance, the team of horses which he is driving, he does so wilfully, that is, intentionally; but surely in most cases he has no bad purpose or evil intent, and unless there is a bad purpose or evil intent, it cannot be a crime under the law contained in § 10,248 to remove such property beyond the confines of the county line. There must be an evil purpose accompanying the removal of such property. There must be some circumstances to show such evil purpose, such as a destruction of the property, or a sale of the same and a conversion of the proceeds, or a concealment of the same and a refusal to disclose its whereabouts; or some other circumstances to show a bad purpose in the removal of such property. The crime mentioned in § 10,248 is a crime merely because the law says so. The things mentioned therein as being crimes are made criminal in order to extend protection to the

creditor in the preservation of the security for the debt owing him by the debtor. The acts mentioned as crimes in said action are crimes merely because the law says so. It is different in other crimes which in themselves show that the acts are really criminal, and where the acts would be wrong whether the law said they were wrong or not. For instance, in homicide. If there were no law defining and punishing homicide, it would nevertheless remain a crime for the reason that it threatens the peace of society and is criminal in its nature and intent. It abhors and terrifies society. It implies an evil purpose and intent, unless it was committed in self-defense, or while a person is insane and without the use of his reason, or for some other good and justifiable excuse and reason as defined by law.

The statute which we have been considering was enacted to protect the property rights only, and it would seem there should be some showing that there was an intent to deprive the lien holder of the security, or that there should be some bad purpose or intent, before there would be any justification for prosecution.

One's good name and reputation is a priceless treasure, and one has the right to remain secure therein. It should not be made easy to destroy one's good name or good standing in the community. The right to enjoy one's good name and reputation and the good opinion of others is one of greater significance, deeper importance, and of much more weight and consequence, than the enjoyment or protection of mere property right. Surely one's good name and reputation should not be attacked and destroyed for any light reasons, and the law should protect such valuable rights, certainly with as great care as it does mere property rights.

In this case there are just two elements,—that of malice and want of probable cause. Each of these elements must be present in this case in order to entitle the plaintiff to recover. The weight of the testimony must preponderate to show both malice and want of probable cause before recovery of damages can be had, though malice may be inferred where want of probable cause is proved. This, as we understand it, is the general rule in this class of cases.

We cannot discuss all the assignments of error and all the law and cases cited by each counsel, but we have given the matter careful

consideration, and, as before stated, find prejudicial error in the record. The judgment is reversed, and the case is remanded for a new trial.

BRUCE, Ch. J. I concur in the opinion of Mr. Justice GRACE, though not in the *dicta* therein contained in regard to what does and what does not constitute a crime.

CHRISTIANSON, J. (specially concurring): I believe it was error to admit the evidence in regard to the attorney's lien, and also the recitals in the justice's docket stating the reasons for the justice's decision upon the preliminary examination. It is with considerable reluctance that I concur in a reversal, however, as it seems to me that the defendant established the fact that the prosecution was instituted upon the advice of the state's attorney of Foster county, after a full, fair, and honest statement of the facts, in a manner so conclusive that it is at least debatable whether there was any issue of fact to submit to the jury with respect to this defense. In any event the evidence on behalf of defendant on this feature of the case was so strong and convincing that it is difficult to see how any different result could ever be reached than that reached by the jury in this case.

In view of the different defenses interposed, it seems to me that upon a retrial it would be desirable, if the trial court would direct the jury to make findings upon particular questions of fact. And this is especially true with respect to the questions involved in the defense of the advice of the counsel.

ROBINSON, J. (concurring specially): This is an appeal from a judgment against the plaintiff in an action to recover $5,000 for malicious prosecution. It appears that in 1914 at Carrington, the plaintiff and one Olson were engaged as partners in running a general automobile garage business. In August, 1914, to secure $1,315, they gave to the bank a mortgage on three automobiles, one office safe, a roll-top desk, and a lot of other property. The mortgage debt was represented by four promissory notes, all of which became due in September, 1914, except one note for $600, due in September, 1915; but in September, 1914, the total debt was liquidated and reduced to the sum of $40.60. Then Olson took one of the cars to Medina, North Dakota, and about

the 1st of November Rhoads took one car and started on a trip to St. Louis, leaving in the garage across the street from the bank a car worth $150. Newberry, the cashier, knew of this car and knew that it was ample security for the balance, $40.60. He knew that he could turn the car into cash without delay. Yet, when Rhoads had got to northern Iowa, defendant Newberry went to a justice of the peace and swore to a complaint charging that on November 1, 1914, in Foster county, Rhoads did commit the crime of wilfully and feloniously removing from Foster county an automobile on which he knew there was a mortgage lien for over $40. On that complaint a warrant was issued for the arrest of Rhoads. The sheriff went to Iowa, arrested Rhoads, brought him back, put him in jail, where he was imprisoned for a month and then discharged.

The defense was that the warrant was sworn out in good faith and on the advice of the state's attorney. However, it does not appear that the state's attorney was fully advised that the mortgage debt had been reduced from $1,315 to $40.60, and that the car across the street from the bank was ample security for the small balance, and that the car in possession of Olson at Medina was worth ten times the balance. These were matters of the utmost importance, because the security was so ample and so accessible there was no possible reason for thinking that Rhoads had taken his car to Iowa to defraud the bank. If the car had been completely destroyed, the security would have been good for ten times the sum due the bank. Hence, there was no excuse for the criminal prosecution.

The purpose of a mortgage and of statutes relating to chattel mortgages is to secure the payment of an honest debt, and not to make it dangerous for a person to use his property. The automobile is made and used for rapid transit and for long drives, and its value would be greatly impaired if there were any danger in crossing state and county lines.

In this case there was not a fair trial. The record shows several gross errors manifestly prejudicial to the plaintiff. In the charge of the court it is said:

Gentlemen: The plaintiff must prove to your satisfaction by a fair preponderance of evidence: (1) That a criminal prosecution was instituted against the plaintiff; (2) that the defendants in this action in-

stituted or procured the institution of the prosecution; (3) that said criminal prosecution was terminated by an acquittal or a discharge of the plaintiff before the commencement of the action. These matters were all proved by record evidence, and were not in dispute. Hence, there was no reason for submitting them as matters in dispute.

Then it was said by the court: I charge that if the plaintiff is guilty of the offense which was charged against him, that is a complete defense. Now that was error of the grossest kind. The plaintiff was not on trial for any offense, and there was no evidence whatever to show that he was guilty. On the contrary, the evidence showed clearly that there never was any reason for thinking him guilty.

Then Mr. Craven, the state's attorney, was sworn, and against objection he was permitted to answer a question concerning his belief as to the probable guilt of Rhoads when the warrant was issued. His answer was: "I believed it then and I still do." And thus the belief of the prosecuting attorney was thrown into the scale against Rhoads. The error was about as gross as if the judge himself had given similar testimony.

Then the court received in evidence the original summons and complaint in this action, with a notice of an excessive lien claimed by the attorneys. The only purpose of that was to prejudice the jury, and the same is true of all the other testimony regarding one Maloney and his checks and his conduct.

The court also erred in admitting in evidence the made-up record of the justice of the peace, which was in effect that while he found the defendant not guilty, he thought him guilty.

In a suit for malicious prosecution it was well to remember the terms "malice" and "maliciously" import a *wish* to vex, annoy, or injure another person or an intent to do a wrongful act, established either by proof or presumption of law. Comp. Laws, § 10,360. Good faith or fool innocence does not justify a wrongful act.

Every person is bound to abstain from injuring the person or property of another, or infringing upon any of his rights. Comp. Laws, § 5942, 26 Cyc.

Judgment reversed and new trial ordered.

JAMES PETERSON v. FARGO-MOORHEAD STREET RAILWAY COMPANY.

(164 N. W. 42.)

Common carriers — defined — street railway company — carrying of passengers — is common carrier.

1. Under § 6235, Compiled Laws of 1913, everyone who offers to the public to carry persons, property, or merchandise is a common carrier of whatever it thus offers to carry. A street railway company operating its lines of street railways upon the streets of a city, or extending from one city to another, or into rural communities, the principal business of which is conveying passengers from point to point on its lines for hire, is a common carrier.

Fellow-servant rule — common carriers — application abolished — negligence of officers, agents, or employees — defects in appliances, cars, or engines — track — machinery — roadbed — ways or works — Federal Constitution — amendments — not contravened by statute.

2. The fellow-servant rule, so far as it applies to common carriers, is by § 4804 of the Compiled Laws of 1913, abolished, and in the language of such statute, "every common carrier shall be liable to any of its employees, or in case of the death of an employee, to his personal representative, for the benefit of his widow, children, or next of kin, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works." Such statute is not unconstitutional, nor does it contravene any of the provisions of the state or Federal

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Note.—Laws abrogating the fellow-servant rule as applied to railroads are generally upheld by the courts upon the theory that, the employment of railroading being especially hazardous, the legislatures are justified in passing laws affecting it which, will apply to railroads only, and such laws will not be deemed unconstitutional as denying to railroads equal protection of the laws, as will be seen by an examination of the notes in 12 L.R.A.(N.S.) 1040 and 47 L.R.A.(N.S.) 84, on validity of statutes abrogating fellow-servant rule. But it is generally held, as will be seen by the cases collated in a note in 17 L.R.A.(N.S.) 117, that such statutes do not apply to street railways for the reason that the hazards and dangers incident to the operation of ordinary steam or commercial railroads are not present in the operation of street railways and that it was these hazards from which the legislature intended to protect employees. The case of PETERSON v. FARGO-MOORHEAD STREET R. Co. is to be reconciled with this rule by the fact that the statute in North Dakota applies to common carriers generally and not specifically to railroads.

Constitutions, nor does it contravene the 14th Amendment to the Federal Constitution, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Common carriers — servants — negligence — contributory negligence — jury — questions for — damages — how measured.

3. Under § 4805, Compiled Laws of 1913, the questions of negligence and contributory negligence are exclusively questions for the jury; and where the negligence of the employer is gross as compared with the contributory negligence of the servant, the fact that the servant has thus been guilty of contributory negligence shall not defeat the recovery of damages, but the damages, by reason of such contributory negligence of the servant, may be diminished by the jury in proportion to the amount of negligence attributable to such servant or employee.

Courts — taking case from jury — error — conflicting testimony — as to subject-matter involved — question for jury.

4. When there is conflicting testimony as to a certain subject-matter involved in the litigation from which minds of average men might draw different conclusions, the question is one for the jury. *Held* in this case, there was such conflicting testimony, and the court erred in directing a verdict for the defendant.

Courts — composition of — constituent parts — judge — determines law of case — jury part of court — in trial of issue of fact.

5. As applied to the tribunal which tries issues of both law and fact, the court is not composed of the judge who is presiding at the trial. The court in such case is composed of the judge who presides or is acting at the trial of the issues of law and fact in such court, and also of the jury. The judge is only one of the constituent parts of such court, and as such his duty is to define the law of the case. The jury is also a material constituent part of the court in such case, and its exclusive duty is to pass and render judgment upon the facts in the case. Each constituent element of the court, as just defined, has exclusive jurisdiction within its own sphere.

Street car — conductor of — action by against company — negligence — damages — jury — questions for — contributory negligence — also for jury.

6. Where the conductor of a street car maintains an action against the defendant, his employer, a street railway company, on the ground of the defendant's negligence in keeping and maintaining its switch in a loose, improper, and imperfect condition, which caused the car of which the plaintiff was in charge to be thrown from the track while passing over such switch, the condition of the switch and the negligence of the defendant in maintaining such switch in its imperfect or improper condition, if it were so maintained, was a question exclusively for the jury; and where there was conflicting testi-

mony as to the rate of speed of the car at the time such car passed over such switch, the contributory negligence of the servant or servants, if any, was also a question exclusively for the jury under the statute hereinbefore referred to. All questions of negligence and contributory negligence are exclusively for the jury.

Opinion filed July 14, 1917.

Appeal from the District Court of Cass County, *Chas. A. Pollock*, J.
Reversed.

M. A. Hildreth, for appellant.

The fellow-servant rule is abolished in this state in so far as concerns actions against common carriers of persons and property, and neither the negligence of the fellow servant, nor that of the plaintiff, is a bar to an action for damages. The statute is constitutional. Comp. Laws 1913, §§ 4804, 4805.

To strike down a state statute as violative of the Federal Constitution, one must show that he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutionality feature injures him, and so operates as to deprive him of rights protected by the Federal Constitution. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359; Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868, 30 Sup. Ct. Rep. 594; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550, 56 L. ed. 1197, 1201, 32 Sup. Ct. Rep. 784; Rosenthal v. New York, 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71.

It is well settled by the decisions of the United States Supreme Court that the equal protection of the law is guaranteed by the 14th Amendment, and that that is satisfied if the law applies equally to all persons in like situations and conditions. Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts), 94 U. S. 155, 163, 24 L. ed. 94, 95; International Harvester Co. v. Missouri, 234 U. S. 199, 210–214, 58 L. ed. 1276, 1281–1283, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Duncan v. Missouri, 152 U. S. 382, 38 L. ed. 487, 14 Sup. Ct. Rep. 570; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Mutual

Loan Co. v. Martell, 222 U. S. 225, 233, 56 L. ed. 175, 178, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Aluminum Co. v. Rumsey, 222 U. S. 251, 255, 56 L. ed. 185, 189, 32 Sup. Ct. Rep. 76, 1 N. C. C. A. 251.

In this case the proof shows beyond question that the street car was derailed because of the improper condition of the switch either from lack of repairs or improper repairs. There being evidence upon this question, even though disputed, it still made a case for the jury, and the court committed reversible error in taking the case from the jury. Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; Wyldes v. Patterson, 31 N. D. 310, 153 N. W. 630; 10 Rose's Notes (U. S.) 438, 439; The Phœnix, 34 Fed. 760; Clyde v. Richmond & D. R. Co. 59 Fed. 394; The Joseph B. Thomas, 46 L.R.A. 58, 30 C. C. A. 333, 56 U. S. App. 619, 86 Fed. 658, 4 Am. Neg. Rep. 105; Richmond & D. R. Co. v. George, 88 Va. 223, 228, 13 S. E. 429; Norfolk & W. R. Co. v. Thomas, 90 Va. 209, 44 Am. St. Rep. 906, 17 S. E. 884; Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226; Thomp. Neg. §§ 4853, 4856; Siegel, C. & Co. v. Troka, 2 L.R.A. (N.S.) 647, and note (218 Ill. 559, 109 Am. St. Rep. 302, 75 N. E. 1053, 19 Am. Neg. Rep. 166); Kern v. DeCastro & D. Sugar Ref. Co. 24 N. Y. S. R. 748, 5 N. Y. Supp. 548; Shearm. & Redf. Neg. 5th ed. § 188; 2 Labatt, Mast. & S. § 184; Lutz v. Atlantic & P. R. Co. 16 L.R.A. 819, note.

If there is any legal evidence tending to prove negligence on the part of the defendant, then the question is one for the jury, and can only be taken from the jury when only one inference can be drawn. Severtson v. Northern P. R. Co. 32 N. D. 200, 155 N. W. 11; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Felton v. Midland Continental R. Co. 32 N. D. 223, 155 N. W. 23.

Fowler & Green, for respondent.

In the absence of a statutory requirement, mere absence of blocking of a switch or frog does not show actionable negligence. Cooper v. Baltimore & O. R. Co. 16 L.R.A.(N.S.) 716, 86 C. C. A. 272, 159 Fed. 82, 14 Ann. Cas. 693, and cases.

The defendant is not an insurer of the condition of its switches. It is only required to use ordinary care to furnish reasonably safe

switches and to keep them in a reasonably safe condition. St. Louis, I. M. & S. R. Co. v. Needham, 25 L.R.A. 835, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107; Shadford v. Ann Arbor Street R. Co. 111 Mich. 390, 69 N. W. 661, 1 Am. Neg. Rep. 88; Ness v. Great Northern R. Co. 25 N. D. 572, 142 N. W. 165; Great Northern R. Co. v. Johnson, 125 C. C. A. 123, 207 Fed. 521; O'Neill v. Chicago, R. I. & P. R. Co. 66 Neb. 638, 60 L.R.A. 445, 92 N. W. 731, 1 Ann. Cas. 337; Prybileski v. Northwestern Coal R. Co. 98 Wis. 413, 74 N. W. 117; Titus v. Bradford, B. & K. R. Co. 136 Pa. 618, 20 Am. St. Rep. 944, 20 Atl. 517; Elliott, Railroads, § 1272, and cases.

Plaintiff must recover, if at all, upon the negligence alleged in the complaint. In this he failed. Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960.

Where specific and particular acts of negligence are alleged and relied upon for a recovery, plaintiff is confined to them. Ibid.; Birmingham R. Light & P. Co. v. O'Brien, 185 Ala. 617, 64 So. 343; Chicago Union Traction Co. v. Leonard, 126 Ill. App. 189; Cook v. Newhall, 213 Mass. 392, 101 N. E. 72; Israel v. United R. Co. 172 Mo. App. 656, 155 S. W. 1092; Williams v. Chicago, B. & Q. R. Co. 169 Mo. App. 468, 155 S. W. 64.

The trial court committed no error in holding that appellant failed to make out his case, and very properly directed a verdict for defendant. Ness v. Great Northern R. Co. 25 N. D. 572, 142 N. W. 165; Great Northern R. Co. v. Johnson, 125 C. C. A. 183, 207 Fed. 521; Curtin v. Boston Elev. R. Co. 194 Mass. 260, 80 N. E. 522; Donnelly v. New York & H. R. Co. 3 App. Div. 408, 38 N. Y. Supp. 709; McCann v. Interurban Street R. Co. 117 App. Div. 188, 102 N. Y. Supp. 296; Beebe v. St. Louis Transit Co. 206 Mo. 419, 12 L.R.A.(N.S.) 760, 103 S. W. 1019; Jenkins v. St. Louis City R. Co. 105 Minn. 504, 20 L.R.A.(N.S.) 401, 117 S. W. 928.

Although there is oral testimony to prove an alleged fact upon the existence of which a litigant's cause of action or defense depends, still if the admitted physical facts demonstrate to a certainty its nonexistence, the court properly directs the verdict. Larson v. Swift & Co. 116 Minn. 509, 134 N. W. 122; Samulski v. Menasha Paper Co. 147 Wis. 285, 133 N. W. 142; Musbach v. Wisconsin Chair Co. 108 Wis. 57, 84 N. W. 36.

Where oral testimony is squarely contrary to the undisputed physical facts, there is no question for the jury. Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; Musbach v. Wisconsin Chair Co. 108 Wis. 57, 84 N. W. 36.

The plaintiff, the conductor, and the motorman were fellow servants. Chicago, I. & L. R. Co. v. Barker, 169 Ind. 670, 17 L.R.A.(N.S.) 542, 83 N. E. 369, 19 Ann. Cas. 375; Berg v. Seattle R. & S. R. Co. 44 Wash. 14, 120 Am. St. Rep. 968, 87 Pac. 34; Chicago City R. Co. v. Leach, 208 Ill. 198, 100 Am. St. Rep. 216, 70 N. E. 222; Savage v. Nassau Electric R. Co. 42 App. Div. 241, 59 N. Y. Supp. 225, affirmed in 168 N. Y. 680, 61 N. E. 1134; Van Wickle v. Manhattan R. Co. 23 Blatchf. 422, 32 Fed. 278; Rittenhouse v. Wilmington Street R. Co. 120 N. C. 544, 26 N. E. 922, 2 Am. Neg. Rep. 224; Baltimore Trust & G. Co. v. Atlanta Traction Co. 69 Fed. 358.

The doctrine of *res ipsa loquitur* has no application here. The pleadings were not framed nor the cause tried upon any such theory. Particular and specific acts of negligence are pleaded and relied upon, and that disposes of the question, and the facts do not warrant its application. Birmingham R. Light & P. Co. v. O'Brien, 185 Ala. 617, 64 So. 343; Chicago Union Traction Co. v. Leonard, 126 Ill. App. 189; Cook v. Newhall, 213 Mass. 392, 101 N. E. 72; Israel v. United R. Co. 172 Mo. App. 656, 155 S. W. 1092; Williams v. Chicago, B. & Q. R. Co. 169 Mo. App. 468, 155 S. W. 64; Benedict v. Potts, 88 Md. 52, 41 L.R.A. 478, 40 Atl. 1067, 4 Am. Neg. Rep. 484; 6 Thomp. Neg. § 7635.

"The duty of keeping switches closed and locked while not in use was not one of the absolute duties of the defendant, but was an assignable duty relating to a detail of operation which could properly be delegated to an employee." Dixon v. Grand Trunk Western R. Co. 147 Mich. 667, 111 N. W. 200; Chicago, I. & L. R. Co. v. Barker, 169 Ind. 670, 17 L.R.A.(N.S.) 542, 83 N. E. 369, 14 Ann. Cas. 375, and cases; Daves v. Southern P. Co. 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708, 13 Am. Neg. Cas. 367; St. Louis, I. M. & S. R. Co. v. Needham, 25 L.R.A. 833, 11 C. C. A. 56, 27 U. S. App. 227, 63 Fed. 107; Denver & R. G. R. Co. v. Sipes, 23 Colo. 226, 47 Pac. 287; Miller v. Southern P. Co. 20 Or. 285, 26 Pac. 70.

The section of our statute relied upon has no application to street

railway companies, but only applies to railroad companies, the employees of which are engaged in the performance of duties of a peculiarly hazardous nature. Comp. Laws 1913, § 4804.

If this statute includes within its terms other common carriers than steam railroads, it violates § 11, Constitution of North Dakota, which provides that "all laws of a general nature shall have a uniform operation." N. D. Const. § 20.

But the statute has no application here. There are two rules of construction in considering such a statute. Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. A. 46, 59 U. S. App. 403, 88 Fed. 589; Norfolk & P. Traction Co. v. Ellington, 108 Va. 245, 17 L.R.A.(N.S.) 117, 61 S. E. 779; Northern P. R. Co. v. Barnes, 2 N. D. 310, 51 N. W. 386; Erskine v. Nelson County, 4 N. D. 66, 27 L.R.A. 696, 58 N. W. 348; Folsom v. Kilbourne, 5 N. D. 402, 67 N. W. 291.

Words of general import are limited by words of restricted import immediately following and relating to the same subject. 36 Cyc. 1119.

The word "railroad" as used in this statute is held to mean and have reference to railroads proper, or commercial railroads,—such railroads as are engaged in business known to be inherently dangerous. Norfolk & P. Traction Co. v. Ellington, 108 Va. 245, 17 L.R.A.(N.S.) 117, 61 S. E. 779; Funk v. St. Paul City R. Co. 61 Minn. 435, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099, 16 Am. Neg. Cas. 326; Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686; Fallon v. West End Street R. Co. 171 Mass. 249, 50 N. E. 536, 4 Am. Neg. Rep. 288; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890; Gunn v. Minneapolis, St. P. & S. Ste. M. R. Co. 34 N. D. 418, 158 N. W. 1004.

If the statute in question includes within its terms other common carriers than steam railroads, it is unconstitutional. Priestly v. Fowler, 3 Mees. & W. 1, 150 Eng. Reprint, 1030, Murph. & H. 305, 7 L. J. Exch. N. S. 42, 1 Jur. 987, 19 Eng. Rul. Cas. 102; Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, 21 Am. Neg. Rep. 394.

This statute relates wholly to those engaged in similar occupations, and to like circumstances and conditions. Edmonds v. Herbrandson,

2 N. D. 271, 14 L.R.A. 725, 50 N. W. 970; Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619.

GRACE, J. This action is one maintained by the plaintiff against the defendant on the ground of negligence. The complaint is in the ordinary form, and alleges the negligence of the defendant and its want of due care and attention to its duty in that the defendant conducted itself so carelessly, negligently, and unskilfully that by and through the carelessness, negligence, and fault of said defendant and its servants, it provided, used, and suffered to be used an insufficient, defective, and unsafe switch, frogs, and connecting appliances on said switch leading from its main line on Eleventh street North near the intersection of Third avenue North in said city of Fargo, into the defendant's car barn.

The bill of particulars furnished the defendant by the plaintiff, and which is a part of the complaint, is as follows:

"Pursuant to demand by defendant for a bill of particulars served upon plaintiff on December 31, 1915, demanding that said allegations in paragraph 4 of plaintiff's complaint be made more definite and certain, said allegations reading as follows: 'That at all times hereinabove mentioned the said defendant conducted itself so carelessly, negligently, and unskilfully that by and through the carelessness, negligence, and default of said defendant and its servants it provided, used, and suffered to be used an unsafe, defective, and insufficient roadbed, unsafe, defective, and insufficient switches, frogs, and connecting appliances at its said switch leading from its main line on Eleventh street North near the intersection of Third avenue North in said city of Fargo, into said car barn, all of which it had notice, but the said defects and the dangers attendant thereupon were unknown to the said plaintiff,' we respectfully submit the following:

"1st. That the roadbed was unsafe, defective, and insufficient in this,—that the defendant's track at said point was not properly laid, or, if in the first instance said rails were properly laid, they had become through use and wear and tear unsafe to the knowledge of defendant; that said rails and joints were loose and insecure to such an extent that the weight of defendant's car in passing over the same would cause said rails to depress and sink and become springy and unlevel;

and were not laid upon a proper foundation; that said defendant's roadbed was otherwise unsafe, defective, and insufficient.

"2d. That the switches, frogs, and connecting appliances at said switch, as alleged in the complaint herein, were unsafe, defective, and insufficient in this,—that the same had become worn, broken, and unsafe for use; that they were not modern appliances used for such purposes; that said switches, frogs, and appliances were not equipped with springs to make them safe and secure for traffic; that for defendant's convenience and through the negligence of the defendant, the said defendant used or caused to be used in connection with said switches, frogs, or appliances a common piece of gas pipe which was loosely inserted between the rails for the purpose of holding said switches, frogs, appliances in place; that the cars in passing over said switches by reason of their weight and otherwise crushed and flattened said gas pipe, and caused the same to slip out of place and throw said switch an improper time while defendant's car was passing thereover; that said switches, frogs, and connecting appliances were otherwise unsafe, defective, and insufficient.

"3d. That the plaintiff by furnishing this bill of particulars in no manner waives any of his rights under his complaint herein, but expressly reserves all rights thereunder, and as a part hereof the plaintiff does hereby refer to and make a part hereof his complaint herein, in no manner limiting the scope thereof, and does hereby further except to the right of the defendant to the bill of particulars as demanded."

The plaintiff alleges that he has suffered great and permanent injuries external and internal, and great mental and physical pain and distress, and is prevented from attending to his duties as aforesaid, and alleges that he has spent large sums of money for medical attendance and nursing, and has lost all the wages he otherwise would have earned, and will continue to be subject to all the foregoing, all to his damage in the sum of $25,000.

Defendant by way of answer sets up a general denial to the allegations of the complaint and bill of particulars, admitting only that it is a corporation operating street cars propelled by electricity at the point mentioned in the complaint and other places in the city of Fargo. The answer further contains allegations by way of defense, setting forth the alleged contributory negligence of the plaintiff, the carelessness and

negligence of the fellow servant or servants of plaintiff, and that the plaintiff knew the nature, character, and condition of said switch and appliances referred to in said complaint and bill of particulars, the manner in which the same was operated, the dangers incident to the operation of street cars over and upon such switch and appliances, and assumed all such dangers; and that injuries and damages resulting from the operation of street cars were assumed by plaintiff as incident of employment as conductor for defendant.

The material facts in the case are in substance as follows: Plaintiff brought this action against the defendant to recover for personal injuries. The plaintiff was employed by the defendant as a street railway conductor, and his duties were to assist in the operating of street cars in the capacity of a conductor. While plaintiff was engaged in the operating of such street car in the capacity of conductor, and riding in the rear vestibule of the car as it approached the switch in question, and partially passed thereover, the front wheels of the car passed over the switch and continued on the main track, but when the rear wheels were about to pass over such switch the car left the track and the plaintiff was thrown from such car to the ground. The case was tried in the district court before Honorable Charles A. Pollock, Judge, and a jury. At the close of the testimony the court, upon the motion of the defendant, directed the jury to return a verdict for the defendant and against the plaintiff, principally on the alleged ground and theory that the motorman, who also assisted in the operation of such car, and the conductor of such car, the plaintiff herein, were fellow servants, and that it was negligence of the motorman which was the proximate cause of the injury, and on the theory that the plaintiff was a fellow servant of the motorman. The defendant contends for that reason it was not liable for any injuries resulting to the plaintiff by reason of the negligence, if any, of the motorman.

The case is one of much importance, necessitating not only the analysis of the law concerning fellow servants, contributory negligence, assumption of risk by the servant, the negligence of the motorman, and the negligence of the defendant, but also the analysis of court machinery, in order to determine what are the provincial rights, duties, and privileges of the court, and what are the provincial rights, duties, and privileges of the jury, in cases involving matters of both law and fact.

The principle that one servant is a fellow servant of another servant, and as such assumed all risk of injury which might result from the negligence of such fellow servant, in its inception, had its origin in the mind of a judge in England, Lord Abinger, who tried a trivial suit for damages of one Priestly, a servant, against one Fowler, the master, who was a butcher, the facts of which were as follows: The defendant, Fowler, desired the servant to go with certain goods of the defendant in a van belonging to the defendant, which was operated by another servant of the defendant. The plaintiff went. The van, being overloaded, broke down, and plaintiff was thrown off and his thigh broken. The court held in that case that the master was not liable to the injured servant, on the theory that to do so would imply an obligation on the part of the master to take more care of the servant than the servant might reasonably be expected to exercise in his own behalf; and for the further reason that to allow the servant to omit diligence and caution on behalf of the master to protect him from the misconduct or negligence of others who served him, and which diligence and caution, while they protect the master, are better security against injury which the servant sustains by the negligence of others engaged under the same master than any recourse against the master for damages could possibly afford; and out of this small case originated the principle that where a servant is injured without negligence on his own part no recovery can be had against the master, where the negligence which caused the injury was that of another servant in the same line of employment, or, in other words, a fellow servant. Prior to the time of this case the rule had evidently been different. A similar question did not arise in England until 1850, the Priestly v. Fowler Case having come up in 1837, 3 Mees. & W. 1, 150 Eng. Reprint, 1030, Murph. & H. 305, 7 L. J. Exch. N. S. 42, 1 Jur. 987, 19 Eng. Rul. Cas. 102. In the year 1850, in the case of Hutchinson v. York, N. & D. R. Co. 5 Exch. 343, 155 Eng. Reprint, 150, 6 Eng. Ry. & C. Cas. 580, 19 L. J. Exch. N. S. 296, the rule was first directly applied to railway companies. The question in this case was whether the defendants were liable for injury to one of their servants by collision while traveling in one of the carriages in the discharge of his duties as their servant, and it was held that there was no liability. The theory of the principle thus enunciated is, if the servant when so injured by negligence

of a fellow servant is allowed to recover against the master, it will make such servant less careful of his own safety; in other words, it would tend to make him negligent. Such cases laid down the principle that if the servant could not recover against the master for injuries occasioned by the negligence of a fellow servant, he would not only exercise more care in his own behalf, but that he would also exercise a superintending care and observation over the conduct and actions of the fellow servant. The same principle was also brought into existence in America by the decision of Murray v. South Carolina R. Co. 1 McMull. L. 385, 36 Am. Dec. 268, decided by the South Carolina court of errors in 1841. Another case which may be said to have been adopted as the leading exposition of this principle of law in the United States is Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407, the opinion of which court was written by Chief Justice Shaw, in which opinion the court said that where a railway company employed a switch tender who was careful and trusty in his general character, and, after he had been long in their service, employed an engineer who knew the character of the switch tender, the company was not answerable to the engineer for an injury received by him in consequence of the carelessness of the switch tender in the management of the switches. This case formally established the doctrine in the United States, so far as the common law was concerned, of the nonliability of the master for an injury to a servant which resulted from the negligence of a fellow servant. The reasoning which was contained in such decision was rapidly adopted by other masters who were large employers of labor or servants, and such reasoning became rapidly a part of their defense where it was possible to interpose it in order to avoid liability for any injury to a servant by reason of the negligence or apparent negligence of a fellow servant. The rule established in such case grew very rapidly and was subsequently applied in thousands of other cases. It is a rule which came into existence without the authority of any parliament or legislature, but had its origin and inception wholly and entirely within the mind of the court. It has never been contended that such rule was based upon justice, but instead thereof the same has been based upon policy and convenience. The result has been that the rights of the servant have been weighed, so to speak, in the scales of policy and convenience, and not

in the scales of justice. It was a policy and convenience that benefited and protected others, and not the servant. The principle of which we have spoken held the servant accountable and responsible for the negligent acts of his fellow servant, and imputed all such negligence to the fellow servant, and not to the master; and as we have stated before, upon the principle, or, more accurately speaking, the fiction,—that by doing so the servant would exercise more care concerning his own conduct and also exercise a superintending care over his fellow servant's acts. So universally did this court-made law permeate the jurisprudence of the various states that it became very difficult for a servant who received injury in the course of his employment while associated with other employees to recover damages for any injury which he might sustain while in such employ, for the reason that his injuries were always attributed to the negligence of some co-employee engaged in the same line of work for the same master.

In order to protect the employee from the rigidity of such rule which had been carried to a great extent, different states of the Union found it necessary to enact legislation dealing with this subject, all of which is similar to, or of the same nature and effect as, our § 4804 of the Compiled Laws of 1913, which is as follows: "Every common carrier shall be liable to any of its employees, or in case of the death of an employee, to his personal representative for the benefit of his widow, children or next of kin, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works."

The defendant claims that said section is unconstitutional, being in conflict with the 14th Amendment to the Constitution of the United States, which is as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws."

We are clear that § 4804 in no way violates the 14th Amendment to the Constitution of the United States. Such section is a law which the legislature of this state had full authority to enact and prescribe. As we have seen, many of the various states of the Union have a law similar in nature and effect to our § 4804, among which may be

mentioned Kansas and Iowa. The law of Kansas relating to the same subject-matter came before the Supreme Court of the United States for construction in the case of Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161. In such case it was held that a law of the nature of the one under consideration in no manner contravened the provisions of the 14th Amendment to the Constitution of the United States. The Supreme Court of the United States in its analysis of the law of Kansas of 1874 uses the following language: "The only question for our examination as the law of 1874 is presented to us in this case [the Kansas law of 1874] is whether it is in conflict with clauses of the 14th Amendment. The supposed hardship and injustice consist in imputing liability to the company where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. Whatever care and protection may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine, and fixes a like liability upon railroad companies where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt."

The statute of Iowa on the same subject is of the same nature as the one in Kansas. It was upheld by the supreme court of the state of Iowa, and an appeal was taken from the judgment of the Iowa supreme court to the Supreme Court of the United States, and the Supreme Court of the United States affirmed the judgment upon the same principle that such law in no manner conflicted with the 14th Amendment to the Constitution of the United States. The title of the case was Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176. It would appear to be conclusively decided, therefore, that laws of the nature of those we are considering which are passed by the various legislatures are con-

stitutional, and in no manner contravene the provisions of the 14th Amendment to the Constitution of the United States. Section 4804, Compiled Laws of 1913, we hold to be constitutional and in no manner repugnant to nor contravening any of the provisions of the 14th Amendment to the Constitution of the United States. Such section of our law abrogates the common law as to fellow servants, and fixes the liability of the master to the employee for any injury to him caused by the negligence of any of the officers, agents, or employees of the master, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, way, or works; and if the death of the employee ensues by reason of such injury a right of action for such liability of the master for such injury survives for the benefit of the widow, children, or next of kin.

In connection with the law of fellow servant, we may also refer to our statute upon contributory negligence, one of the defenses in this action being contributory negligence. Section 4805, Compiled Laws of 1913, is as follows: "In all actions hereinafter brought against any common carrier to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury."

The law as expressed in such section to some extent relieves from evils which have resulted from the doctrine of contributory negligence. The doctrine of contributory negligence is not grounded in common sense, and is really in conflict with the laws of human nature. A person in normal condition and being of sound mind, that is, having the power to distinguish between right and wrong, and having the power to know that which will benefit his body and that which will injure it,—would not voluntarily place his body in a place where it could be injured. If, for instance, an employee engaged in assisting in the operation of a saw in and about a sawmill should, while performing his duties, have his arm severed from his body, it can hardly be said that he would willingly or voluntarily do any act which would

bring about such pain, suffering, and disfigurement to his person. It is also difficult to believe that one having knowledge of such danger, or who had any appreciable amount of reason to apprehend such danger, would not use at least ordinary care to safeguard his body, and avoid the sufferings resultant from such injury, and the humiliation of the disfigurement of his body, and the inconvenience resulting therefrom. It is contrary to the principles of human nature to believe that any person in any employment would be injured and maimed if he could himself, by the exercise of ordinary care, prevent it.

What is a true measure of ordinary care which should be exercised by a servant under a given state of circumstances is a question fraught with great difficulty. Different persons possess very different qualities of mind. One person's mind in case of danger may be clear, his decision as to what is best to do in a moment of extreme danger may be instantaneous, and he may act with great promptitude. Another person under the same circumstances may possess a mind slow to act, and may be subject to indecision and inability to decide in a moment or a short space of time what is proper and safe to do, and the best and safest manner in which to act in order to protect himself. One person may be of an observing turn of mind; hardly anything can transpire within his range of vision which he does not observe and make mental note of. Another may lack this quality almost entirely. One person may be of a cautious character and almost continually apprehensive of danger, while another may be largely deficient in this quality; and so we might proceed to point out many other qualities which exist in different degrees in different individuals, and that which would be a standard for ordinary care in one class would hardly answer the same purpose in another class. If a servant in the discharge of his duties in which he is injured can at all be said to be guilty of contributory negligence in view of the natural law that each will strive to protect his body against injury resulting in pain, disfigurement, and lack of future full enjoyment of the use of the different members of the body, such as the arms and the limbs, and the great inconvenience which ensues from the loss of any such members, it can certainly be said to be only slight contributory negligence, or the failure to use ordinary care to the best ability of the servant injured, to a slight degree, so we think that possibly the legislature had some of these

principles in mind when it passed § 4805, Compiled Laws of 1913, which we have quoted in full, wherein the legislature enacted what may be termed the law of comparative negligence, and provided that all questions of negligence and contributory negligence shall be for the jury. In the case at bar there was a question of negligence and contributory negligence upon which there was conflicting testimony. There was testimony also in regard to the condition of the switch at which the injury occurred, as to whether the switch was properly blocked, and as to the construction of the switch and its condition, as to whether it was worn, broken, or not in proper condition for use. In other words, the condition of the switch was one of the questions in dispute concerning which there was testimony as to whether it was in the proper condition, or as to whether or not the blocking of the switch was necessary to its operation and use in a reasonably safe manner, and from the testimony concerning such switch reasonable minds might draw different conclusions. We think, therefore, whether or not the switch was in proper condition, was a question of fact for the jury. Whether the defendant was negligent in not furnishing safe appliances in the way of a proper switch was a question for the jury. Whether the switch was properly blocked, whether the same was worn or in improper condition, and whether the different parts of the switch were in proper condition, and whether an iron plug used in such switch, being an iron pipe, was more dangerous than a wooden plug, were all questions under the testimony for the jury.

Another question which the defendant has raised is that it claims not to be a common carrier. Common carriers are such as are defined by § 6235, Compiled Laws of 1913. Such section is as follows: "Everyone who offers to the public to carry persons, property, or merchandise is a common carrier of whatever it thus offers to carry." The defendant is a street railway company of the city of Fargo, operating its lines of street railways upon the streets of the city of Fargo, and extending them from Fargo to the city of Moorhead in the state of Minnesota, and its principal business is conveying passengers from point to point upon its lines for hire. Such street railway company is therefore a common carrier. See Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827, 4 Am. Neg. Cas. 220; Watson v. St. Paul City R. Co. 42 Minn. 46, 43 N. W. 904. In the case of Watson v.

St. Paul City R. Co., the supreme court of the state of Minnesota used the following language: "The defendant is a carrier of passengers, and as respects the construction and condition of its track and roadbed, as well as its cars and their management, the extreme rule as stated by the court is applicable generally as in the case of other carriers." In the case of Spellman v. Lincoln Rapid Transit Co. 36 Neb. 890, 20 L.R.A. 316, 38 Am. St. Rep. 753, 55 N. W. 270, 9 Am. Neg. Cas. 538, it was held that street railway companies are common carriers of passengers for hire, and that their liability was the same as of other common carriers upon common-law principles. The defendant claims that it is not a common carrier, contending that such name applies more exclusively to railroads proper, the cars on which are drawn by engines, the energy for which is supplied by steam. What motor power is used in the operation of a railway is not the test. It is possible to operate street railways with motor power other than electricity, and it is possible, and in the future may become the custom, to operate railroads by electricity. What motor power is used is immaterial. The main proposition is, What is the character of the employment in which they are engaged? If a railroad company or a street railway, whether operated by steam or electricity, are engaged in transporting persons from place to place or from point to point on their lines, and charge such persons for such transportation, they and each of them are common carriers for hire. In the absence of statutes circumscribing their powers, street railways may carry property and freight as well as passengers. State v. Dayton Traction Co. 18 Ohio C. C. 490, 10 Ohio C. D. 212. We think there is no doubt but the defendant in this case is a common carrier within the meaning of our statutes and the decisions of courts of other states. Section 4804, Compiled Laws of 1913, is constitutional, and the defendant, being a common carrier, is bound by its provisions. Whoever is a common carrier, it would seem, would be bound by the provisions of § 4804.

In the case of Gunn v. Minneapolis, St. P. & S. Ste. M. R. Co. 34 N. D. 418, 158 N. W. 1004, this court in an exhaustive opinion held that § 4804 was constitutional on the ground that the character of the work performed by Gunn belonged to an extrahazardous class, and was connected with the physical operation of the railroad. Considering the occupation of a conductor of a street car, we conclude that the

character of the employment is sufficiently hazardous to bring it within the meaning of a hazardous employment.

There is still another theory which would permit the plaintiff to maintain this action, and that is that § 4804 is not limited to railroads or other corporations, but includes all common carriers. This language of the statute would seem not only to include all kinds of railroads, including street railways, but also any other common carrier who undertook to convey persons or property from place to place for hire. The statute itself nowhere says it shall be limited to railroads or extrahazardous occupations in connection with the operation of railroads, but its language includes *common carriers,* without any specified degree of the hazard of the occupation or duties performed by the employees for such common carriers. The language of the section is exceedingly plain, and would seem to be susceptible of but one construction; that is, that it applies to all common carriers. It was within the discretion of the legislature to pass such a law, and the United States Supreme Court in the case of Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, quoting the opinion of the lower court, said: "It is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage-coaches, and to persons and corporations using steam in manufactories." See also Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Pierce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693; State v. Northern P. R. Co. 36 Mont. 582, 15 L.R.A.(N.S.) 134, 93 Pac. 945, 13 Ann. Cas. 144; Honorable Isaac F. Redfield, chief justice of the Vermont supreme court, in the case of Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625, said: "The police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state." And in the same case he says: "There is also the general police power of the state by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which no question ever was,

or, upon acknowledged general principles, ever can be, made so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm that the right to do the same in regard to railways should be made a serious question." It would seem, therefore, that under all the authority we have examined, the legislature had full authority to pass such a law as § 4804, providing for the abolition of the fellow-servant rule, not only as to railroads, but as to all those persons or corporations which come within the definition of a common carrier as defined by our statute. The legislature had the discretion and power to enact the law in question, and it should be construed by the courts to mean what its plain and simple terms set forth and indicate. The legislature did not enact the law for a particular common carrier or for two or three common carriers as identified by the character and nature of the employment, but the law says *every common carrier*. This can mean nothing else excepting all common carriers as defined by statute.

Section 4804 is not unconstitutional as being in conflict with § 11 of our Constitution, which provides that "all laws of a general nature shall have a uniform operation." Such law is uniform in its operation as to the class, persons, or corporations affected; neither is such law unconstitutional as being contrary to § 20 of the Constitution of North Dakota.

The court below, in laying its foundation as a basis for its authority in directing a verdict in favor of the defendant, endeavored to incorporate therein the philosophy of certain mechanical laws. The court, however, in its effort to apply mechanical laws, signally failed for reasons which we will endeavor to point out. The court below made use of the following language: "Mr. Swanson testified they were going 3 miles an hour when the accident happened. There is other testimony really showing that he was going from 8 to 10 miles an hour by those who were present to see. That would be a question of dispute. Now, gentlemen, to determine upon this motion I must consider that this car was going at the rate of 3 miles an hour, not to exceed 4. Now, we are up against a few laws of mechanics here. Three miles an hour a man walks, as you are walking, practically 3 miles an hour. The average man walking will walk 3 miles an hour. If this car was going 3 miles an hour it would be going only as fast as the ordinary man

walks, and yet, with the car going only as fast as a man will walk—only as fast as a man walks—it will plunge ahead—the testimony differs on that, but suppose we say 8 feet—I think there is some testimony here that it plunged ahead and made a record as one witness said, but take the least. Now, gentlemen, we know as a matter of just plain sense,—that is all there is to it, just simple plain sense,—that if the car was going 3 miles an hour as it was going over this switch, and something had happened so that the rear wheels had run off the switch, or in other words, if the car jackknifed, the car would probably stop right where it was. There would not be enough force in the speed to have thrown it ahead as the testimony without question shows that it was. If that be true, who is responsible for this accident? Who was the cause of this accident? Swanson, and not the railroad company. Swanson is concededly a coemployee."

We see, therefore, that the court justified its position in the first instance by invoking the application or philosophy of the laws of mechanics, but later in the statement from which we quoted the court seemed to have lost sight of the laws of mechanics, and instead thereof applied or substituted therefor "just simple plain sense;" and basing his analysis, not upon mechanical laws, but on the rule of plain sense, the court finds, "If the rear wheels had run off the switch, or, in other words, if the car jackknifed, the car would probably stop right where it was."

It is quite evident that the court could in this case have reached no conclusion which could be based upon the application of mechanical laws. Mechanical laws are certain in their operation. Laws of mechanics are not based upon uncertainties. Before an application of the laws of mechanics can be made, the *fundamental quantities* must be known, or at least some of them must be known from which others may be determined. For instance, to determine the momentum which the car in question possessed, it would be absolutely necessary to know the weight of the car and the velocity which it traveled, for momentum is the product of the weight or mass and the velocity. In this case neither the weight of the car nor the velocity which it traveled were known. Consequently, two of the fundamental quantities were lacking with which to proceed to arrive at a mechanical truth or to demonstrate a mechanical fact or law. Nothing is known as a fact in this case about

the distance the car traveled, nor the time in which the car traveled such distance. Hence, there is no way to find the velocity of the car, for velocity is equal to distance divided by time. Neither do we know whether the velocity was linear or angular, nor do we know whether or not there was any acceleration; and if we knew for certain some or all the fundamental quantities, we might still be under the necessity of taking into account the composition or resolution of forces to arrive at a mechanical truth. All these fundamental quantities necessary for the purpose of determining a mechanical truth or demonstrating a mechanical law are lacking. They are unknown or uncertain. Therefore no application of mechanical laws worthy of the name can be made in this case. If the law of plain sense is a proper law by which to determine as near as may be all the disputed questions in the case, such as the rate of speed and velocity of the car, the distance it traveled after it left the switch, the resistance with which it was met when it touched the ground, they were all questions of disputed fact which it was the province of the jury to determine as best they could, considering all the circumstances and conditions which were submitted to them by the testimony of the witnesses.

The trial court directed the verdict for the defendant and against the plaintiff in this case. In other words, the trial court did not submit the questions of fact to the jury. The court is the medium or instrument through which litigants seek to have their rights, whether personal or property, litigated. The district court is the court to which litigants apply for the purpose of trying the issues of both law and fact. Such a court is composed of a judge and jury. It takes both a judge and a jury to make up such a court. The judge alone is not the court; the jury alone is not the court; both together constitute the court. The powers and duties of the judge and jury of such court are entirely separate and distinct. It is the exclusive duty of the judge to interpret the law of the case. It is the exclusive duty of the jury to pass judgment upon the facts of the case. The judge cannot invade the province of the jury. The right to a trial by jury is preserved to litigants in actions at law by the Federal and our state Constitutions, and in an action at law where the amount corresponds with that specified in the Constitutions as a minimum for which a trial by jury may be had, it is the right of the litigants under the Constitution to have a trial by jury,

and it is not the privilege of the judge who is presiding in such court to extend the right of trial by jury. Wherever there are disputed questions of fact from which men of ordinary intelligence might draw different conclusions, the findings upon such facts are for the jury, and the court cannot rightfully interfere with the prerogative of the jury nor the rights of the litigants in such case. It is just as presumptuous for the jury in such case to invade the province of the judge, and seek to pronounce the law of the case, as it is for the judge to invade the province of the jury and seek to pass judgment upon the facts of the case. The facts when disputed are exclusively for the jury. The important principle involved is that a judge is only part of the court, and such judge has certain well-defined duties to perform. The jury is the other important part of such court, and both together constitute the court for the purpose of trying issues of law and fact; and in such case the judge may not invade the province of the jury as defined by the Constitution, both Federal and state. It was one of the very wisest provisions made at the inception of our government to provide for the right of trial by jury. Much reflection and criticism have at times been made of the jury system, but it is difficult to imagine how a better system could have been devised or a better principle evolved than that, where one is a litigant, the questions of fact involved in the case should be decided by the judgment of twelve true and tried men, each of whom is a peer of the litigants, and each under solemn oath to well and truly try the issues involved and a true verdict return. Such a jury, we believe, drawn as it is from every walk and station of life, composed of men who have experience in various avocations and callings of life, composed of men drawn from the factory, the farm, the commercial world, the business world in general, from the ranks of labor, from the rich and poor, the well to do class, or any of the other and many different occupations or classes, are better fitted and better qualified by reason of the various experiences and sources of knowledge, and by reason of the variety of knowledge and experience which is thus secured upon a jury, to decide questions of fact so presented to it, than is a judge of the court who, like other individuals engaged in a professional career, whose knowledge of the callings, occupations, and activities in which persons are engaged may be no broader or more extensive than any of the individual jurors who are selected to try a given case. One

becomes a judge, as a rule, after having practised the profession of an attorney at law for many years. Prior to becoming an attorney he put in several years in some law school. Prior to that he spent many years in his preliminary education, and in pursuing his studies, has had little time or occasion to acquire the vast fundamental knowledge of the ordinary occupations and activities of life. The judge having thus been educated, and spent his time in pursuing and acquiring an education, cannot be said to be a better judge of fact which arises out of the many occupations and activities of life than men who are drawn directly from those occupations and activities. It is true that juries frequently disagree, but that is but evidence of their intelligence and keen analysis of questions of fact. They at times also arrive at results by their verdict which are looked upon with disfavor, but it is very questionable whether if twelve lawyers or twelve judges were selected upon the jury they would on the whole agree any better or arrive at more just results than do our juries, as now constituted, which are drawn from every walk of life. Lawyers and judges do not agree upon the law. There are thousands of questions presented to the highest courts in different states upon which such courts do not agree. The decisions of one court are often diametrically opposed to those of another court. The supreme tribunals of justice of each state quite frequently differ from each other upon well-known principles of law. The supreme court of a given state or of the United States will very frequently divide among themselves in their opinion as to what is the law of a given case. How, then, can it be assumed that in any sense they would be any better judges of the fact than a jury as provided by the Constitution.

In the case at bar the trial court directed a verdict for the defendant against the plaintiff in the case, notwithstanding there was a conflict of testimony concerning material facts. For instance, there was testimony showing that the car in question was going 3 miles an hour, and other testimony showing that the car was going from 8 to 10 miles an hour. How fast the car really was going was one of the questions of fact to be proved. There was a conflict of testimony as to the speed of the car. The speed of the car was a material fact to be proved in the case, as it went to the question of contributory negligence. That such disputed question of fact was not submitted to the

jury was prejudicial and reversible error. Whether the car at the time of the injury was thrown ahead 8 feet, 19 feet, or no feet, was a question of fact to be determined by the jury under all the testimony. The credibility of the witness is for the jury. The question of negligence or contributory negligence is one for the jury. All the disputed questions of fact in the case were for the jury. There were disputed questions of fact in this case upon which reasonable minds might differ and from which they might draw different conclusions. All such facts in the case should have been submitted to the jury. The trial court erred in directing a verdict for the defendant and against the plaintiff. The judgment of the trial court is reversed and a new trial granted, with the costs to plaintiff.

BRUCE, Ch. J., and BIRDZELL, J. I concur in the result and in the syllabus.

CHRISTIANSON, J. (concurring specially). I concur in a reversal of the judgment and in the principles of law announced in the syllabus. I agree with Mr. Justice Grace that § 4804, Comp. Laws 1913, does not violate the 14th Amendment to the Constitution of the United States, nor has it been shown that it violates any other constitutional provision, either state or Federal. I also agree that the defendant is a common carrier and within the provisions of this section, and that the plaintiff was engaged in work of such character as to bring him within the statute. I am also of the opinion that under §§ 4804 and 4805, Comp. Laws 1913, the questions of negligence and contributory negligence were in this case for the jury. I express no opinion upon the other matters discussed in the majority opinion.

ROBINSON, J. (concurring specially). The plaintiff brings this action to recover damages against the defendant by reason of its alleged negligence and failure to construct and keep in proper condition a circular switch joining the two lines of street railway on which the plaintiff was employed as a conductor. It is said that by reason of some defect in the circular switching, or by reason of plaintiff running the car too fast, it ran off the track and he was injured.

The action is based on chap. 203, Laws 1907,—the Fellow-Servant

Act. Its title is: "An Act Relating to the Liability of Common Carriers to Their Employees." It provides:

"Sec. 1. Every common carrier shall be liable to any of its employees . . . for all damages which may result from the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

"Sec. 2. In all actions . . . against any common carrier to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury."

Clearly the case involved the question of negligence and contributory negligence, which by the plain words of the statute was for the jury, and not for the court. Judgment reversed.

STATE OF NORTH DAKOTA EX REL. F. E. McCURDY, State's Attorney within and for Burleigh County, North Dakota, v. ANNIE BENNETT and John H. Bennett.

(L.R.A.—, —, 163 N. W. 1063.)

Personal property — destruction of — when used and kept in bawdyhouse — statutory enactment authorizing — absence of — court has no inherent power to order — court may take possession of and close such house — costs and expenses properly incurred — may charge up against.

1. In the absence of legislative enactment authorizing the destruction of personal property which is kept and used in connection with the operation and maintenance of a bawdyhouse. The court has no inherent authority to order

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Note.—On right of state to confiscate property found in bawdyhouse, see note in 52 L.R.A. (N.S.) 932.

On validity of statute or ordinance against bawdyhouses, see note in L.R.A.1917B, 1078.

the destruction of such property, and has no authority to order the destruction of any property connected with the operation of a bawdyhouse. The court has the authority, under the present law defining bawdyhouses, prescribing what may be done with such houses and personal property therein, to take possession of, close, and keep closed for the term of one year any house or building in which such bawdyhouse is conducted; and has authority also to take possession of all personal property found therein or on such premises, and place it in the possession, by its order, of a sheriff or some person appointed by the court, to remain in such possession for the term of one year; and has also the right and authority to charge up as costs in such case the expense of caring for all such property during such time the same is in the possession or control of such persons as are authorized by law to take charge of property, such as sheriffs or other persons appointed by the court.

Injunction — application for — affidavits for — present existence of nuisance — failure to allege — court still has jurisdiction — where complaint does so state — injunctional order — based on both complaint and affidavits.

2. Where the affidavits in support of an application for injunction refer to the nuisance as having existed, rather than existing, the court is not without jurisdiction, notwithstanding that the affidavits do not allege the present existence of the nuisance at the time of the commencement of the action, where the complaint in the action does allege that the nuisance is existing at the time of the commencement of the action and the injunctional order is based upon both the complaint and the affidavits.

Opinion filed July 14, 1917.

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

Modified.

Wm. Langer, Attorney General, and *F. E. McCurdy,* State's Attorney, for plaintiff and respondent.

Fiske, Murphy, & Linde and *Sullivan & Sullivan,* for appellants.

The proof is insufficient, as a matter of law, to confer jurisdiction upon the court when there is no showing that any nuisance ever existed, or that it was transpiring and being carried on at the time of the beginning of the action. Comp. Laws 1913, §§ 9644 to 9651.

In cases against bawdyhouses, or to enjoin the maintenance of such a nuisance, the court has no power under our statute to order the destruction of personal property found in such place. Nor has the court any inherent power to so order. State ex rel. Robertson v. New

England Furniture Co. (State ex rel. Robertson v. Lane), 126 Minn. 78, 52 L.R.A.(N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549.
(No brief by State.)

GRACE, J. The complaint states a cause of action for the discontinuance of a common nuisance, to wit, a bawdyhouse, alleged to have been maintained at the time of the commencement of the action and prior thereto at the place described in the complaint. As proof of the maintaining of the nuisance, the affidavit of the state's attorney, on information and belief, and the affidavit of F. L. Watkins, upon his own knowledge, were made in support of the injunctional proceedings. The answer was a general denial. The affidavits also constitute the evidence in the case, by stipulation.

The first point raised by the appellants is that the affidavits, which by stipulation constitute the proof in the action, were insufficient as a matter of law to confer upon the court jurisdiction, in that they do not show or furnish any proof that any nuisance ever existed, or that it was transpiring, existing, and being carried on at the time of the commencement of the action. The main contention of the parties in regard to this assignment of error relates to the proposition that there is no allegation or statement in the affidavits that a nuisance is in existence or was in existence at the time of the commencement of the action. In this case, however, the court, in making its injunctional order, bases its order not only on the affidavit of the state's attorney and F. L. Watkins, but also upon the verified complaint. It will be noticed that the complaint alleges that the nuisance was being maintained at the time of the commencement of the action, and this is nowhere disproved by any competent testimony, although the same is denied in the answer; but so far as determining the question of jurisdiction is concerned, the allegation in the complaint, taken together with the fact that there was positive proof of the existence of the nuisance, and these taken together with the presumption of the continuance of the nuisance, it having been shown by competent proof that it did once exist, is sufficient to give the court jurisdiction,—and we hold that the court did have jurisdiction.

As to the other assignment of error, which is that the court had no power as a matter of law under our statute to make an order destroying

the personal property found in the building in which the alleged nuisance is charged to have been maintained, it is a matter of considerable importance, and not easy of solution. The statute referring to that matter is found in Comp. Laws 1913, §§ 9644–9651, inclusive. The main section, however, is § 9644. It will be noticed by such section that the existence of such nuisance when it be established in either a criminal or equitable action, upon the judgment of a jury, court, or judge having jurisdiction, and where it is found in any such proceeding that such a place is a nuisance, the sheriff, his deputy, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place by taking possession thereof and closing the same against its use by anyone, and keep the same closed for the period of one year from the date of the judgment decreeing such place to be a common nuisance. Under this statute the court, after having found the place under consideration in this complaint to be a nuisance, ordered the house to be closed up for the period of one year, and all of the personal property therein, consisting of the list of personal property included in the judgment of the trial court, and which it is not necessary to fully describe in this opinion,—but generally such personal property consisted of pictures, a piano, clock, heating stove, chairs, tables, vases, beds and bedding, dressers, commodes, a victrola, the usual dining-room furniture, the usual kitchen furniture, and also a trunkful of cut glass (said to be worth about $500), and other furniture of like nature,—destroyed. There is no question under the statute but what the court had a right to close the house for the term of one year. The sole question, therefore, remaining is whether the court had authority, under its inherent equitable powers, to order the destruction of such property being in the house at the time of the continuance of the nuisance, and at least most of it, to some extent, susceptible of use in the continuance and conduct of such nuisance. All of the personal property is such property as could be used for a good and legitimate use, and was such personal property of which a legitimate use could be made. It is different from the dice which are used in a dice game; poker chips and gambling devices or tables or paraphernalia for which no other beneficial use could be generally found, and which would be generally useless excepting in the conduct and operation of gambling games and devices. Our

statute does not provide that such property may be destroyed. Has the court then the power, in the exercise of its function as a court of equity,—on the grounds of public policy; for the public good; the moral welfare, the moral safety of the community; and for the protection of the younger members of the community, both male and female, if the court concludes that such property is being used and persistently used to carry on and operate a nuisance,—to order its destruction? We are clear that the court has no such inherent power, and the court has such power only where conferred upon it by the legislature. The United States Supreme Court, in the case of Mugler v. Kansas, 123 U. S. 659, 31 L. ed. 210, 8 Sup. Ct. Rep. 273, has decided with what branch of the government the police power is lodged, and has determined which branch of the government has power to determine questions of police regulation so as to bind all, and has determined that the legislative branch of the government is the division of the government with which is lodged the power to determine what rules, regulations, and laws of police power shall be enacted and be operative. The United States Supreme Court in such case, speaking through Justice Harlan, uses the following language, referring to police powers: "Power to determine such questions so as to bind all must exist somewhere; else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. *Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public peace.*"

In the case of Balch v. Glenn, 85 Kan. 735, 43 L.R.A.(N.S.) 1080, 119 Pac. 67, Ann. Cas. 1913A, 406, the following is found in the syllabus: "The legislature of the state may declare that to be a nuisance which is detrimental to the health, morals, peace, or welfare of its citizens, and may confer power upon local powers or tribunals to exercise the police power of the state when in the judgment of such tribunals the conditions exist which the legislature has declared constitute such nuisance."

We think it is well settled that the power to declare what is a

nuisance and to enact or bring into existence laws, regulations, powers, and remedies to destroy such nuisance, rests primarily with the legislative branch of the government. Our legislature has declared, for instance, that places where intoxicating liquors are kept for sale, or a place to which persons resort to drink intoxicating liquors, are a nuisance, and has authorized the abatement of such nuisance and in connection therewith authorized the destruction of any liquors found upon such place. It has also declared that the keeping and maintaining of a place where gambling is carried on is a nuisance, and has authorized the discontinuance of such nuisance and the destruction of all gambling apparatus connected with such place. Our legislature has also enacted a law, being § 9644, Comp. Laws 1913, which defines bawdyhouses, and declares them to be a nuisance, and authorizes any place or house of ill fame, assignation, or prostitution, maintained as a place to which persons may resort or visit for unlawful sexual intercourse, to be abated and closed up for a period of one year, and has also authorized the officer to take possession of all personal property found on such premises, and hold the possession of such premises, and keep the same closed until final judgment is entered, or until the possession of the same shall be disposed of by an order of the court or judge upon a hearing had before it for such purpose. This is the expression of the legislature upon this subject, and confers the only power relative to such subject which the courts may exercise. In the law enacted by the legislature relating to bawdyhouses, it does not authorize the destruction of the property, and until the legislature enacts such a law the courts are without the inherent power to order the destruction of property used in the maintenance of a bawdyhouse. The court can order that all such property shall be taken possession of by a sheriff or other public officer, whether the same is real or personal property, and retained in the possession of such public officer or other person appointed by the court by its order, for the full term of one year, and may also order that the expenses of holding and caring for such property during the year to be taxed as a part of the costs in the action. This is as far as the legislature has gone, and the court is not authorized to go any farther, in view of the fact that the power to enact laws upon such subject, and to make regulations concerning the abatement of such nuisance and the disposition of the property connected with such nuisance and

what may be done to abate such nuisance, is lodged wholly and entirely with the legislature.

The case of State ex rel. Robertson v. New England Furniture Co. (State ex rel. Robertson v. Lane), 126 Minn. 78, 52 L.R.A.(N.S.) 932, 147 N. W. 951, Ann. Cas. 1915D, 549, holds that the court may order the destruction of property used in the maintenance of a bawdyhouse. The legislature of Minnesota, however, has enacted a statute directly upon this subject, authorizing the destruction of this property when so used. They do, however, in such case say that equity could have dealt with the property in any way reasonably necessary to suppress the nuisance, meaning thereby that the court of equity could have assumed any powers it saw fit to destroy the nuisance, even in the absence of a statute. We do not believe such holding is sound as applied to nuisances and property of the character here involved, in view of the fact that the power to deal with common nuisances, and to enact laws defining them and for their discontinuance and the disposition of property connected therewith and its destruction, if necessary to abate such nuisance, is lodged wholly and entirely in the legislative branch of government, as is clearly shown from the conclusion reached by the United States Supreme Court in the case referred to,—and there are many other cases to the same point and of like import.

The judgment of the District Court is reversed in so far as it orders the destruction of the property mentioned and set forth in its findings of fact and decree.

ROBINSON, J. (dissenting in part). This is an appeal from a judgment or order which is to the effect that the defendants have kept in Bismarck a bawdyhouse, and that the sheriff take possession of the house and keep it securely locked for one year, and destroy all the stoves, beds, furniture, and furnishings of the house, amounting to the value of $2,000 or $3,000. The proceeding was commenced by warrant or order signed by the judge, directing any sheriff, constable, or policeman to take possession of the house, and to lock and hold the same, with all the personal property therein.

If the judgment is valid, then the most innocent party in Bismarck may be charged with the keeping of a bawdyhouse, and at any moment

of the day or night be may be thrown out of his house and home, and have it locked up and his property destroyed. Such a procedure is unknown to the common law, and it is unknown to common sense and common reason. It leads to the destruction of civil liberty, the burning of Salem witches, and the persecution of those who do not think as we do.

In Blackstone we read that a man's house is his castle, wherein he may defy even the monarch, but, under the spell of modern reform, if some irresponsible detective, working for his dirty fee, makes affidavit, whether true or false, charging a person with the keeping of a bawdyhouse, then a party may be thrown out of his house and the house and all the property destroyed, and, as in this case, it may all be done in a summary manner and without a trial by jury.

And still the Constitution provides: The right of trial by jury shall be secured to all, and shall remain inviolate. Under constitutional law, before the courts may hang a man, or send him to state's prison, or throw him out of his house, or destroy his property, they must give him a trial by jury. The right of trial by jury is a thousand times more sacred than the right to abate forbidden houses and to destroy property. Indeed, the Constitution contains nothing to warrant the destruction of property, and it does protect property to the same extent that it protects life and liberty. It reads: All men are by nature equally free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property and reputation, and pursuing and obtaining safety and happiness. The right of trial by jury shall be secured to all, and shall remain inviolate. No person shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property without due process of law. Excessive bail shall not be required nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted.

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due process of law, and right and justice administered without sale, denial, or delay.

These are among the most sacred provisions of the Constitution. They cannot be too often repeated. It were well to commit them to memory, and to repeat them morning and evening as we do the Lord's Prayer and the Ten Commandments. The action is under chapter 59, Laws of 1911, which was house bill No. 136. At the close of the session the bill was rushed through and passed without reading or discussion, contrary to the Constitution. The act declared every bawdy-house to be a common nuisance, to abate which an action may be commenced by any person in the name of the state, and that at the commencement of such action, on an affidavit stating the offense, the judge must grant an injunction and issue a warrant commanding the officer to take possession of the house and to securely lock and hold the same to abide the final judgment. Then it is provided that a final judgment against the accused shall direct the officer to shut up and abate the place, and to keep the same securely closed for one year.

The statute contains nothing to warrant the destruction of personal property, and, if it did, it would be clearly void, and it is void in declaring a house to be a public nuisance when in fact it may not be a nuisance. A house may be a public nuisance when it overhangs the street, or when it becomes a worthless firetrap and a menace to the city; but shall we say that the McKenzie hotel is a common nuisance, and that it should be closed for one year, by reason of the fact that to some extent it is or may be used, as all hotels are used, for gambling, drinking, and forbidden love? Shall we say that the grass and parks are nuisances to be destroyed because of use in that way? Shall we say that, on mere affidavits and without trial by jury, any party may be turned out of his house and deprived of his liberty and property? Even Shylock disdained to beg for life without his property. He said: You take my life when you do take the means whereby I live.

There is nothing in the record to show that the house in question is a nuisance. For aught that appears from the affidavits, it may be one of the nicest and best and most secluded houses in the town. When a party offends against the law he may be punished by the law, and as provided by the law, but not by destroying his property or dispossessing him of lands or houses or home. The act in question is void. The judgment is void, and it should be reversed.

JOSEPH MANN, Administrator of the Estate of Melissa C. Prouty, Deceased, v. JOHN L. PROUTY.

(164 N. W. 139.)

Contracts — warranty deed — action to cancel — grantor fatally ill — capacity to transact business — lower court — findings and judgment — evidence — sustained by.

In an action brought to set aside and cancel a deed executed by one, an aged person, who at the time of the execution thereof was fatally ill, and from which illness shortly afterwards died, and it appearing from the testimony that the grantor, the mother, had seven children, all of whom had reached maturity, and the property conveyed consisted of a half section of land which was practically all the property the grantor owned at the time of her death, and one of the main grounds alleged for the setting aside and cancelation of the deed was the undue influence of the grantee over the grantor at the time, and prior to the time, of the execution of such deed, and during the time of her illness, the judgment of the lower court rendered in the exercise of its equitable powers, decreeing that one of the quarter sections of such land should go to the grantee, and as to the other the deed should be declared void and set aside, will be sustained, where the testimony shows or tends to show an undue influence of the grantee over the grantor, and where the testimony shows that the grantee procured the drawing of such deed, and did other things in and about having the deed prepared, and the testimony of one physician shows that the grantor was incompetent and incapacitated at the time of the execution of the deed to transact business which required as much physical and mental capacity as the execution of the deed in question; and the testimony further showing that the grantor was exceedingly ill at the time of the execution of the deed and was sixty-nine years old.

Opinion filed July 19, 1917.

Appeal from the District Court of McLean County, *J. M. Hanley,* Judge.

Affirmed.

Note.—On presumption and burden of proof as to undue influence respecting gifts *inter vivos* from parent to child, see note in 35 L.R.A.(N.S.) 944.

On presumption of undue influence from unnatural testamentary disposition, see notes in 6 L.R.A.(N.S.) 202 and 22 L.R.A.(N.S.) 1024.

On avoiding deed for undue influence or mental incapacity, see note in 34 Am. St. Rep. 86.

On mental incapacity of grantor, see note in 67 Am. St. Rep. 788.

J. A. Hyland, for appellant.

The reason for allowing duress to avoid a deed is that consent, one of the essential elements, is wanting. 1 Devlin, Real Estate, ¶ 83; Bane v. Detrick, 52 Ill. 19.

The burden of proving undue influence is upon the party alleging it. 1 Devlin, Real Estate, ¶ 84; Howe v. Howe, 99 Mass. 88.

If the influence be a just exercise of power, a discreet and proper influence directed to accomplish commendable and lawful ends, it is an influence to which the law will take no exception, but rather will uphold and encourage. Davis v. Culver, 13 How. Pr. 62; Suttles v. Hay, 41 N. C. (6 Ired. Eq.) 124; Miller v. Miller, 3 Serg. & R. 267, 8 Am. Dec. 651; Allore v. Jewell, 94 U. S. 506, 24 L. ed. 260.

It must be borne in mind that suggestion and advice, addressed to judgment, and appeals to gratitude, love, and esteem, do not of themselves constitute undue influence. Delaplain v. Grubb, 44 W. Va. 612, 67 Am. St. Rep. 783, 30 S. E. 201.

To be undue, the influence must proceed from dominance and coercion, and not from sympathy and affection. Adair v. Craig, 135 Ala. 332, 33 So. 902; Sawyer v. White, 58 C. C. A. 587, 122 Fed. 223.

Family relationship of itself does not establish fiduciary relationship. Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403; Albrecht v. Hunecke, 196 Ill. 127, 63 N. E. 616; Thill v. Freiermuth, 132 Minn. 242, 156 N. W. 260; Zinkula v. Zinkula, 171 Iowa, 287, 154 N. W. 158; Pritchard v. Hutton, 187 Mich. 346, 153 N. W. 705; Lewis v. Murray, 131 Minn. 439, 155 N. W. 395.

The influence condemned means that which destroys free agency to act. Woodville v. Morrill, 130 Minn. 92, 153 N. W. 131; Pritchard v. Hutton, 187 Mich. 346, 153 N. W. 105; Comp. Laws 1913, § 5852; Ingwaldson v. Skrivseth, 7 N. D. 388, 75 N. W. 772.

Where a deed is made by a parent to a child it is absolutely necessary to show that independent advice has been taken, even though an advantage over the grantor has been gained. Carney v. Carney, 196 Pa. 34, 46 Atl. 264; Sawyer v. White, 58 C. C. A. 587, 122 Fed. 223; Whitten v. McFall, 122 Ala. 619, 26 So. 131; Latimer v. Latimer, 174 Ill. 418, 51 N. E. 548; Valter v. Blavka, 195 Ill. 610, 63 N. E. 499; Ball v. Ball, 214 Ill. 255, 73 N. E. 314.

The fact that a person is impaired physically by old age and con-

sequent loss of mental vigor is not sufficient to avoid a deed. Tate v. Holmes, 22 C. C. A. 466, 44 U. S. App. 702, 76 Fed. 664; Stringfellow v. Hanson, 25 Utah, 480, 71 Pac. 1052; Sibley v. Somers, 62 N. J. Eq. 595, 50 Atl. 321; Delaplain v. Grubb, 44 W. Va. 612, 67 Am. St. Rep. 788, 30 S. E. 20; Wright v. Jackson, 59 Wis. 569, 18 N. W. 486; or that he has severe bodily ailments (Bowdoin College v. Merritt, 75 Fed. 480; Swank v. Swank, 37 Or. 439, 61 Pac. 846).

The presumption is that the grantor was sane and competent to execute the deed. Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383; West v. Douglas, 145 Ill. 164, 34 N. E. 141; Mallow v. Walker, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; Paulus v. Reed, 121 Iowa, 224, 96 N. W. 757; Sears v. Vaughan, 230 Ill. 572, 82 N. E. 881; Altig v. Altig, 137 Iowa, 420, 114 N. W. 1056; Kime v. Addlesperger, 24 Ohio C. C. 397; Clarke v. Hartt, 56 Fla. 775, 47 So. 819.

Where there is no evidence of fraud committed, or of undue influence or advantage taken of the grantor's weakness, such weakness, unless it is to such a degree that it may be termed imbecility, will not invalidate the deed; and where the evidence is fairly evenly divided upon this question, the deed will not be set aside. Marmon v. Marmon, 47 Iowa, 121; Trimbo v. Trimbo, 47 Minn. 389, 50 N. W. 350; Argo v. Coffin, 142 Ill. 368, 34 Am. St. Rep. 86, 32 N. E. 679; Onstott v. Edel, 232 Ill. 201, 83 N. E. 806, 13 Ann. Cas. 28.

It is not evidence of unsoundness that a father conveyed the most of his real property to his sons, to the exclusion of his daughters. McLaughlin v. McLaughlin, 241 Ill. 366, 89 N. E. 645; Slaughter v. McManigal, 138 Iowa, 643, 116 N. W. 726; Case v. Bogart, 188 Mich. 297, 154 N. W. 45; Zinkula v. Zinkula, 171 Iowa, 287, 154 N. W. 158.

A person is legally competent to execute a deed when he is capable of knowing the nature, character, and effect of it. Black v. Post, 67 W. Va. 253, 67 S. E. 1072; Johnson v. Coleman, 134 Ga. 696, 68 S. E. 480; Francis v. Preachers' Aid Soc. 149 Iowa, 158, 126 N. W. 1027; Hale v. Cole, 31 W. Va. 576, 8 S. E. 516; Ramsdell v. Ramsdell, 128 Mich. 110, 87 N. W. 81.

The courts have universally held that no presumption of undue influence, in case of conveyance *inter vivos* by parent to child, arises from the mere relationship of the parties, and that therefore the burden

is upon the attacking party to show undue influence. Skrinsrud v. Schwenn, 158 Wis. 142, 147 N. W. 370; Re Crissick, — Iowa, —, 156 N. W. 415; McLeod v. McLeod, 145 Ala. 269, 117 Am. St. Rep. 41, 40 So. 414; Bain v. Bain, 150 Ala. 453, 43 So. 562; Dolberry v. Dolberry, 153 Ala. 434, 44 So. 1018; Sanders v. Gurley, 153 Ala. 459, 44 So. 1022; Neal v. Neal, 155 Ala. 604, 47 So. 66; Stanfill v. Johnson, 159 Ala. 546, 49 So. 223; Soberanes v. Soberanes, 97 Cal. 140, 31 Pac. 910; Becker v. Schwerdtle, 6 Cal. App. 462, 92 Pac. 398; Mooney v. Mooney, 80 Conn. 446, 68 Atl. 985; Burt v. Quisenberry, 132 Ill. 385, 24 N. E. 622; Oliphant v. Liversidge, 142 Ill. 160, 30 N. E. 334; Francis v. Wilkinson, 147 Ill. 370, 35 N. E. 150; Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121; Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403; Sears v. Vaughan, 230 Ill. 572, 82 N. E. 881; Hudson v. Hudson, 237 Ill. 9, 86 N. E. 661; Fitzgerald v. Allen, 240 Ill. 80, 88 N. E. 240; McLaughlin v. McLaughlin, 241 Ill. 366, 89 N. E. 645; Kosturska v. Bartkiewictz, 241 Ill. 604, 89 N. E. 657; Tenbrook v. Brown, 17 Ind. 410; McCammack v. McCammack, 86 Ind. 387; Teegarden v. Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; Slayback v. Witt, 151 Ind. 376, 50 N. E. 389; Curtis v. Burns, 27 Ind. App. 74, 60 N. E. 963; Samson v. Samson, 67 Iowa, 253, 25 N. W. 233; Muir v. Miller, 72 Iowa, 585, 34 N. W. 429; Mallow v. Walker, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; Chidester v. Turnbull, 117 Iowa, 168, 90 N. W. 583; Burrow v. Hicks, 144 Iowa, 584, 120 N. W. 727; Bauer v. Bauer, 82 Md. 241, 33 Atl. 643; Kennedy v. McCann, 101 Md. 643, 61 Atl. 625; Russell v. Phillips, 145 Mich. 268, 108 N. W. 718; Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597; Rader v. Rader, 108 Minn. 139, 121 N. W. 393; Naeseth v. Hommedal, 109 Minn. 153, 123 N. W. 287; Burnett v. Smith, 93 Miss. 566, 47 So. 117; McKinney v. Hensley, 74 Mo. 326; Doherty v. Noble, 138 Mo. 25, 39 S. W. 458; Hatcher v. Hatcher, 139 Mo. 614, 39 S. W. 479; McKissock v. Groom, 148 Mo. 459, 50 S. W. 115; Bonsal v. Randall, 192 Mo. 525, 111 Am. St. Rep. 528, 91 S. W. 475; Jones v. Thomas, 218 Mo. 508, 117 S. W. 1177; Gibson v. Hammang, 63 Neb. 349, 88 N. W. 500; Ward v. Ward, 86 Neb. 744, 126 N. W. 305; Justice v. Justice, — N. J. Eq. —, 18 Atl. 674; Re Flagg, 27 Misc. 401, 59 N. Y. Supp. 167; Toms v. Greenwood, 30 N. Y. S. R. 478, 9 N. Y. Supp. 666; Wessell v. Lathjoln, 89

N. C. 377, 45 Am. Rep. 696; McAdams v. McAdams, 80 Ohio St. 232, 88 N. E. 542; Kime v. Addlesperger, 24 Ohio C. C. 397; Crothers v. Crothers, 149 Pa. 201, 24 Atl. 190; Yeakel v. McAtee, 156 Pa. 600, 27 Atl. 277; Simon v. Simon, 163 Pa. 292, 29 Atl. 657; Knowlson v. Fleming, 165 Pa. 10, 30 Atl. 519; Clark v. Clark, 174 Pa. 309, 34 Atl. 610, 619; Campbell v. Brown, 183 Pa. 112, 38 Atl. 516; Carney v. Carney, 196 Pa. 34, 46 Atl. 264; Kleckner v. Kleckner, 212 Pa. 515, 61 Atl. 1019; Vaughn v. Vaughn, 217 Pa. 496, 66 Atl. 745; Wendt's Estate, 14 Pa. Super. Ct. 644; Britton v. Britton, 23 Pa. Co. Ct. 89; Worrall's Appeal, 110 Pa. 349, 1 Atl. 380, 765; Travis v. Lowry, 5 Sadler (Pa.) 525, 8 Atl. 601; Saufley v. Jackson, 16 Tex. 579; Millican v. Millican, 24 Tex. 426; Chadd v. Moser, 25 Utah, 369, 71 Pac. 870; Orr v. Pennington, 93 Va. 268, 24 S. E. 928; Todd v. Sykes, 97 Va. 143, 33 S. E. 517; Burwell v. Burwell, 103 Va. 314, 49 S. E. 68; Rixey v. Rixey, 103 Va. 414, 49 S. E. 586; Jenkins v. Rhodes, 106 Va. 564, 56 S. E. 332; Teter v. Teter, 59 W. Va. 449, 53 S. E. 779; Vance v. Davis, 118 Wis. 548, 95 N. W. 939; Meyer v. Arends, 126 Wis. 603, 106 N. W. 675; Mason v. Seney, 11 Grant, Ch. (U. C.) 447; Wycott v. Hartman, 14 Grant, Ch. (U. C.) 219; Armstrong v. Armstrong, 14 Grant, Ch. (U. C.) 528; McConnell v. McConnell, 15 Grant, Ch. (U. C.) 20.

The parent, in such cases, is presumed to have been the dominant party. McLeod v. McLeod, 145 Ala. 269, 117 Am. St. Rep. 41, 40 So. 414; Dolberry v. Dolberry, 153 Ala. 434, 44 So. 1018; Sanders v. Gurley, 153 Ala. 459, 44 So. 1022; Neal v. Neal, 155 Ala. 604, 47 So. 66; McLaughlin v. McLaughlin, 241 Ill. 366, 89 N. E. 645; Mallow v. Walker, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452.

Where the parent is aged and living with the child, creates no presumption of undue influence. Bishop v. Hilliard, 227 Ill. 382, 81 N. E. 403; Bonsal v. Randall, 192 Mo. 525, 111 Am. St. Rep. 528, 91 S. W. 475; Kime v. Addlesperger, 24 Ohio C. C. 397; Chidester v. Turnbull, 117 Iowa, 168, 90 N. W. 583.

The test of whether a person has mental capacity to make a deed is whether or not he is qualified to do that particular business. Nelson v. Thompson, 16 N. D. 295, 112 N. W. 1058.

Newton, Dullam, & Young, and *J. T. Hoge,* for respondent.

In charges of undue influence, courts should be liberal in admitting

evidence of all circumstances, even though slight, which might tend, in conjunction with other circumstances, to throw light upon the relation of the parties and upon the disputed question of undue influence. Clough v. Clough, 10 Colo. App. 443, 51 Pac. 513; Re Shell, 28 Colo. 167, 53 L.R.A. 387, 89 Am. St. Rep. 181, 63 Pac. 413.

The age and physical condition of the grantor are properly to be considered. Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75; Semper v. Englehart, 140 Iowa, 286, 118 N. W. 318; Blackman v. Edsall, 17 Colo. App. 429, 68 Pac. 790; Fischer v. Sperl, 94 Minn. 421, 103 N. W. 502; Myers v. Hauger, 98 Mo. 433, 11 S. W. 974.

A further circumstance is the mental condition of the grantor. Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75; Blackman v. Edsall, 17 Colo. App. 429, 68 Pac. 790; Allore v. Jewell, 94 U. S. 506, 24 L. ed. 260; Lester v. Mahan, 25 Ala. 445, 60 Am. Dec. 530.

And in cases where deeds have been obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive benefit or advantage from them. It is the peculiar province of a court of conscience to set them aside, and that a court of equity will interpose in such a case is among its best settled principles. Harding v. Handy, 11 Wheat. 103, 125, 6 L. ed. 429, 435; Watkins v. Brant, 46 Wis. 419, 1 N. W. 82.

Another material consideration is the confidential relation existing between the grantor and the beneficiary. Samson v. Samson, 67 Iowa, 253, 25 N. W. 233; Yardley v. Cuthbertson, 108 Pa. 395, 56 Am. Rep. 218, 1 Atl. 765; Dunn v. Dunn, 42 N. J. Eq. 431, 7 Atl. 842; Darlington's Appeal, 86 Pa. 519, 27 Am. Rep. 726; Stewart's Estate, 137 Pa. 175, 20 Atl. 554; Thorn v. Thorn, 51 Mich. 167, 16 N. W. 324; Davis v. Dean, 66 Wis. 100, 26 N. W. 737; Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75; Brummond v. Krause, 8 N. D. 576, 80 N. W. 686; Jacox v. Jacox, 40 Mich. 473, 29 Am. Rep. 547.

All the acts and conduct of the person who procures a deed of land from a grantor under such disabilities at the time and prior thereto are matters which form the subject of very careful investigation and consideration; and where deceit, fraud, wrong, and injustice appear, the transaction should not be allowed to stand. Warrall's Appeal, 110 Pa. 349, 1 Atl. 380; Greenfield's Estate, 14 Pa. 489; Miskey's Appeal, 3

Pennyp. 409; Turner v. Collins, L. R. 7 Ch. 329, 41 L. J. Ch. N. S. 558, 25 L. T. N. S. 779, 20 Week. Rep. 305; Gandy v. Macaulay, L. R. 31 Ch. Div. 1.

There is great significance in the close relationship of the parties. Hall v. Otterson, 52 N. J. Eq. 522, 28 Atl. 907; Naeseth v. Hommedal, 109 Minn. 153, 123 N. W. 287; Miller v. Miller, 187 Pa. 572, 41 Atl. 277; Justice v. Justice, — N. J. Eq. —, 18 Atl. 674; Hensan v. Cooksey, 237 Ill. 620, 127 Am. St. Rep. 345, 86 N. E. 1107; Highberger v. Stiffler, 21 Md. 338, 83 Am. Dec. 593; Smith v. Smith, 84 Kan. 242, 35 L.R.A.(N.S.) 944, 114 Pac. 245.

Especially is this true where the parent is in reduced physical and mental condition,—where the health has for a long time been greatly impaired, and where he is aged and infirm. Smith v. Smith, supra; Couch v. Couch, 148 Ala. 332, 40 So. 624; Croissant v. Beers, 118 Ill. App. 502; Spargur v. Hall, 62 Iowa, 498, 17 N. W. 743; Brant v. Brant, 115 Iowa, 701, 87 N. W. 406; Paddock v. Pulsifer, 43 Kan. 718, 23 Pac. 1049; Brummond v. Krause, 8 N. D. 576, 80 N. W. 686; Fjone v. Fjone, 16 N. D. 100, 112 N. W. 70.

Inadequacy of consideration is another important circumstance. Thorn v. Thorn, 51 Mich. 167, 16 N. W. 324; Naeseth v. Hommedal, 109 Minn. 153, 123 N. W. 287; Allore v. Jewell, 94 U. S. 506, 24 L. ed. 260; Fitch v. Reiser, 79 Iowa, 34, 44 N. W. 214; Graham v. Burch, 44 Minn. 33, 46 N. W. 148.

And that the grantor under such circumstances was without opportunity for independent advice is another element to be considered. Slack v. Rees, 66 N. J. Eq. 447, 69 L.R.A. 393, 59 Atl. 466; Post v. Hagan, 71 N. J. Eq. 234, 124 Am. St. Rep. 997, 65 Atl. 1026; Rhodes v. Bate, L. R. 1 Ch. 252, 12 Jur. N. S. 178, 35 L. J. Ch. N. S. 267, 13 L. T. N. S. 778, 14 Week. Rep. 292; Nesbit v. Lockman, 34 N. Y. 167; Watkins v. Brant, supra; Yordi v. Yordi, 6 Cal. App. 20, 91 Pac. 348; Bergen v. Udall, 31 Barb. 9; Williams v. Williams, 63 Md. 371; Naeseth v. Hommedal, 109 Minn. 153, 123 N. W. 287.

The activity of the beneficiary in the preparation of the deed is significant; also the secrecy of his actions. Disch v. Timm, 101 Wis. 179, 77 N. W. 196; Bancroft v. Otis, 91 Ala. 279, 24 Am. St. Rep. 904, 8 So. 286; Richmond's Appeal, 59 Conn. 226, 22 Am. St. Rep.

85, 22 Atl. 82; Martin v. Martin, 1 Heisk. 644; Decker v. Waterman, 67 Barb. 460; Smith v. Henline, 174 Ill. 184, 51 N. E. 227.

The fact that the distribution of property resulting from the conveyance is grossly unequal and unjust strengthens the evidence of undue influence when its existence is indicated by other independent evidence. Tyner v. Varien, 97 Minn. 181, 106 N. W. 898; Newhouse v. Goodwin, 17 Barb. 236; Spargur v. Hall, 62 Iowa, 498, 17 N. W. 743; Manatt v. Scott, 106 Iowa, 203, 68 Am. St. Rep. 293, 76 N. W. 721.

That the inequities of a will may be taken into consideration in determining the mental capacity of the testator, or whether undue influence has been exercised, is well settled. Re Hess, 48 Minn. 504, 31 Am. St. Rep. 665, 51 N. W. 614; Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75; Prescott v. Johnson, 91 Minn. 273, 97 N. W. 891; Fairchild v. Bascomb, 35 Vt. 398.

Closely related to the foregoing is the intent of the donor as expressed prior to the exercise of the alleged undue influence. Graham v. Burch, 44 Minn. 33, 46 N. W. 148; Davis v. Dean, 66 Wis. 100, 27 N. W. 737; Tyler v. Gardiner, 35 N. Y. 559; Frush v. Green, 86 Md. 494, 39 Atl. 863.

The effect of the grant upon the donor must be considered. Prescott v. Johnson, 91 Minn. 273, 97 N. W. 891; Graham v. Burch, 44 Minn. 33, 46 N. W. 148; Clark v. Stansbury, 49 Md. 346; Lins v. Lenhardt, 127 Mo. 271, 29 S. W. 1025.

The dominating character of the person favored is a circumstance to be considered. Hartman v. Strickler, 82 Va. 225; Lewis v. Mason, 109 Mass. 169.

With all these circumstances to be properly considered, there is still the further element of opportunity. Fischer v. Sperl, 94 Minn. 421, 103 N. W. 402; Watkins v. Brant, 46 Wis. 419, 1 N. W. 82; Re Wheeler, 5 Misc. 279, 25 N. Y. Supp. 314; Tyner v. Varien, 97 Minn. 181, 106 N. W. 898; Davis v. Dean, 66 Wis. 100, 27 N. W. 737; Loennecker's Will, 112 Wis. 461, 88 N. W. 215.

That undue influence is more readily established in transactions *inter vivos,* than in testamentary dispositions, is the rule laid down by many authorities. Bancroft v. Otis, 91 Ala. 279, 24 Am. St. Rep. 904, 8

So. 286; Michael v. Marshall, 201 Ill. 70, 66 N. E. 273; Re Sparks, 63 N. J. Eq. 242, 51 Atl. 118.

"The general rule of principle is that where, from the nature of the transaction and the situation and relation of the parties, fraud and imposition may be presumed, relief will be granted in equity, although fraud in fact be not proved." Smith v. Smith, 84 Kan. 242, 35 L.R.A. (N.S.) 944, 114 Pac. 245; Tyner v. Varien, 97 Minn. 181, 106 N. W. 898; Greenfield's Estate, 14 Pa. 489; Disch v. Timm, 101 Wis. 179, 77 N. W. 196; Justice v. Justice, — N. J. Eq. —, 18 Atl. 674.

The coupling of a confidential relation with a grossly inadequate consideration is sufficient to shift the burden of proof. Re Wheeler, 5 Misc. 279, 25 N. Y. Supp. 314; Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121.

The circumstances combining to make a prima facie case were the making of a conveyance by an aged person of his entire property without consideration to one standing in a position of trust and confidence, under circumstances of secrecy. Doyle v. Welch, 100 Wis. 24, 75 N. W. 400.

It is the function of this court to try this cause anew, and to render such a decision as justice may require. Comp. Laws 1913, § 7846; Tyler v. Shea, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468.

GRACE, J. This case is one involving the title and ownership of the southeast quarter of section 1, and the northeast quarter of section 12,—all in township 147, north of range 82, McLean county, North Dakota. The action is one to quiet title. The complaint, in addition to being in the usual statutory form, contains other allegations, among which are those alleging ownership of, and title to, said land by Melissa C. Prouty on the 11th day of October, and prior thereto, and from said date up to and including the 10th day of November, 1910, on which last date Melissa C. Prouty died, and left surviving her as heirs at law five sons and two daughters, all of whom are living. That the defendant claims title to said land by virtue of a warranty deed executed by Melissa C. Prouty on or about the 11th day of October, 1910, such deed being dated October 1, 1910, wherein and whereby it is claimed that said premises were conveyed to the defendant. That on the 11th day of October, 1910, and for a long time prior thereto, said Melissa

C. Prouty by reason of sickness, ill health, and advanced years, was weak and feeble in body and in mind, and was confined to her bed at her home upon said premises. That by reason of her weakness and physical disability she was unable to read or write, and was wholly unfit and incompetent to engage in the transaction of her business. That the defendant is the son of Melissa C. Prouty and one of her heirs at law, and that on the 11th day of October, 1910, and for a long time prior thereto, resided with his family upon land adjoining the above-described premises. Then follows numerous other obligations to the effect that defendant, while his mother lay sick, obtained her trust and confidence to such degree that he could control and overpower her will, and while said Melissa C. Prouty was in such weak and feeble condition and incompetent to carry on business transactions and properly exercise control of her property, the defendant in bad faith designedly and without the knowledge of the other children of the said Melissa C. Prouty, with the intention of cheating and defrauding them out of their share of their mother's property, and by means of false and fraudulent representations to his mother, took advantage of his close and confidential relations with her, to procure her, while under his influence, on or about the 11th day of October, to make and execute without any consideration whatever, an instrument in writing purporting to convey to said defendant the land in question, which instrument was recorded in the office of the register of deeds for McLean county on the 2d day of October, 1910. Then follows allegations that Melissa C. Prouty had no knowledge at the time she executed said instrument that she was dispossessing herself of the title to said property; and also allegations showing that defendant executed various encumbrances upon such land after he recorded the said warranty deed. The complaint concludes with the prayer that the deed be adjudged null and void and canceled, and that the defendant be required to account to the plaintiff for the money derived from the loans which are described in the complaint, and to make restitution to the plaintiff as the administrator of the estate of Melissa C. Prouty, and other relief was also asked for.

Defendant in his answer sets out certain specific denials, and in addition thereto, and by way of defense, alleges and claims ownership under the warranty deed in question. Also alleges that he purchased the south-

east quarter of section 1 from Millard B. Boddy; and for business reasons and convenience, and with an agreement made by and between Melissa C. Prouty and this defendant, the deed to the said southeast quarter of section 1 named Melissa C. Prouty as grantee therein, the deed bearing date November 20, 1907. And defendant further alleges possession, use, and occupancy of the said southeast quarter of section 1 ever since the time of the delivery of said deed, and that until the 11th day of October, 1910, the said Melissa C. Prouty held the bare legal title to the southeast quarter of section 1 in trust for this defendant. That shortly after Melissa C. Prouty received the deed to said southeast quarter of section 1, and long prior to the 11th day of October, 1910, she made her warranty deed, conveying the said southeast quarter of section 1 to this defendant. That for business reasons and convenience the same was never recorded. That said deed was misplaced and lost; and thereafter, on the 11th day of October, 1910, the said Melissa C. Prouty did convey the same, as heretofore alleged, by the deed of the 11th day of October, 1910. Then follows allegations in the answer, to the effect that on the 11th day of October, the defendant, in accordance with the wishes and request of the said Melissa C. Prouty, and for other considerations, did purchase and buy of said Melissa C. Prouty the northeast quarter of section 12, in township 147, range 82. That Melissa C. Prouty did convey to the defendant by warranty deed the said northeast quarter of section 12. The defendant in other allegations denies the use of any undue influence, or that he acted in a fraudulent manner, or was guilty of fraud in or about the making of the deed in question by the said Melissa C. Prouty, and admits the receiving of $2,400 by reason of mortgaging such land, part of which mortgages, it is alleged, was given to secure a portion of the interest on a certain mortgage for $1,200.

The facts in the case are substantially as follows: On the 10th day of November, 1910, in McLean county, North Dakota, Melissa C. Prouty died intestate, and left surviving her as heirs at law two daughters and five sons. F. E. Funk was appointed as administrator of her estate, and qualified and entered upon the discharge of the duties of his office after having received letters of administration. That until the 11th day of October, 1910, the legal title to all the land in question was in Melissa C. Prouty. On that day it appears that a warranty deed was

made from her to the defendant to all the land in question, which deed the plaintiff claims was procured by fraud and undue influence. The defendant claims that for a long time he has been the owner of the southeast quarter of section 1, and that on the 11th day of October, 1910, he purchased the northeast quarter of section 12. It also appears that at the time Melissa C. Prouty executed the deed in question she was about sixty-nine years of age, and was at that time in feeble health and had been in ill health for some time prior thereto. The defendant is the son of Melissa C. Prouty and one of her heirs at law; and upon the 11th day of October, and for a long time prior thereto, he and his family resided upon land adjoining the premises in question, and often visited his mother during the time she was sick, and at times before the time of her sickness he had managed some of her business. The deed in question was prepared at the request of the defendant or under his direction. Melissa C. Prouty had no property other than her interest in the land in question, except personal property of the estimated value of about $400.

The sole question in this case is the ownership of the land in question; and in order to determine fully upon this point, it will be necessary to consider each quarter section of such land separately. We will first consider the southeast quarter of section 1. It appears from the testimony that Melissa C. Prouty before coming to the state of North Dakota resided in the state of Iowa for many years, and that while she was residing in the state of Iowa her husband died, and she, with most of her children, resided upon a certain tract of land in the state of Iowa, consisting of an 80-acre tract, and also a 40-acre tract which adjoined, which is termed the "tree claim." That some of her children were with her, and that the defendant, J. L. Prouty, lived adjoining her, with his family, until the death of his wife, when he moved over with his mother for a term of four years and assisted her in various ways, and among other things took care of the trees upon the tree claim; and he claims that his mother promised him that, if he would take care of the trees upon the "tree claim," he should have the same. Thereafter the defendant remarried and came to the state of North Dakota, and thereafter his mother sold the land she had in Iowa, including the tree claim, and also came to North Dakota and made homestead entry on the northeast quarter of section 12, which was

near the home of the defendant. The southeast quarter of section 1 was purchased from Boddy, and was paid for by trading the mortgage on the tree claim for such land. The defendant claims that he was entitled to the tree claim by the promises made by his mother, and that it was understood at the time the southeast quarter of section 1 was purchased that such land should be his, but the legal title of which should be carried in the name of Melissa C. Prouty, his mother, for business reasons concerning the defendant.

We are of the opinion that the claim of the defendant concerning the southeast quarter of section 1 is supported by the testimony in the case, and that as a matter of equity he is entitled to be adjudged the owner in fee of the southeast quarter of section 1.

As to the northeast quarter of section 12, the homestead of the mother, Melissa C. Prouty, we are of the opinion that the claims of the defendant are not supported by the testimony in the case; and before discussing the testimony relative to the execution of the deed, which included the northeast quarter of section 12, we deem it wise to consider certain laws of nature which, when connected with certain parts of the testimony, aid us in disposing of this branch of the case.

Melissa C. Prouty, the mother, at the time of her death left surviving her five sons and two daughters, one of which was the defendant in this case. The testimony shows that practically all the valuable property which Melissa C. Prouty had, under the deed in question went to J. L. Prouty, one of her sons. This was not the natural thing for her to do unless there were special reasons for her disposing of her property in the manner stated. The other four sons and the two daughters were entirely eliminated. They had also, no doubt, during all of their lives, been of more or less service to their mother. They had, no doubt, done many kind acts of service towards her. Jeptha Prouty had lived with her in North Dakota, and helped to take care of her farm; and it is reasonable to suppose that for each of her children she had a true motherly affection. It does not appear from the testimony that she had any trouble with any of them, or they with her. There does not appear any special reason why she should entirely ignore and forget the rights of all the other children, and fail to give them any portion of her property which they as coheirs with the defendant had a reasonable right to expect. Melissa C. Prouty at the time of the execution of the

deed in question was really upon her deathbed. She was the mother of seven children. To say that at such time and such an hour she had no concern and no kindly thought or wish for the future welfare of any of her children excepting one, would be to ignore and set aside all laws of parental affection, and especially would this be true where there was no testimony showing that the mother had any trouble or grievance against any of the other children; and these observations are valuable in support of the contentions of the plaintiff that the deed in question was procured by the defendant from his mother by reason of undue influence, which was exercised at a time when the mother was in a weakened condition, her body racked with pain, and at a time when the material things of this world had ceased to be, most likely, of any great consequence to her. We think that, if the testimony may be in any way nearly equally balanced, considerations such as these would give an added weight to plaintiff's claim. As to the capacity of the mother to execute the deed in question, the most vital testimony is that of the physicians who attended the mother during her last illness. Dr. Cain testified substantially as follows: That he was first called to attend her (Melissa C. Prouty) in the early part of September, 1910. That to the best of his recollections he called on her seven times, the last time being the 6th day of November, and the last time before the 6th day of November he called on her was the 10th day of October,—all in 1910. Testifying as to her physical condition on the 10th of October, he said she was very weak. Further testifying, he said he examined her thoroughly physically. Further testifying as to her condition on the 10th day of October, Dr. Cain said she was confined to her bed, the heart's action was very weak, and her breathing was a constant effort. She seemed to be annoyed by conversation. "To the best of my knowledge she was unable to attend to anything requiring such effort of either mind or body." Dr. Cain further testified that, on the occasion of one visit, she requested him to tell F. A. Russell, banker of Underwood, McLean county, North Dakota, to come to her the following day for the purpose of making a will—"I understood her own." Dr. Cain was a witness on behalf of the plaintiff.

Dr. Heinzeroth was a witness in behalf of the defendant. His testimony shows that he was called in his professional capacity to the home of Melissa C. Prouty. The first time he was so called was in

the latter part of September, 1910; and after that he visited her in his professional capacity four or five times. The last professional call was about October 4th, 1910. He called on her once after that, but not in his professional capacity. He testified that he stopped hardly ever less than half an hour when called. He testified that he thought her mental condition was good each time he was there. He testified that she was very sick, and was affected with kidney trouble and some liver complications, but in answer to a question said that she was rational in her mind; that the same conditions existed the last time he saw her, except that she was probably a trifle weaker, but testified that she was rational and talked about her business with her son. In answer to a question, he said he was present at the time an instrument was made at the Prouty place. He said he did not remember the date, but it was some time during the fore part of October, on one of his visits. In answer to a question as to whether he remembered the nature of it or not, he said he really helped to make it out, and that it was a will. He testified that he did not know what became of it, and did not remember the contents.

Mr. Reuter testified to making out the instrument (the deed), and on the 11th day of October went out to the home of Melissa C. Prouty to have her execute the deed. The testimony shows that he was not there when the deed was signed; that he and John (John Prouty) went into the room, and Mr. Paulson took the instrument and asked Mrs. Prouty if she signed that deed. He further testified that he (Paulson) opened up the deed and asked her if that was her signature. She said, "Yes," that was her signature. He said, "Did you sign that?" and she said, "Yes." He said, "This is a deed to your two quarters of land, the southeast quarter of section 1 and the northeast quarter of section 12-147-82," and she said, "Yes," she had signed it. He (Paulson) told her it was to John Prouty, and it was understood that John Prouty and J. L. Prouty was the same party, and John was in the room at the same time.

The witness Paulson testified to taking the acknowledgment, and testified that he asked her (Melissa C. Prouty) if she signed it of her own free will. "She said, 'Yes, I want Lynn to have this,' were her exact words; and I think I read the material part of the instrument to

her. I could not say for certain, but I think I did, as far as I remember," and further said that he mentioned to her that it was a deed.

Jane Jacobson, a daughter, in answer to the question, "Was there anything said about your mother's property between you and J. L. Prouty?"

A. He said that she was making her will. He was the administrator, him and the doctor over at Turtle Lake.

Jane Jacobson further testified in answer to the following question: "What was said on that Sunday, October 16, 1913, if anything, between your mother and John F. Rueter with reference to her property, or the disposition of her property?

A. When the women folks went out, Rueter started out with them, and ma she called him back and asked him if he had that will fixed. He said, "Yes, grandma, it is all fixed all right."

Q. Did she mention any particular provision of the will?

A. Yes, she asked if he had it all fixed so that Jeptha could not get but $5.

The testimony of Jane Jacobson also was to the effect that she (Melissa C. Prouty) about this time was weak so she could not either get up or lay down without help; that she was weak and nervous. She further testified in answer to a question: "She (Melissa C. Prouty) called me to her bed and asked me if there was anyone else in the room, and I told here there was not, and then she said she had made the will for all alike, except Jeptha Prouty, and he was only to get $5."

The capacity to make a contract is not determined by whether one has much or little intellect. That is, a contract may be good if made by a person with great intellect, or good if made by a person of no great amount of intellect. The true test is, Had the party who made the contract sufficient mental capacity to know the nature of, and understand the terms of, the contract? If so, and there is no undue influence, or circumstances and facts from which undue influence may be inferred, and there is an absence of evidence which would point towards incapacity, such as great senility, severe illness resulting in excessive pain and suffering such as to disturb the equilibrium to some extent, and incapacitate or weaken the mental faculties, the contract may very often be permitted to stand. However, in this class of cases each case must to a large extent, be determined upon its own merits. In the case at

bar, the testimony shows the grantor to have been an aged lady, being in the neighborhood of sixty-nine years of age; that she was exceedingly ill at the time of the execution of the instrument in question; in fact, she was upon her deathbed at that time, and her death ensued within a very few weeks thereafter, and that she was very nervous and irritable; and that during such time the instrument in question was executed, the arrangements for its preparation and execution having largely, if not entirely, been made by the defendant, and he having stood in more or less confidential relation to his mother for many years; coupled with the fact that practically her entire property was thus conveyed to the defendant, places the burden of proof upon the defendant to show the absence of undue influence on his part and sufficient consideration for the execution of the instrument in question. It does not appear that the defendant made any effort to have others of the absent heirs at law present when the deed was executed, excepting Mrs. Jacobson, but it does appear that the interest of all of such heirs was entirely disregarded by the mother (Melissa C. Prouty) when she delivered title by such instrument, the warranty deed in question, and gave all of her property which was of any particular value to the defendant, which transaction, if the mother fully understood it, would largely evidence entire lack of affection in regard to all the balance of her children, and there is nothing in the testimony in this case to prove any such lack of affection for the balance of her children. We think the principle in the case is well expressed in the case of Davis v. Dean, 66 Wis. 100, 26 N. W. 737. The facts in the case of Nelson v. Thompson, 16 N. D. 295, 112 N. W. 1058, cited by the appellant, are entirely different from the facts in the case at bar. In the Nelson Case the deed had been effective for seventeen years. The son had been taking care of the father during much of that time. He had agreed to care for him the balance of his life. Silence had been maintained for seventeen years, and there were many other circumstances that gave the case a different aspect to the one at bar. We have no quarrel with the general rule laid down in that case, which is as follows: "The test of whether a person is competent to make a deed is that he should be qualified to do that particular business rationally—not, on the one hand, that he should be capable of doing all kinds of business with judgment and discretion, nor, on the other hand, that he should be wholly deprived of reason

so as to be incapable of doing the most familiar and trifling work." We do not think, however, that the rational condition of the mind should be limited to the act in question. While the party might not be capable of doing all kinds of business with judgment and discretion, he should have such judgment and discretion to a sufficient extent, and be capable of doing any kind of business transaction which would require no greater degree of intellect than the business transaction which is the subject of discussion.

The trial court, as we view it, has done justice to all the parties to this action, and its decree seems to us to be equitable and just, and the greater weight of all the testimony by the physicians is to the effect that the grantor of the deed in question was not in such mental condition to really be competent to execute the deed or do any like act requiring such a mental and physical effort. While one of the physicians testified that she was rational at all the times he saw her, nevertheless, in view of all the surrounding circumstances and conditions, we think the testimony of Dr. Cain was quite conclusive and entitled to much weight and credit, and more in accord with all the other facts and circumstances of the case.

The judgment of the District Court is in all things affirmed with costs.

H. B. SENN v. THOMAS STEFFAN.

(164 N. W. 102.)

Court — instructions.

1. Instructions of the court examined, and *held* to present no prejudicial error.

Questions of fact — disputed — findings of jury thereon — conclusive — competent evidence to support.

2. Where disputed questions of fact are submitted to the jury, the findings of the jury thereon are conclusive if there is sufficient competent testimony to support such findings.

Opinion filed July 19, 1917.

Appeal from the judgment of the District Court of Pierce County.
Harold B. Nelson, for appellant.
Campbell & Jongewaard, for respondent.
Affirmed.

GRACE, J. This action was for the recovery by the plaintiff against the defendant for alleged attorney's fees and costs in certain foreclosure proceedings concerning the foreclosure of two certain mortgages, and for other professional services. The complaint alleges a cause of action as to attorney's fees on *quantum meruit,* and the bill of particulars which was furnished to the defendant also sets forth certain items of costs, expenses, and taxes paid by the plaintiff for the defendant.

The defendant in his answer alleges a specific agreement as to the amount of attorney's fees in the sum of $150, and concedes that some of the costs and expenses were incurred and that certain taxes were paid. There being a square conflict in the pleadings of the parties as to the amount of attorney's fees, and as to whether there was any contract concerning the same, the question was submitted by the court to the jury, and all the disputed questions of fact, including those relating to costs, expenses, taxes, etc., were also properly submitted to the jury as questions of fact, upon which the jury found a verdict. It also appears that the plaintiff had come into the possession of $396.99, being the amount received in the year 1912 for Steffan's share of crop for the year 1912 from certain land, which amount the defendant pleaded as a counterclaim against any demand that plaintiff might have. This amount the plaintiff retained, and, in addition to this, the jury awarded him an additional amount of $21.17.

The court, before submitting the case to the jury, gave a careful and lucid written charge of the law. It explained and analyzed quite carefully the issues of the case so that the jury might understand the claims of the plaintiff and the defendant respectively. All the facts were submitted to the jury, with full instructions as to the law. We have examined the instructions given by the court, and all the assignments of error based upon such instructions, and also the refusal of the court to give the instruction requested by the plaintiff, and find the court made no error in any of its instructions given, or in the refusal to give the requested instruction. All the issues of the case were fairly tried and submitted to the jury under proper instructions from the court. The jury determined the main question in the case: Did or

did not the plaintiff enter into a contract with the defendant for the rendering and performance of professional and legal services concerning the transactions involved, and which are set out in the pleadings? The jury answered this question affirmatively. It being a disputed question of fact upon which there was conflicting testimony, their decision is conclusive. We think, on the whole, the case was fairly and impartially tried, and the verdict is sustained by the evidence. The burden of proof was upon the plaintiff to sustain the allegations of his complaint and the cause of action by a fair preponderance of evidence. The plaintiff claimed there was no contract, and sought to recover for the reasonable value of his services. The defendant alleged there was a contract, and named a specific amount as a consideration for such contract and services. The jury believed the testimony of the defendant and found a verdict accordingly, and this is conclusive.

The judgment of the lower court is affirmed, with costs.

F. D. HAIGH v. BOARD OF COUNTY COMMISSIONERS IN AND FOR THE COUNTY OF BILLINGS AND STATE OF NORTH DAKOTA, and J. B. Stoddard, John Tester, W. H. Hanson, as Members of said Board of County Commissioners, and J. A. McGregor as County Auditor of Said Billings County, and J. E. Arnold as County Treasurer of Said Billings County.

(164 N. W. 146.)

Title — cloud upon — action to remove — tax proceedings — facts stipulated — court — placing assessed values on land — not warranted in so doing — if different from those fixed by the boards.

1. In an action to remove cloud from title occasioned by invalid tax proceedings, the plaintiff, who sues on behalf himself and all other real estate taxpayers in the township, asked that the court place upon each parcel of land in the taxing district a just and equitable tax. The facts are stipulated. Assuming the invalidity of the tax proceedings, the stipulations are held not to warrant the court in placing assessed values upon the lands, under § 2201, Compiled Laws of 1913, different from those which were passed by the township board of review and the county board of equalization.

Complaint — prayer for relief — equalization of taxes asked — between townships — proof.

2. Where, in a prayer for relief, plaintiff asks virtually an equalization of taxes between the various townships in a county, and where plaintiff confines his proof of inequality to a comparison between the taxing district involved and three contiguous districts,—he fails to present sufficient facts to justify the changing of valuations by the court, under § 2201, Compiled Laws of 1913.

Opinion filed July 20, 1917.

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

Judgment for defendants.

Plaintiff appeals.

Affirmed.

Jefferson & Jones and *Casey & Burgeson,* for appellant.

The assessor did not view the land nor list or place a value thereon. The listing and placing of values were done by the county auditor before the books of the township in question came into his possession. There was no legal assessment of lands in such township, and the pretended assessment was void. 37 Cyc. 1009; Paldi v. Paldi, 84 Mich. 346, 47 N. W. 510; People v. Hastings, 29 Cal. 449; People v. San Francisco Sav. Union, 31 Cal. 132.

For assessment purposes the value of the property must be fixed by the proper assessing officer, and he cannot delegate such duty to another. People v. San Francisco Sav. Union, supra; State Finance Co. v. Mather, 15 N. D. 389, 109 N. W. 350, 11 Ann. Cas. 1112; Baker v. La Moure, 21 N. D. 140, 129 N. W. 464; Moran v. Thomas, 19 S. D. 469, 104 N. W. 212; Ferris v. Coover, 10 Cal. 632.

There were sufficient facts before the trial court to show the assessed valuation of the lands adjoining those in the township where the taxes are in question, to warrant the court in fixing a reasonable assessment upon the lands in said township. The lands in the adjoining townships had been assessed by the proper officer, and the presumption is that these officers had done their duty in accordance with the law. Comp. Laws 1913, subd. 15, § 7936; Pine Tree Lumber Co. v. Fargo, 12 N. D. 360, 96 N. W. 357; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132.

Curative statutes do not apply to the jurisdictional defects in assessments of real property, and our courts also hold to this doctrine. State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76; Grand Forks County v. Frederick, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839.

J. K. Swihart and *H. L. Halliday* (*R. F. Gallagher,* of counsel), for respondents.

The assessment of lands in the township mentioned, while irregular, was not void. An assessment is not invalid because the assessor did not view and inspect the lands to be assessed, if he had other sufficient knowledge of their value. 37 Cyc. 998.

Where the assessor makes his duly verified return of assessment of property, he is presumed to have had sufficient knowledge as to values for assessment purposes. Boorman v. Juneau County, 176 Wis. 550, 45 N. W. 675; Sawyer-Goodman Co. v. Crystal Falls Twp. 56 Mich. 597, 23 N. W. 334; 27 Cyc. 1069; Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 191.

"We cannot hold a mere failure of the assessor to value the lands from actual view invalidated the assessment." Farrington v. New England Invest. Co. supra.

"The presumption is that the tax is valid, and this presumption necessarily extends to every act upon which the tax in any measure depends. The court must be able, upon the evidence, to pronounce judgment against its validity." Shuttuck v. Smith, 6 N. D. 56, 69 N. W. 5.

The mere fact that in the first instance the valuation was placed upon the lands in this township by the county auditor does not make the tax void. An assessor may adopt the values as fixed by another. South Platte Land Co. v. Crete, 11 Neb. 344, 7 N. W. 859; Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 193; Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241.

The burden was upon the plaintiff to show affirmatively that the assessor did not adopt the values placed on the lands by the county auditor. Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 193; Shuttuck v. Smith, supra.

"The presumption is that public officers do as the law and their

duty require them." Pine Tree Lumber Co. v. Fargo, 12 N. D. 360, 96 N. W. 357; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132.

Only the board of review of the township could change the assessed valuation of individual property. First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836.

The legislature can pass curative acts that will validate defects which make the levy or assessment void. Shuttuck v. Smith, supra; Richman v. Muscatine County, 77 Iowa, 513, 4 L.R.A. 445, 14 Am. St. Rep. 308, 42 N. W. 422; Single v. Marathon County, 38 Wis. 363; Iowa Railroad Land Co. v. Soper, 39 Iowa, 112; Clester v. Black, 132 Pa. 568, 6 L.R.A. 802, 19 Atl. 276; Grim v. Weissenberg School Dist. 57 Pa. 433, 98 Am. Dec. 237; Donley v. Pittsburg, 147 Pa. 348, 30 Am. St. Rep. 738, 23 Atl. 394; Kunkle v. Franklin, 13 Minn. 127, Gil. 119, 97 Am. Dec. 226; Fisk v. Kenosha, 26 Wis. 33; Boardman v. Beckwith, 18 Iowa, 292.

"The presumption is that the values as returned by the assessor were correct." Shuttuck v. Smith, 6 N. D. 56, 69 N. W. 5.

The court must be able, upon the evidence, to pronounce judgment against the validity of a tax, and in such cases equitable rules prevail. 37 Cyc. 1134, 1135, 1137; Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241; People ex rel. Bishop v. Feitner, 116 App. Div. 452, 101 N. Y. Supp. 1021; People ex rel. Queens Borough Gas & E. Co. v. Woodbury, 67 Misc. 481, 123 N. Y. Supp. 592; State ex rel. Spokane & I. E. R. Co. v. State Board, 75 Wash. 90, 134 Pac. 695.

A reassessment can only be made where it clearly appears that the original assessment, either as a whole, or as to individuals, was void, for illegality, error, or irregularity. Such is the general rule. 37 Cyc. 119, 1019, 1104.

BIRDZELL, J. This is an appeal from a judgment entered in the district court of Billings county in an action to enjoin the collection of certain real estate taxes, levied in the year 1911, against the real estate of the plaintiff, and to remove the cloud incident to the purported lien resulting from alleged invalid tax proceedings. The action was started more than five years ago, and involves questions of importance in connection with the administration of the revenue affairs of the county. Though the facts are simple and are stipulated, the case has

dragged along until it has finally reached this tribunal for ultimate determination.

The complaint attacks the assessment in the taxing district of Lone Tree township, in which the plaintiff's land is situated, on the ground that the assessor failed to make an assessment as required by law. It is alleged that the assessor did not, at any time in the year 1911, place a valuation upon any piece or parcel of real estate located within the taxing district; that the assessor did not view any piece or parcel of land for the purpose of placing an assessed value thereon; that the values set opposite each description of real estate in the township in question in the assessment lists were placed there by the county auditor before the lists were delivered to the assessor, and that the township board of review did not, in any manner, equalize the purported assessment; that the purported assessment is excessive as compared with the assessment of other real property, in that the real property in Lone Tree township is assessed from 60 per cent to 75 per cent higher than other real property similarly situated in neighboring townships of the county. The remaining allegations of the complaint merely set forth the lien resulting from the purported taxes, and the complaint, after setting forth a tender of 40 per cent of the taxes, concludes with a prayer for relief, asking that the cloud on the title, occasioned by the purported assessment of taxes, be removed, and defendants be enjoined and restrained from collecting such taxes, and that the court place upon each parcel of land in the taxing district a just and equitable tax.

The stipulated facts support the foregoing allegations of the complaint. Among other things it is stipulated that the township in question is 12 miles in length; that the west border abuts on the state of Montana; that the townships immediately touching Lone Tree township on the north, east, and south are made up of lands similar in quality and cultivation to those in Lone Tree township; and that the average assessed valuation in 1911 was only about one half of the assessed value of Lone Tree township in the year 1911. In Bullion township, which borders Lone Tree township on the east, the taxes on land averaged $9.50 per section, while in Lone Tree township the taxes were $28.49 per section. It is also stipulated that the assessed

valuation of Lone Tree township and the adjoining townships used for purposes of comparison are as follows:

Lone Tree township	$6.33	per	quarter	section.
Bullion township	3.20	"	"	"
Bull Run township	2.08	"	"	"
Beach township (which includes the city of Beach)	6.33	"	"	"

The court found the facts in accordance with the stipulations, but in the conclusions of law determined that there was not sufficient evidence of value before the court to enable it to place any different valuations upon the land. According to this conclusion, the court denied the relief sought, and entered judgment, decreeing that the assessment of the township in the year 1911 (the year in question) was inequitable, but that, since the court was without sufficient facts to change this assessment, the plaintiff should be required to pay taxes according to the assessment placed against his land in the manner hereinbefore set forth.

There is no question arising upon the record requiring extended discussion. The trial court was clearly right in determining that there was not sufficient evidence of value before the court to enable it to place any different valuation on the land from that placed there by the county auditor before turning the books over to the assessor. It does affirmatively appear that both the township board of review and the county board of equalization met as required by law. To ask, under § 2201, Comp. Laws 1913, that the trial court or this court place different values on the land than those which were passed by the township board of review, and the county board of equalization is to ask the court to indulge in a presumption that the officers in question wholly disregarded their duties under their oaths of office. The only proof that the land in the township in question has been unequally assessed, compared with the remaining townships in the county, is the stipulation with reference to the values in the immediately adjoining townships. From such inequality as there may be in the assessments between Lone Tree township and the three bordering townships, we cannot presume that the same or any inequality exists as between Lone Tree township and the remainder of the county. The

stipulated facts do not go far enough to enable the court to so change the assessment as to approximate justice with any degree of assurance. For these reasons the relief prayed for must be withheld.

The judgment of the trial court is affirmed.

ROBINSON, J. (dissenting). The plaintiff brings this action on behalf of himself and all other taxpayers of Lone Tree township to abate or cancel the taxes levied in said township for the year 1911. The grounds are that in 1911 there was no assessment of the land for taxation, and that in truth the tax levies were based on a pretended assessment, which was twice that of similar lands in the adjoining townships. The trial court denied the plaintiffs any relief, on the ground that the stipulations and evidence showed only the comparative value of the lands in question, and not the market value of the same. But the courts must take notice of the facts which are generally known, —that all assessments are based on comparative values, representing only a small part of the market values.

The written stipulation shows that in 1911 there was no assessment of the land in Lone Tree township, but against a description of the several tracts of land on the assessment list there was marked a valuation which was twice as much as the valuation extended against similar lands in the adjoining townships. Hence, the assessment is void, and under the stipulations the court must fix a new rate or remand the case for additional testimony on the comparative values of the assessments. And it seems better for all parties that this court should end the litigation by fixing some rate in accordance with the stipulations, and such a rate is 50 per cent of the value extended against the land in Lone Tree township.

Wherefore, the judgment of the district court is reversed, and it is directed to enter a judgment that all valuations and taxes extended on the tax lists against land in Lone Tree township be reduced 50 per cent, and that all the taxes charged against any tract of land in said township for the year 1911 be canceled and discharged upon payment of 50 per cent of the same, with interest at 6 per cent a year from the date when such taxes become delinquent.

PATRICK SEXTON and Margaret Sexton v. S. S. SUTHERLAND and Frank Windmueller.

(164 N. W. 278.)

Homestead — adverse claims — action to determine — husband and wife — may be joined as defendants — legal title in husband's name.

A wife may properly be joined with her husband as joint plaintiff in an action brought to determine adverse claims to a homestead, even though the legal title thereto is held in the husband's name.

Opinion filed July 21, 1917.

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

From an order overruling a demurrer to the complaint as to the plaintiff Margaret Sexton, the defendant Sutherland appeals.

Affirmed.

C. H. Starke, for appellants.

Issues of fact must be tried at the regular term of the district court, if the trial is by jury; otherwise at a regular or special term. Comp. Laws 1913, § 7609.

The manner in which cases are brought on for trial is provided by statute. Comp. Laws 1913, § 7610.

Our statute provides that any person having an estate in, interest in, or lien or encumbrance upon the land, may maintain an action to determine adverse claims to lands. The action being statutory, only such designated persons may maintain it. Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 328, 44 Am. St. Rep. 511, 54 N. W. 404; Buxton v. Sargent, 7 N. D. 503, 75 N. W. 811; McHenry v. Kidder County, 8 N. D. 415, 79 N. W. 875; Hooper v. Henry, 31 Minn. 264, 17 N. W. 476.

The legal title to the land here in question is in the name of the

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NOTE.—As to whether wife is necessary party to suit concerning homestead, see note in 81 Am. Dec. 451.

As to effect of mortgage of homestead by husband alone, see note in 68 Am. Dec. 323.

On effect of conveyance or encumbrance of homestead by one spouse only, see note in 95 Am. St. Rep. 909.

husband. The only right of Margaret Sexton to maintain this action is predicated upon the fact that she is the wife of the legal owner and that the land is their homestead. The question raised by the demurrer is whether or not these facts give her such "an interest" in the land as will permit her to maintain this action, or whether the action can be maintained jointly by husband and wife. Conrad v. Adler, 13 N. D. 202, 100 N. W. 722; San Francisco v. Ellis, 54 Cal. 72; Walton v. Perkins, 28 Minn. 413, 10 N. W. 424.

The homestead right is an exemption, not an "estate."

"It is difficult to understand how the right of an owner of particular land to hold such land exempt from liability for debts can be in any sense an estate." Tiedeman, Real Prop. 1121; Black v. Curran, 14 Wall. 463, 20 L. ed. 849; McDonald v. Crandall, 43 Ill. 231, 92 Am. Dec. 112; Waples, Homestead, chap. 9.

The statutory restraint upon alienation in the case of the married man does not change the character of the right in any respect. Arnold v. Waltz, 53 Iowa, 706, 36 Am. Dec. 248, 6 N. W. 40; Greenwood v. Maddox, 27 Ark. 649.

"The wife cannot properly be said to have any estate in the homestead property of her husband during his life, and the application of the term "estate" to her statutory right to prevent any alienation by him, or to her contingent right to succeed, on his death, to the homestead privilege, is to be avoided." Tiedeman, Real Prop. 506; Gee v. Moore, 14 Cal. 472; Pounds v. Clarke, 70 Miss. 263, 14 So. 22; Creath v. Creath, 86 Tenn. 659, 8 S. W. 847; Godfrey v. Thornton, 46 Wis. 677, 1 N. W. 362; Burns v. Keas, 21 Iowa, 257; Jenness v. Cutler, 12 Kan. 515; Const. § 208.

Neither by statute nor court decision has this state ever recognized any right of the wife in the homestead of her husband during his lifetime.

The word "interest" as used in our statute means some present right of property in the land itself, either legal or equitable. In this statute such expression is grouped with others which can only bear the meaning above stated. They are "estates," "liens," "encumbrances," all of which expressions mean some live, present, existing interest in lands. Tiedeman, Real Prop. p. 506, Act 1860, § 1; Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 83 N. W. 245.

The right of the wife in the homestead of her husband during his lifetime is not an "interest" in the land, and she cannot maintain an action to determine adverse claims. Williams v. Santa Clara Min. Asso. 66 Cal. 193, 5 Pac. 85; Comp. Laws 1913, § 8144; 32 Cyc. 1348–E; Grider v. American Freehold Land & Mortg. Co. 99 Ala. 281, 42 Am. St. Rep. 58, 12 So. 775.

Casey & Burgeson, for respondent.

The court did not err in ordering that the case stand for trial upon ten days' notice, as a condition for allowing an answer, after overruling a demurrer. Comp. Laws 1913, § 7481; Walker v. Maronda, 15 N. D. 63, 106 N. W. 296.

It is held that courts do not abuse their discretion when they order an answer filed upon the date of their ruling upon demurrer. Davis v. Peck, 12 Colo. App. 259, 55 Pac. 192.

In adverse claim actions, "an action may be maintained by any person having an estate or interest in or lien or encumbrance upon real property." Comp. Laws 1913, § 8144.

The interest of the wife in the homestead is fully as great as that of the husband, and this is true even though the legal title remains of record in the name of the husband during his lifetime. The wife may unite with the husband in an action to set aside a conveyance or mortgage of the homestead premises in which she did not join. Shoemaker v. Collins, 49 Mich. 595, 14 N. W. 559; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Watts v. Gallagher, 97 Cal. 47, 31 Pac. 626; McDonald v. Sanford, 88 Miss. 633, 117 Am. St. Rep. 758, 41 So. 369, 9 Ann. Cas. 1; Larson v. Reynolds, 13 Iowa, 579, 81 Am. Dec. 444.

The homestead of the family in this state is absolutely exempt from attachment or mesne process, and from levy and sale upon execution. Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684; McDonald v. Sanford, 88 Miss. 633, 117 Am. St. Rep. 758, 41 So. 369, 9 Ann. Cas. 1.

The homestead belongs to and is for the benefit of the family. Larson v. Reynolds, 13 Iowa, 579, 81 Am. Dec. 444.

The wife may join with the husband in an action to quiet title to the homestead. Rasmussen v. Stone, 30 N. D. 451, 152 N. W. 809; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Erickson v. Wiper, 33 N. D. 193, 157 N. W. 592.

The wife's right or "interest" in the homestead does not depend upon the will or caprice of the husband. Comp. Laws 1913, § 5627.

CHRISTIANSON, J. This is an appeal from an order of the district court of Stark county overruling a demurrer to the complaint of the plaintiff Margaret Sexton.

The action is brought to determine adverse claims to a certain lot in the city of Dickinson. The plaintiffs filed the following joint complaint:

"The plaintiffs for their complaint herein allege and show to the court: (1) That the plaintiff Margaret Sexton is the wife of the plaintiff Patrick Sexton, and joins with him in this action for the purpose of quieting title in the lands and premises hereinafter described, which is and for more than six years last past has been the homestead of herself and husband; that this action is for the purpose of freeing the title to such premises from all liens and encumbrances of whatever description claimed by the defendants, which lien and encumbrances have grown out of mortgages signed by her husband without being either signed or acknowledged by herself, the said Margaret Sexton.

"(2) That the plaintiff Patrick Sexton is the owner in fee simple of the following described real property, situated in the county of Stark and state of North Dakota, to wit:

"Lot two (2) in block two (2) in Hilliard and Manning's second addition to the city of Dickinson, according to the plat thereof on file and of record in the office of the register of deeds, Stark county, North Dakota.

"(3) That the defendants claim certain estates or interest in or liens or encumbrance upon the same, adverse to plaintiffs.

"Wherefore, plaintiffs pray:

"1. That defendants be required to set forth all of their adverse claims to the property above described, and that the validity, superiority, and priority thereof be determined.

"2. That the same be adjudged null and void, and that said defendants be deemed to have no estate or interest in, or lien or encumbrance upon, said property.

"3. That plaintiff's title be quieted to such lands and premises as

against the defendants or either of them, and that the defendants be forever debarred and enjoined from further asserting the same.

"4. That they have such other and general relief as to the court seems just, together with the costs and disbursements of this action."

The defendant Sutherland demurred to the complaint as to the plaintiff Margaret Sexton, on the ground that it does not state facts sufficient to constitute a cause of action. It is conceded that the complaint states a cause of action so far as the plaintiff Patrick Sexton is concerned.

Under our statute a misjoinder or excess of parties plaintiff does not constitute a ground for demurrer. Olson v. Shirley, 12 N. D. 106, 96 N. W. 297. Whether a defendant may single out one of several joint plaintiffs and demur to the complaint as to such plaintiff, on the ground that the complaint does not state a cause of action, is by no means free from doubt. It is at least an unusual procedure, and one not to be encouraged, because if a joint complaint states a cause of action in favor of any of such plaintiffs it tenders an issue for trial. Ordinarily the only parties likely to be injured because unnecessary persons have been made parties to an action are such parties themselves. If these persons do not object to being made parties, as a general rule, other persons have no cause for complaint. The mistake, if any, in joining unnecessary parties may be corrected on the final decree, as the judgment will be so framed as to work full and substantial justice, and obviously no relief will be allowed to any plaintiff who has failed to allege or establish sufficient facts to show that he is entitled thereto. See Brown v. Lawton, 87 Me. 83, 86, 32 Atl. 733; 30 Cyc. 141. See also Webster v. Kansas City & S. R. Co. 116 Mo. 114, 22 S. W. 476.

The splitting of a joint complaint in the manner adopted in this case tends to encumber the records of this court with needless appeals. It seems that the legislature intended that this practice should not be pursued, otherwise it would doubtless have made misjoinder or excess of parties a ground for demurrer. As this question has not been raised, however, and as both parties have argued the appeal on its merits, we will dispose of the question they have presented.

The sole contention on the part of the appellant is that, where the legal title to a homestead is held in the name of the husband, the wife

has not a sufficient interest therein to maintain an action to determine adverse claims.

Section 8144, Compiled Laws 1913, provides: "An action may be maintained by any person having an estate or interest in or lien or encumbrance upon real property whether in or out of possession thereof, and whether said property is vacant or unoccupied against any person claiming an estate or interest in or lien or encumbrance upon the same for the purpose of determining such adverse estate, interest, lien or encumbrance."

That courts of equity have inherent original jurisdiction to entertain suits to quiet title is elementary. 17 Enc. Pl. & Pr. 279. And "the broad grounds on which equity interferes to remove a cloud on title are the prevention of litigation, the protection of the true title and possession, and because it is the real interest of both parties, and promotive of right and justice, that the precise state of the title be known if all are acting bona fide." 32 Cyc. 1306. And hence, "a court of equity, on the sole ground of preventing multiplicity of suits, will entertain an action to quiet title where there are a number of persons interested in it, and a great many actions at law would be necessary to conclude the title." 32 Cyc. 1307.

The statutory action to determine adverse claims was evidently designed as a substitute for the equitable action to quiet title and the common-law action of ejectment, but it is broader and more comprehensive than either of these actions. Burleigh v. Hecht, 22 S. D. 301, 307, 117 N. W. 367. Whether the action is to be regarded as legal or equitable must be determined by the pleadings. Mitchell v. Black Eagle Min. Co. 26 S. D. 260, 265, 128 N. W. 159, Ann. Cas. 1913B, 85; Tracy v. Wheeler, 15 N. D. 243, 249, 6 L.R.A.(N.S.) 516, 107 N. W. 68; Powers v. First Nat. Bank, 15 N. D. 466, 470, 109 N. W. 361.

The general purpose and effect of the statute, as regards the equitable form of the action to determine adverse claims, is to extend the remedy to cases in which, by the settled rules of equity, no relief could be had, either because the adverse claim is not such as to constitute a technical cloud, or because the plaintiff is not in a situation to invoke the equitable jurisdiction. 17 Enc. Pl. & Pr. 290; Burleigh v. Hecht,

supra. The purpose of the action, as stated by the legislature, is to determine adverse or conflicting claims to real property.

The legislature intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether derived from a common source or from different or independent sources (Walton v. Perkins, 33 Minn. 357, 23 N. W. 527), and thereby avoid a multiplicity of suits. Such legislative intent is clearly evidenced by the express direction that "the court in its decision shall find the nature and extent of the claims asserted by the various parties, and determine the validity, superiority, and priority of the same." Comp. Laws 1913, § 8153; Spencer v. Beiseker, 15 N. D. 140, 107 N. W. 189; Mitchell v. Black Eagle Min. Co. 26 S. D. 260, 265, 128 N. W. 159, Ann. Cas. 1913B, 85.

That a wife may maintain an appropriate action to protect the homestead right is generally recognized by the courts. Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684; Eve v. Cross, 76 Ga. 695; Adams v. Beale, 19 Iowa, 61; Mauldin v. Cox, 67 Cal. 390, 7 Pac. 804; Andrews v. Melton, 51 Ala. 400; Comstock v. Comstock, 27 Mich. 97; McKinnie v. Shaffer, 74 Cal. 614, 16 Pac. 509; Magneson v. Pacific Mfg. Co. 26 Cal. App. 52, 146 Pac. 69. The right to maintain such action is also recognized by § 5610, Compiled Laws 1913, which limits the time within which such action may be brought.

The statutes of this state provide: "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs except as otherwise provided in this chapter." Comp. Laws 1913, § 7403. "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an action to recover possession of real estate the landlord and tenant thereof may be joined as defendants, *and any person claiming title or right of possession to real estate may be made party, plaintiff or defendant as the case may require, to any such action.*" Comp. Laws 1913, § 7404. "Of the parties to the action *those who are united in interest* must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint; . . ." Comp. Laws 1913, §

7406. "Any two or more persons having an estate or interest in or lien or encumbrance upon real property, under a common source of title, whether holding as tenants in common, joint tenants, copartners or in severalty, may unite in an action against any person claiming an adverse estate or interest in, or lien or encumbrance thereon, for the purpose of determining such adverse claim or establishing such common source of title, or declaring the same to be held in trust, or of removing a cloud upon the same. Comp. Laws 1913, § 8146.

It is a general rule of equity pleading that all persons who are materially interested in the event of the suit or in the subject-matter, however numerous, should be made parties, either as plaintiffs or defendants. 15 Enc. Pl. & Pr. 584. The reason of the rule is found in the principle of public policy enforced in courts of equity, that a decree must finally and completely determine the rights which all persons have in the subject-matter decided, so that the parties may safely obey and act upon the decree, and a multiplicity of suits or a circuity of proceedings may be avoided. 15 Enc. Pl. & Pr. 587.

"The governing motive of equity in the administration of its remedial system," says Pomeroy (Pom. Eq. Jur. 3d ed. § 114), "is to grant full relief, and to adjust in the one suit the rights and duties of all the parties, which really grow out of or are connected with the subject-matter of that suit. Its fundamental principle concerning parties is that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject-matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained either for or against them, shall be made parties to the suit; and it is not ordinarily a matter of substantial importance whether they are joined as plaintiffs or as defendants, although this question of procedure is regulated to a certain extent by rules based upon considerations of convenience, rather than upon any essential requirements of the theory. The primary object is that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled, the liabilities properly apportioned, and the incidental or consequential claims or interest of all may be fixed, and all may be bound in respect thereto by the single decree."

In another of his valuable works (Pom. Code Rem. § 331) the same author said: "The doctrine of equity, expressed in its most general form, is that all persons materially interested, either legally or beneficially, in the subject-matter of the suit, should be made parties to it, either as plaintiffs or as defendants, so that there may be a complete decree which shall bind them all."

This general equitable rule, it has been said, is one of convenience only, framed by the courts for the purposes of justice and to prevent the court from doing business by halves. Wiser v. Blachly, 1 Johns. Ch. 437; Elmendorf v. Taylor, 10 Wheat. 166, 6 L. ed. 294; 15 Enc. Pl. & Pr. 606. Story (Story, Eq. Pl. § 76C) says: "The truth is that the general rule in relation to parties does not seem to be founded on any positive and uniform principle, and therefore it does not admit of being expounded by the application of any universal theorem as a test. It is a rule founded partly in artificial reasoning, partly in consideration of convenience, partly in the solicitude of courts of equity to suppress multifarious litigation, and partly in the dictate of natural justice that the rights of persons ought not to be affected in any suit without giving them an opportunity to defend them."

Courts of equity therefore refused to enforce the rule where its application would tend to defeat the ends of justice, and certain recognized exceptions thereto became established. 15 Enc. Pl. & Pr. 606. Consequently the persons who, because of their interest, may or must be made parties, were divided by the courts and text-writers into classes. The Supreme Court of the United States divided parties into three classes, designated respectively as formal, necessary, and indispensable parties. While these three classes of parties clearly exist, it is somewhat difficult to distinguish between "indispensable" and "necessary" parties; and the great majority of the courts and text-writers use these two terms synonymously, and divide parties into two classes: First, necessary or indispensable parties; second, proper, but not indispensable, parties. 15 Enc. Pl. & Pr. 610.

In discussing this classification a learned legal writer said: "With respect to the nature of the interest which requires a person to be joined in a suit, there is, of course, no difficulty as to persons against whom relief is expressly asked. But with respect to those who are incidentally connected with the relief asked against others, the line of de-

marcation is less easy to draw. The interests, however, which require such joinder seem generally referable to one of the three following heads: First, interest in the subject-matter, which the decree may affect, and for the protection of which the owners are joined; secondly, concurrent claims with the plaintiff, which, if not bound by the decree, may be afterwards litigated; and, thirdly, liability to exonerate the defendant or to contribute with him to the plaintiff's claim." Adams, Eq. 8th ed. 314.

In discussing the same subject Pomeroy (Pom. Code Rem. § 329) said: "Necessary parties, when the term is accurately used, are those without whom no decree at all can be effectively made, determining the principal issues in the cause. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject-matter of the litigation."

The Supreme Court of the United States has defined necessary parties to be the "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Shields v. Barrow, 17 How. 130, 15 L. ed. 158; Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825.

"A proper party," said Sanborn, J., (Kelley v. Boettcher, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55, 64), "as distinguished from one whose presence is necessary to the determination of the controversy, is one who has an interest in the subject-matter of the litigation, which may be conveniently settled therein." It has been suggested by another learned legal writer that the propriety of a person being made a party depends upon his interest in the *object,* rather than the subject-matter, of the suit. See Calvert, Parties, p. 10. See also Van Keuren v. McLaughlin, 21 N. J. Eq. 163.

These equitable doctrines were embodied in the statutory provisions quoted above. Pom. Code Rem. §§ 196, 200. The permissive joinder under the Codes has a very wide range of application. 30 Cyc. 117, 118. It will be noted that the statutory provisions are couched in permissive language. They provide that certain parties "*may* be joined

as plaintiffs,"—not *must* be; and that certain persons "*may* unite in an action,"—not *must* unite. This language is a recognition of the right to unite "proper but not indispensable parties," as distinguished from "necessary or indispensable parties," as parties plaintiff in an action in the courts of this state. In discussing these provisions of the Code of Civil Procedure, Pomeroy (Pom. Code Rem. § 331), said: "Those whose interests are adverse to the claim set up by the plaintiff, and who would therefore naturally resist such claims, should be brought into the action as defendants. On the other hand, those whose interests are concurrent with the interests of the principal plaintiff, who actually institutes and prosecutes the suit, should primarily be joined with him as coplaintiffs."

The present action, according to the averments of the complaint, was instituted for the purpose of quieting title to certain real property which constitutes the homestead of the plaintiffs,—to have the adverse claims of the defendants thereto adjudged null and void, and to have defendants enjoined from further asserting the same.

The setting apart of a homestead for the preservation of the home is part of the public policy of this state embodied in the Constitution itself. N. D. Const. § 208. The failure to make a declaration of the homestead by the head of the family "does not impair the homestead right." Comp. Laws 1913, § 5621. While the homestead exemption is claimed by the head of the family, it is intended primarily for the benefit of the family. Calmer v. Calmer, 15 N. D. 127, 106 N. W. 684; Bremseth v. Olson, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 Ann. Cas. 1155. If the head of the family dies, the homestead survives for the benefit of the surviving husband or wife and minor children. Comp. Laws 1913, §§ 5622–5631.

If the legal title to the homestead is held by the husband, the homestead interest of the wife is dependent upon his legal title. But the interests of both husband and wife are harmonious. The maintenance and enforcement of his legal title is not in conflict with the maintenance and protection of the homestead right. The wife is a beneficiary of the homestead and vitally interested in its preservation. She is entitled to occupy the homestead. It is her home. And while she is not always a necessary party to proceedings relating to the homestead, she will not be estopped by any decree or judgment affecting her homestead right,

unless she has been made a party to the proceeding. 13 R. C. L. p. 692, § 151. And it has been held that any unlawful invasion of her right to the peaceful and quiet enjoyment of her homestead is a legal wrong against her. Lesch v. Great Northern R. Co. 97 Minn. 503, 7 L.R.A.(N.S.) 93, 106 N. W. 955.

It has also been held that she may maintain an action to determine adverse claims to her homestead even though the legal title thereto is vested in her husband. McKinnie v. Shaffer, 74 Cal. 614, 16 Pac. 509; Magneson v. Pacific Mfg. Co. 26 Cal. App. 52, 146 Pac. 69. And while the question of her right to maintain such action was not raised, this was the form of action maintained by the wife in Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684. It has also been held that the minor children, while not necessary, are nevertheless proper, parties plaintiff to a suit brought by their mother to recover the homestead. Showers v. Robinson, 43 Mich. 502, 5 N. W. 988.

It is not necessary for us, however, in the instant case to consider or discuss the nature or extent of the homestead right. Nor is it necessary to determine whether the wife alone may maintain an action to determine adverse claims to a homestead where the legal title thereto is in the name of her husband, as this question is not necessarily involved in this case. The question here presented is whether she is a proper party plaintiff in an action instituted by her husband to determine adverse claims to such homestead.

We are agreed that, while a wife is not an indispensable party to such action, she is nevertheless a proper party. She is clearly interested in the object of, and the relief sought in, the action. She has an interest in the subject-matter of the litigation which cannot be concluded by decree unless she is made a party to the proceeding.

If the defendant had desired to enforce their claims against the premises, either by action to determine adverse claims or otherwise, it would have been manifestly proper for them to join both Patrick Sexton and Margaret Sexton as parties defendant. In fact this would have been absolutely necessary in order to obtain a judgment concluding the homestead rights, if any, of Margaret Sexton in the premises.

In considering the question of joinder of husband and wife as parties plaintiff in an action affecting the title to a homestead owned by one of them, the supreme court of Michigan, speaking through the celebrated

jurist Cooley, in Henry v. Gregory, 29 Mich. 69, said: "When the wife is owner of the land, and the husband occupies it with her, living upon it, any remedy that may be sought by them to protect their possession, or which in its final results may disturb their possession, should properly be sought by or against both. For, though the wife may have the exclusive title, the husband has a legal right to occupy jointly with her; and it is manifest there cannot be an adjudication covering the whole case so long as only one of the parties jointly entitled to the possession is before the court." See also Shoemaker v. Gardner, 19 Mich. 96; Hodson v. Van Fossen, 26 Mich. 68.

"What has been said above disposes of the only point raised and argued by the appellant. However, Mr. Justice Robinson has seen fit to raise a question which was in no manner raised or argued, or even suggested by the appellant. The question raised by Mr. Justice Robinson is that the statement in the complaint, with respect to the nature of the adverse claims of the defendants, transforms the action from a statutory action to determine adverse claims, to an action under the general system of pleading for the removal of a specific lien.

"The point made by Mr. Justice Robinson was ruled contrary to his contentions, by this court, in Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029."

In discussing the point in Blakemore v. Roberts, supra, this court, speaking through Judge Morgan, said: "It is urged that the complaint is not framed under chapter 5, p. 9, Laws 1901, for the reason that it alleges that the lien relied on is a tax lien. *The contention is that plaintiffs have set forth more facts than are required by law, and are therefore not within its provisions. We see no force in the contention.* The fact that the complaint alleges that the lien relied on is held 'by reason of each of said certificates of tax sale' is not sufficient to warrant us in holding that a cause of action to determine adverse claims is not pleaded in view of all the other allegations of the complaint. These additional words do not make the complaint other or different than a complaint under chapter 5, id. The allegations show a cause of action based on a lien. Wilson v. Hooser, 72 Wis. 420, 39 N. W. 772. If the complaint showed on its face that the lien pleaded is an invalid one, the rule would be different. The fact that more facts are pleaded than necessary under the statute does not render the complaint demurrable if the

required facts are stated and no other or different cause of action is stated. *We find no warrant for holding that the plaintiffs have waived the statutory form of complaint or elected to plead another.* The defendant relies on the case of Swenson v. Greenland, 4 N. D. 532, 62 N. W. 603. That case is not applicable to this one. This complaint is authorized and its form prescribed by statute. It is therefore excepted from the principles applied in that case to an action for the foreclosure of a tax lien. The case of Walton v. Perkins, 28 Minn. 413, 10 N. W. 424, is also claimed to be in point. But we do not so understand it. In that case the complaint was defective as a complaint in an equitable action to cancel a mortgage which was a cloud upon a title to land. The court refused to sustain the complaint as sufficient under the statute which provided for settlement of adverse claims."

It will be noted that Mr. Justice Robinson also cites and relies on the case of Walton v. Perkins, supra. The holding in that case is stated in the syllabus therein as follows: "A complaint which is clearly one to remove a specified cloud upon title to real estate cannot, if it fail to show that the instrument under which defendant claims is invalid, be sustained against a demurrer, on the ground that the fact stated show that plaintiff might have brought an action under Gen. Stat. 1878, chap. 75, §§ 2, 3, to determine adverse claims upon real estate."

In the subsequent case of Buffalo Land & Exploration Co. v. Strong, 91 Minn. 84, 97 N. W. 575, the Minnesota supreme court had occasion to consider a complaint in an action to determine adverse claims, wherein plaintiff's title was alleged in detail and the alleged interests of the defendants were also set out with considerable particularity. In answering the contention that this rendered the complaint demurrable, the court said: "It was unnecessary to allege in detail plaintiff's chain of title, or to refer to the issuance of the patent to defendant Strong; and the fact that this was done, and also that the complaint alleged that the patent was issued through mistake and fraud, did not alter the nature of the action, nor add anything to the force of the pleading. These allegations could be rejected as surplusage, and a cause of action still be found in the complaint." The same question was also considered and the same result reached by the supreme court of South Dakota in the cases of Frum v. Weaver, 13 S. D. 457, 82 N. W. 579; Campbell v.

Equitable Loan & T. Co. 14 S. D. 483, 85 N. W. 1015; Bennett v. Darling, 15 S. D. 1, 86 N. W. 751.

An examination of the complaint set forth in the beginning of this opinion, clearly discloses that the pleader intended to state a statutory cause of action to determine adverse claims. The complaint contains every averment which the statute requires to be contained in such complaint, and the prayer for relief follows the statutory form. The allegations regarding the nature of the liens of the defendants and the reason for their invalidity certainly cannot prejudice the defendants. These additional allegations are in no manner inconsistent with the plaintiff's claim of ownership, or with the allegation in the complaint that the defendants claim certain estates or interests in, or liens or encumbrances upon, the premises, adverse to the plaintiffs; or with the prayer that such adverse claims be adjudged null and void.

It is interesting to note that Mr. Justice Robinson appeared as counsel for the defeated parties in the two cases of Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029, and Bennett v. Darling, 15 S. D. 1, 86 N. W. 751. And the views expressed by him in his dissenting opinion in this case are in accord with the argument advanced by him in those two cases. The South Dakota supreme court held that his contention was "not sustainable." And this court said that it could "see no force in his contention." Those decisions represented the unanimous opinions of the then justices of the respective courts, and they also represent the views of all the present members of this court, with the obvious exception of Mr. Justice Robinson.

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

ROBINSON, J. (dissenting). In this case there is a demurrer to the complaint of Margaret Sexton on the ground that it does not state facts sufficient to constitute a cause of action. The question of misjoinder of parties is not at all presented, as there is no demurrer on that ground, and as a demurrer lies only for a defect or want of parties plaintiff or defendant, and not for any excess from parties or the joinder of needless parties.

The complaint avers that Margaret Sexton is the wife of Patrick Sexton, and joins with him in this action to quiet title to certain land which is owned by Patrick Sexton and which is occupied as a home

stead by the plaintiffs. Then it avers that the action is for the purpose of freeing title to such premises of all liens and encumbrances claimed by the defendants, which liens and encumbrances have grown out of mortgages signed by her husband without being signed or acknowledged by the said Margaret Sexton. Then it avers that defendant's claim certain estates in the land adverse to the plaintiff, and makes a demand for judgment quieting title.

The complaint is neither fish nor fowl. It is not a bill in equity, and it is not a proper complaint under chapter 5, Laws of 1901, for the determination of adverse claims. In Walton v. Perkins, 28 Minn. 413, 10 N. W. 424, the distinction between those two actions is very clearly made, and it is there held that when the complaint is one to remove a specified cloud upon title to real estate it must show the cloud and state facts showing that it is void. And if it fail to show that the instrument under which the defendant claims title is invalid, then the complaint is demurrable, even though it state facts sufficient in an action to determine adverse claims, and the reasoning of the court is sound and logical, because, in an action to remove a specified cloud, the plaintiff is entitled to recover costs, even though the defendant does not appear, but in an action to determine adverse claims under the statute the plaintiff recovers no costs in case of no defense. The complaint merely asserts that the defendants make an adverse claim, without showing that the defendants do plaintiff any wrong in making it. And, as we held in a recent case involving title to school lands, the answer is in reality the commencement of an action by the defendant against the plaintiff, and an answer claiming title sets forth a counterclaim, to which the plaintiff must reply. The object of the action is to force one claiming an adverse interest or lien, to establish or abandon his claim.

With respect to the claim of defendant, the position of the parties is the reverse of that occupied by parties in an ordinary action. The defendant becomes practically the plaintiff, and takes the affirmative in pleading and proof, while the plaintiff becomes practically the defendant and defends against the claims.

In an ordinary action the plaintiff must tender the issues to the defendant, and, if defendant takes issue on facts alleged, the plaintiff must prove enough of them to entitle him to recover. An action under the statute is brought to compel defendant to tender issues unless he

chooses to abandon his claim. In this case the complaint is one to remove a specified cloud arising from mortgages on homesteads, and as such it does not state facts sufficient to constitute a cause of action.

The demurrer should be sustained.

IVER BRUDEVOLD and W. F. Stremel, Administrators with the Will Annexed of the Estate of John H. Waldorf, Deceased, v. MARY E. WALDORF, Sarah A. Waldorf, Alfred M. Waldorf, and Harriett E. Tulle.

(164 N. W. 154.)

Homestead — husband and wife — legal title in husband — death of husband — widow may occupy until remarriage — exemptions — personal property — amount and value — not liable for debts of deceased husband — law upon subject — mandatory — administrator must set aside exempt property — estate — residue — liable for debts left.

Where the husband and wife were residing and living upon the homestead, the legal title of which was in the husband at the time of his death, after the death of the husband the widow may continue to reside upon such homestead, as defined by law, so long as she does not again marry. In addition to this, the widow is entitled as an exemption to personal property to the extent of $1,500; and none of such property shall be liable for any of the debts which the deceased owed at the time of his death. The law is mandatory, requiring the administrators of such estate to set aside for the use and benefit of the widow such exempt property. The residue of such property or estate, exclusive of all such exemptions, is chargeable with the debts owing by the decedent at the time of his death.

Opinion filed July 21, 1917.

NOTE.—On the question of widow's exemptions under homestead and exemption laws, see note in 4 L.R.A.(N.S.) 391, discussing the rights acquired by widowship of the widow and setting forth cases holding that, after the death of the husband, the widow becomes the head of the family and is entitled to homestead exemptions.

On effect of divorce on homestead rights, see notes in 23 L.R.A. 239, and 16 L.R.A. (N.S.) 114.

Appeal from the judgment of the District Court of Cass County, *Charles A. Pollock,* Judge.

Affirmed.

W. J. Courtney, for appellant.

The court could not make Mary E. Waldorf a party to this record and reinstate the appeal which she and her attorney of record had consented to dismiss in the manner here sought. Miller v. Glass, 14 Ill. App. 177; Smith v. Wilson, 26 Ill. 186; Cropper v. West, 4 Munf. 299; Craigen v. Thorn, 3 Hen. & M. 269.

Appellants were not consulted, nor did they know of such proceedings until the decision on the appeal which they themselves dismissed; we were not a party by stipulation or otherwise to such proceedings. A motion to reinstate an appeal must be made within the time between the making of the order of judgment of dismissal and the entry of the order or judgment of dismissal. Rayne v. O'Brien, 12 La. Ann. 400; Pipkin v. Green, 112 N. C. 355, 17 S. E. 534.

The court could not reinstate such an appeal. Its judgment of dismissal was an affirmance of the decision of the lower court; that when it was regularly entered the court could not reinstate the appeal unless fraud or mistake of fact which could not have been discovered appears, and no such claim is here made. Comp. Laws 1913, § 8618; People v. McDermott, 97 Cal. 248, 32 Pac. 7; People v. Sprague, 57 Cal. 147; Vance v. Pena, 36 Cal. 328; Hanson v. McCue, 43 Cal. 178; Rowland v. Kreyenhagen, 24 Cal. 52; Blanc v. Bowman, 22 Cal. 23; Leese v. Clark, 20 Cal. 387; Crogan v. Ruckle, 1 Cal. 193; Martin v. Wilson, 1 N. Y. 240; Mateer v. Brown, 1 Cal. 231, 52 Am. Dec. 303, 7 Mor. Min. Rep. 156; Delaplaine v. Bergen, 7 Hill, 591.

Mary E. Waldorf did not show that her appeal was taken in good faith, and is estopped to question the dismissal before taken and entered. Hagar v. Mead, 25 Cal. 598; Lightle v. Ivancovich, 10 Nev. 41.

The court cannot stipulate respondents in and stipulate the creditors out. Howell v. Van Ness, 31 N. J. L. 443.

Pollock & Pollock, for Mary E. Waldorf, respondent, and *V. R. Lovell* for Sarah A. Waldorf, respondent.

There are two questions to be determined. Who was the lawful wife of Waldorf at the time of his death? Then, was such wife entitled to homestead and exemption rights?

The legal representatives of Waldorf are not in a position to question the validity of the decree of divorce obtained by him from Sarah Waldorf. By the acts, agreement, and conduct of Sarah Waldorf, she is estopped also. Mohler v. Shank, 93 Iowa, 273, 34 L.R.A. 168, 57 Am. St. Rep. 274, 61 N. W. 981; Marvin v. Foster, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484; Re Morrison, 52 Hun, 102, 5 N. Y. Supp. 90; Karren v. Karren, 25 Utah, 87, 60 L.R.A. 302, 95 Am. St. Rep. 815, 69 Pac. 465.

The matter of reinstating the appeal was one addressed to the discretion of the trial court, and there was no statutory limitation against it. Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Dedrick v. Charrier, 15 N. D. 515, 125 Am. St. Rep. 608, 108 N. W. 38; Acme Harvester Co. v. Magill, 15 N. D. 116, 106 N. W. 563; Keeney v. Fargo, 14 N. D. 419, 105 N. W. 92.

The decedent, while living and up to the time of his death, could not have questioned the property rights of Mary E. Waldorf in relation to his estate. He would have been estopped to do so. The administrators are in the same position, and they also are estopped. Marvin v. Foster, 61 Minn. 154, 52 Am. St. Rep. 586, 63 N. W. 484; Re Morrison, 52 Hun, 102, 5 N. Y. Supp. 90; Re Swales, 60 App. Div. 599, 70 N. Y. Supp. 220.

GRACE, J. A very substantial statement of the facts in this case will greatly aid us in considering this case, and to a large extent will dispose of it.

John H. Waldorf died about the 1st day of October, 1912. At the time of his death he was living upon his homestead in Cass county. With him lived his second wife, Mary E. Waldorf. Prior to his marriage to Mary E. Waldorf, he was married to Sarah A. Waldorf, from whom he secured a divorce in the fall of 1911. Iver Brudevold and W. F. Stremmel were the administrators of the estate. Sarah A. Waldorf, his first wife, had never been in the state of North Dakota to live, but came to this state to be present at a hearing in the county court of Cass county. Much of the litigation in the county court of Cass county in the first instance was between Sarah A. Waldorf, the first wife, whose then attorney was Mr. V. R. Lovell, and Mary E. Waldorf, the second wife, whose attorneys were Pollock & Pollock. The only question in

the litigation between the two women in the county court was which of the two was the lawful widow of John H. Waldorf who, under the law would be entitled to the exemptions. Mary E. Waldorf made her claim for exemptions to the county court, which claim was resisted by Sarah A. Waldorf, the first wife, on the grounds that the decree of divorce granted John H. Waldorf during his lifetime from Sarah A. Waldorf was void by reason of defective service of the summons in the divorce action, and for that reason there was no divorce; Sarah A. Waldorf claiming for that reason that there was no divorce between her and John H. Waldorf; and if this were true, and held to be true, she would be the lawful widow of John H. Waldorf, and the second marriage would be invalid. This subject we will revert to a little later in the opinion.

Judge Hanson, of the county court of Cass county, attempted to hold, and did hold, that the decree of divorce was void and that John H. Waldorf had never been divorced from Sarah A. Waldorf, and that Sarah A. Waldorf was the surviving widow of John H. Waldorf, and denied exemptions to Mary E. Waldorf, the second wife, and granted exemptions to Sarah A. Waldorf, the first wife. This degree was filed in the county court on the 2d day of June, 1913. The administrators took no part in all of this litigation. Mary E. Waldorf appealed from the decree of the county court of June 2, 1913, to the district court of Cass county. Just before the district court convened in November, 1913, the attorneys,—Mr. Lovell for Sarah A. Waldorf, and Messrs. Pollock & Pollock for Mary E. Waldorf, signed a stipulation that the two widows would divide the estate equally regardless of which received the estate. Upon this stipulation being signed, the appeal from the order of June 2d of the county court was dismissed, which left the order of the county court standing in favor of Sarah A. Waldorf, the first wife. At this point the administrators applied to the county court by petition for an order to vacate the order of the court of June 2d which granted Sarah A. Waldorf, the first wife, exemptions. This application or petition was resisted by Mr. Lovell, the attorney for Sarah A. Waldorf. Various hearings were had, and on the 2d day of June, 1914, the county court of Cass county made its order setting aside and vacating its former order of June 2, 1913, and denied Sarah A. Waldorf any exemptions, and made the property liable

for the payment of debts. Sarah A. Waldorf, through her attorney V. R. Lovell, perfected an appeal to the district court of Cass county, and, when the matter came on to be heard in the district court, Pollock & Pollock appeared for Mary E. Waldorf and made application to have the appeal of Mary E. Waldorf, which was formerly dismissed—about two years prior to the time of this hearing—reinstated. The stipulation dismissing her former appeal was signed by Pollock & Pollock, counsel for Mary E. Waldorf, and V. R. Lovell, attorney for Sarah A. Waldorf. The dismissal was actually made on the 4th day of November, 1913. The district court of Cass county granted an order to Mary E. Waldorf dismissing her former appeal more than two years and three months before her application was made to reinstate the same. The judge of the district court of Cass county, the Honorable Judge Pollock, affirmed the decision of the county court with reference to Sarah A. Waldorf, denied her any exemptions in the estate of John H. Waldorf, and at the same time, and as a part of the same appeal, opened up the case and reinstated the appeal of Mary E. Waldorf which had formerly been dismissed in the manner we have recited.

We think the district court was right in affirming the last order of the county court with reference to Sarah A. Waldorf and denying her any exemptions, and by so doing holding that Mary E. Waldorf was the lawful wife residing with John H. Waldorf upon his homestead at the time of the death of John H. Waldorf, and as such is entitled to receive all the exemptions provided for the widow by law. She is entitled to the homestead as defined by § 5605, Compiled Laws of 1913, so long as she does not again marry, and in addition thereto is entitled to personal property to the extent of $1,500, if there was so much personal property in the estate of John H. Waldorf, and other allowances for her support if in the discretion of the county court she is in need of such additional allowance. Such exemptions as we have referred to, and which are provided by statute, belong to the surviving widow, and at no time are such exemptions subject to any debts which the husband owed at the time of his death. Furthermore, it is the duty of the administrator, made mandatory by such provisions relative to exemptions for the widow, to set aside all such exempt property to the amount and in the manner specified by law, if there is any such property. It is only out of other property, exclusive of all of such exempt property, that the

administrator may pay the debts which were owing by the deceased at the time of his death, or other claims which have arisen since his death which are properly chargeable against such estate. Sarah A. Waldorf never having resided in the state of North Dakota, never having been a resident or citizen thereof, nor ever having resided as the wife of John H. Waldorf with him upon his homestead, was never entitled to claim any exemptions, and she cannot be heard to make a collateral attack upon the decree of divorce which was granted in the divorce proceedings between her and John H. Waldorf. For the purposes of deciding this case, at least we assume that the decree of divorce was valid and binding on John H. Waldorf and Sarah A. Waldorf. The fact that John H. Waldorf had some creditors and owed some debts at the time of his death under the law can make no difference. The exemptions provided by law are no fund out of which such debts can be paid. The law specifically and lucidly sets apart all such exemptions for the benefit of the widow, and plainly says that such exempt property shall not be subject to be used to pay debts owed by the decedent at the time of his death. Such exempt property is not, therefore, subject to be used for the payment of any such debts, or any debts of the deceased, and it is the mandatory duty of the administrator to set aside all such exempt property as the law says shall be exempt in such case to the widow for her use and benefit.

The judgment appealed from is in all things affirmed, with costs.

THE NORTHERN TRADING COMPANY, a Corporation, v. THE DREXEL STATE BANK OF CHICAGO, a Corporation.

(164 N. W. 151.)

Negotiable instruments — promissory note — possession — presumption — valid title — conflict in testimony — questions of fact — submitted to court — jury waived — decision not conclusive — entitled to careful consideration.

1. Where one has possession of a promissory note or a negotiable instrument,

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NOTE.—The general rule is in accord with the case of NORTHERN TRADING CO. v. DREXEL STATE BANK in holding that a negotiable instrument duly executed and

the presumption is that he has valid title thereto, and that it was delivered to him. Where there is a conflict of testimony as to the title and delivery of such instrument, and the questions of fact as to title and delivery are submitted to the court without a jury, and the court decides upon the matter of title and delivery, while the decision of the trial court is not conclusive upon this court, nevertheless the judgment of the trial court is entitled to be carefully considered by this court; and especially is this true in a case such as the one at bar where there is just one witness who testifies for the plaintiff and one for the defendant, and their testimony is in entire conflict. The trial court under such circumstances has the advantage of seeing the witnesses on the stand, noting their demeanor, their candor, the willingness with which they testify, and many other characteristics or qualities of the witnesses, while this court is entirely without such facilities to aid it in its final determination as to the credibility of the witness.

Negotiable instruments — possession of — presumption — good title — that it was delivered — due course.

2. Under § 6901, Compiled Laws of 1913, where one has possession of a negotiable instrument, the presumption is that he has a valid title thereto and that it was delivered to him. Under § 6944, Compiled Laws of 1913, every holder of negotiable paper is presumed to be a holder in due course.

Negotiable instruments — consideration — pre-existing debt.

3. Under § 6910, Compiled Laws of 1913, an antecedent or pre-existing debt constitutes value, and is sufficient to support a simple contract.

Negotiable instruments — indorsement in blank — effect of — payable to bearer — negotiated by delivery.

4. Under § 6919, Compiled Laws of 1913, a blank indorsement is one which specifies no indorsee, and where an instrument is so indorsed, it is payable to bearer and may be negotiated by delivery.

Opinion filed July 21, 1917.

Appeal from the judgment of the District Court of Traill County, *Charles A. Pollock,* Judge.

Affirmed.

Pollock & Pollock, for appellant.

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delivered, and payable to bearer, or indorsed in blank, will pass by delivery, and that title to such instrument will pass by delivery to a bona fide purchaser for value, without notice, without reference to the title of the one from whom it was obtained, although the instrument may have been stolen or otherwise unlawfully obtained from the owner, as will be seen from note in 19 L.R.A.(N.S.) 107, on rights of owner of negotiable paper, payable to bearer, or indorsed in blank, as against bona fide purchaser from one unlawfully in possession thereof.

The respondent gave no new consideration or value for the disputed collateral, but under its own theory took it as security for a pre-existing debt of Kittel and for its own advantage and benefit, and is therefore not privileged as a purchaser in good faith and for value, under the law. Porter v. Andrus, 10 N. D. 558, 88 N. W. 567; Comp. Laws 1913, § 6937; Roseman v. Mahony, 86 App. Div. 377, 83 N. Y. Supp. 749.

The burden was upon the bank to show that it acquired the paper in good faith and for value, and that it was a holder in due course, and it has not sustained such burden. Comp. Laws 1913, § 6944; Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550; Walters v. Rock, 18 N. D. 45, 115 N. W. 511.

The giving of the notes and mortgage constituted but one transaction, and none of the said instruments are privileged as negotiable instruments. Jones Mortg. § 71; Joyce, Defenses to Commercial Paper, § 365; Oster v. Mickley, 35 Minn. 245, 28 N. W. 710; Garnett v. Meyers, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803; Brooke v. Struthers, 110 Mich. 562, 35 L.R.A. 536, 68 N. W. 272; Allen v. Dunn, 71 Neb. 831, 99 N. W. 680; Gilbert v. Nelson, 5 Kan. App. 528, 48 Pac. 207; Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779.

Lawrence & Murphy, for respondent.

The indorsement was the same as if the paper had been indorsed to bearer, no indorsee being named. Comp. Laws 1913, § 6894, subd. 5, § 6919.

The fact of possession of the instrument raises prima facie the presumption of valid title thereto. Comp. Laws 1913, § 6901.

The holder of such paper is presumptively a holder in due course. Comp. Laws 1913, § 6944; Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724; Rev. Codes 1899, § 59, chap. 100; 2 Randolph, Com. Paper, § 730; Million v. Ohnsorg, 10 Mo. App. 432; 1 Dan. Neg. Inst. § 573, and cases cited.

The holder of negotiable paper as collateral security for a pre-existing debt is now and expressly brought within the law by the provisions of the Uniform Negotiable Instruments Act. Rev. Codes 1905, § 6327, Comp. Laws 1913, § 6910.

This act has abolished the old rule that such a holder was not a holder "for value." Brewster v. Shrader, 26 Misc. 480, 57 N. Y.

Supp. 606; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822; People's Sav. Bank v. Bates, 120 U. S. 565, 566, 30 L. ed. 757, 758, 7 Sup. Ct. Rep. 679; Weaver v. Barden, 49 N. Y. 286; Cary v. White, 52 N. Y. 138; Wood v. Robinson, 22 N. Y. 567; Mingus v. Condit, 23 N. J. Eq. 313; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61; National Revere Bank v. Morse, 163 Mass. 381, 40 N. E. 180; Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308; Bridgeport City Bank v. Welch, 29 Conn. 475; Hanold v. Kays, 64 Mich. 439, 8 Am. St. Rep. 835, 31 N. W. 420; Fitzgerald v. Barker, 96 Mo. 661, 9 Am. St. Rep. 375, 10 S. W. 45; Spencer v. Sloan, 108 Ind. 183, 58 Am. Rep. 35, 9 N. E. 150; Quinn v. Hard, 43 Vt. 375, 5 Am. Rep. 284; Armour v. McMichael, 36 N. J. L. 92; Fisher v. Fisher, 98 Mass. 303; Roberts v. Hall, 37 Conn. 205, 9 Am. Rep. 308; Giovanovich v. Citizens' Bank, 26 La. Ann. 15; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Robinson v. Lair, 31 Iowa, 9; Bonaud v. Genesi, 42 Ga. 639.

The exception to the general rule is based upon considerations of commercial policy, and is peculiar to commercial paper. Schaeffer v. Fowler, 111 Pa. 451, 2 Atl. 558; Martin v. Citizens Bank & T. Co. 94 Tenn. 176, 28 S. W. 1097; Roach v. Woodall, 91 Tenn. 206, 30 Am. St. Rep. 883, 18 S. W. 407; Jenkins v. Schaub, 14 Wis. 1; Comp. Laws 1913, § 6912.

It is held that a person who takes negotiable paper as a holder in due course has a good title, and is not affected by the want of title of the party from whom he takes it. Voss v. Chamberlain, 139 Iowa, 569, 19 L.R.A.(N.S.) 106, 130 Am. St. Rep. 331, 117 N. W. 269.

A statement that collateral security has been deposited for the performance of the promise contained in the note is a recital only, which does not affect its negotiability. Wise v. Charlton, 4 Ad. & El. 486, 111 Eng. Reprint, 979, 6 Nev. & M. 364, 2 Harr. & W. 49, 6 L. J. K. B. N. S. 80; Fancourt v. Thorne, 9 Q. B. 312, 115 Eng. Reprint, 1293, 15 L. J. Q. B. N. S. 344, 10 Jur. 639.

A provision merely authorizing the sale of the collateral if the note be dishonored, does not have this effect. Perry v. Bigelow, 128 Mass. 129; Towne v. Rice, 122 Mass. 67; Biegler v. Merchants' Loan & T. Co. 62 Ill. App. 560; Arnold v. Rock River Valley Union R. Co. 5 Duer, 207; Brinen v. Muskegon Sav. Bank, 174 Mich. 414, 140 N. W. 529.

GRACE, J. The complaint states a cause of action to foreclose a certain real estate mortgage covering section 31, in township 144, range 51, Traill county, North Dakota, given to secure $5,400, as evidenced by six certain promissory notes; five notes being for $1,000 each, and one note for $400. The notes and mortgage were signed by Frederick Siegert and Ida Siegert. They, however, make no defense to the foreclosure, the defense being by the Drexel State Bank of Chicago, they claiming that the notes and mortgage in question were assigned to them as collateral security. The complaint contains all the regular allegations of an ordinary foreclosure by action.

The answer, among other things, alleges the indebtedness of Richard C. Kittel and the Northern Trading Company to the defendant in the sum of $8,500, represented by a promissory note which the defendant, the Drexel State Bank of Chicago, alleges was secured by the delivery to the defendant of the notes mentioned in the complaint and the assignment of the mortgage which secured said notes; and the answer alleges that such notes and mortgage were to be held as a pledge and security to the debt due from Kittel and for the purpose of paying such debt. The defendant further alleges the possession of the said notes and mortgage since the time of the delivery to them, and claims to be the owner and holder of the notes and mortgage described in the complaint, and claims that plaintiff has no right or interest in said notes and mortgage until the debt of Richard C. Kittel to the defendant is paid and satisfied; and that there is now due to the defendant from said Richard C. Kittel and the plaintiff a sum of over $11,000. Defendants add in the prayer that, if the said mortgage be foreclosed and the property sold, the proceeds be delivered to the defendant in payment and satisfaction of the debt due and owing from Richard C. Kittel to the defendant.

The plaintiff in its reply states the following: The plaintiff admits that the defendant, Drexel State Bank of Chicago, secured possession of the notes and real estate mortgage described in the plaintiff's complaint herein, and several assignments of said mortgage, and has retained and still retains the possession thereof, and in this behalf alleges that the same were not by the plaintiff, nor any other person or party, delivered to said defendant, but were taken clandestinely by the agent and representative of said defendant, without any authority from the plaintiff and without the plaintiff's consent, and against its

will. The plaintiff admits there was certain indebtedness of the plaintiff and Richard C. Kittel owing to and held by the defendant at the time said defendant secured possession of said papers as aforesaid, but in this behalf alleges that all of the indebtedness of the plaintiff to the defendant has long since been paid in full.

The facts in the case are substantially as follows: The plaintiff is a corporation organized and existing by virtue of the laws of the state of North Dakota, its principal place of business being at Casselton, North Dakota. The Drexel State Bank of Chicago is a corporation organized and existing by virtue of the laws of the state of Illinois. On the 15th day of August, 1913, Frederick Siegert and Ida Siegert executed and delivered to Murray Bros. & Ward Land Company, a corporation, their promissory notes in writing for the sum of $5,400, being five notes for $1,000 each, and one note for $400, which were secured by a real estate mortgage upon all of section 31–144–51. Murray Bros. & Ward Land Company afterwards assigned such mortgage to the Minneapolis Trust Company, which assignment was filed February 5, 1914, in Traill county, North Dakota. On or about the 1st day of May, 1914, Minneapolis Trust Company reassigned such mortgage to Murray Bros. & Ward Land Company. About the 2d day of May, 1914, Murray Bros. & Ward Land Company assigned such mortgage to the plaintiff, the Northern Trading Company, and sold, assigned, indorsed, transferred, and delivered the notes in question to the Northern Trading Company, which notes were indorsed without recourse.

During the times mentioned herein Richard C. Kittel, of Casselton, North Dakota, was vice president, director, stockholder, and managing agent of the plaintiff, the Northern Trading Company, and the president, director, and managing agent of the First National Bank of Casselton, and William F. Kittel was the treasurer, director, and stockholder of the plaintiff, the Northern Trading Company, and cashier, stockholder, and director of the First National Bank of Casselton, North Dakota. Between the 1st day of January, 1914, and the 20th day of January, 1916, M. B. Cottrell was the president and director of the defendant, the Drexel State Bank of Chicago, Illinois, and its duly authorized agent in the transaction of the business involving said defendant during said time. On or about the 9th day of July, 1914,

Richard C. Kittel was indebted to the Drexel State Bank of Chicago approximately in the sum of $11,000, which was represented by a promissory note delivered by Richard C. Kittel to the defendant, and which was on the 9th day of July, 1914, in the possession of the defendant, and owned by it, and was past due.

It appears that in the first part of July, 1914, Mr. Cottrell came to Casselton for the purpose of procuring the payment or security for the indebtedness of the Northern Trading Company to the Drexel State Bank of Chicago, and also the indebtedness of Richard C. Kittel to the same bank. That the first matter considered on such occasion, which was on the 9th day of July, 1914, was the indebtedness claimed to be due from the Northern Trading Company to the Drexel State Bank of Chicago, which it seems was satisfactorily secured by the assignment of the Northern Trading Company of a mortgage for $24,000, which was secured on eighteen sections of land, which debt it seems was fully paid or thereafter paid, and the collateral reassigned. At the same time Cottrell demanded further security for the debt of Richard C. Kittel. The Drexel State Bank turned back certain bank stock of the State Bank and received in lieu thereof 125 shares of stock of the First National Bank of Casselton of par value, which was duly assigned to the Drexel State Bank in writing. Thus far there is no dispute as to the questions of fact, and the main contention arises over the question of fact whether or not Richard C. Kittel did turn over the notes and mortgage in question with the intention that they should become security for his personal obligation to the Drexel State Bank of Chicago. Richard C. Kittel contends that he never turned such notes and mortgage over, and never authorized the possession thereof by the Drexel State Bank, but that the Drexel State Bank, through its agent Cottrell, clandestinely took such notes and mortgage from the desk in the office of Richard C. Kittel in the First National Bank at Casselton. In other words, that said Cottrell clandestinely, secretly, and without any knowledge on the part of Richard C. Kittel, took all of such notes and the mortgage, which fact was not discovered by Kittel until some time thereafter.

The questions to be considered in the case are, therefore, narrowed down to whether or not Richard C. Kittel did place in the possession of the Drexel State Bank of Chicago, through their agent Cottrell,

the notes and mortgage in question as security, which Richard C. Kittel denies doing, and if it is found that Richard C. Kittel did place such notes and mortgage with the Drexel State Bank of Chicago as security for his own personal obligation to such bank, without any knowledge or notice of, or acquiescence in, such act by, the Northern Trading Company, then, whether his acts in so doing are binding upon the Northern Trading Company.

Mr. Kittel admits that at the same time Cottrell adjusted the matter of the indebtedness of the Northern Trading Company with the Drexel State Bank as to security, he talked with him about making some adjustment of the personal debt of Richard C. Kittel. Richard C. Kittel claims that the notes and mortgage in question were inspected by Cottrell as collateral offered on the Northern Trading Company claim, and that Cottrell rejected the notes and mortgage for such purpose, but that Cottrell did select other collateral, which was the Merlien mortgage for $24,000 secured as hereinbefore stated. Richard C. Kittel also testified that he secured his personal indebtedness by 125 shares of the stock of the First National Bank of Casselton. Kittel claims that he notified the Drexel State Bank of Chicago that they had no right to this paper, and says that he did that as soon as he knew they had the paper, which should have been about the time the note was sent to the First National Bank for collection. Kittel testifies that the notes in question were never indorsed either in lead pencil or any other way, and that he never had any intention of delivering them, not even as security for the Northern Trading Company. He gives as his excuse for not being more insistent on the return of such papers or making no more complaint, that he owed money, and was in default, and was constantly in danger, as he expressed it, "of being shut down on, and I could not complain at that time." He claims that his personal indebtedness to the bank at that time was $10,000, and is about $6,000 at the present time. As a part of the settlement as to his own personal debt, he also agreed to pay $500 a month on the indebtedness due from him personally to the Drexel State Bank of Chicago. Some of the monthly payments at least were made.

Mr. Cottrell, the agent of the Drexel State Bank of Chicago, testified substantially as follows:

As I remember it, we were in Mr. Kittel's office in the First National

Bank of Casselton. I have forgotten what security we had for the Northern Trading Company note, but in settlement he gave me additional—or, we accepted a mortgage note of something over $20,000 of Merlien, with the guaranty of the company; that was delivered to me in his office. After we had accepted that, I asked him what he was going to do with his individual paper that was outstanding, that I was dissatisfied with the collateral we had at that time, consisting of state savings bank stock, which, as you know, is not satisfactory collateral, only to the bank itself, as they hold a prior lien on the stock when there is any indebtedness. I requested him to give me something else, and he gave me at that time 125 shares of the First National Bank of Casselton, which I accepted with the agreement that he would give something else or other kind of collateral, as we did not consider bank stock the best of collateral. At the same time that he handed me the bank stock, he gave me this mortgage of Siegert's.

Q. Had you ever heard of this mortgage before?

A. Not that I remember of.

Q. Never had it until he handed it to you?

A. I don't ever remember of seeing it.

Q. What did he say when he handed it to you?

A. Well, I cannot remember the conversation at the time, but it was handed to me the same as the other.

Q. At the time or immediately after your demand for additional security on his personal note?

A. Yes, sir; it was handed to me the same as the other stock. He went out and got it out of his safety deposit box and gave it to me.

Q. And at that time you received these plaintiff's exhibits one to ten, did you know anything about the claims of the Northern Trading Company to that paper?

A. I did not.

Q. Was there anything said to you by Mr. Kittel other than what you have already related on the stand?

A. Not that I can recollect at present.

Q. What did you do with these papers, plaintiff's exhibits one to ten, after you left Casselton?

A. I delivered them to the Drexel State Bank on my return to Chicago.

Q. As far as you know, Mr. Cottrell, who has held these papers since that time?

A. They have been held by the Drexel State Bank.

Q. Has Mr. Kittel been in Chicago at different times since that time?

A. Yes, sir.

Q. Did he at any time prior to the 15th day of January, 1916, talk with you on the occasion of any of these visits as to the claims of the Northern Trading Company to that paper?

A. He did not.

It will be seen, therefore, that there is a direct conflict between the testimony of Richard C. Kittel and Cottrell, the agent of the Drexel State Bank, concerning the delivery of the notes and mortgage in question to the Drexel State Bank as collateral security to the obligation of Richard C. Kittel. All the testimony in this case, including that concerning the delivery of the notes and mortgage in question as collateral security for the individual debt of Richard C. Kittel, was submitted to the trial judge, who passed upon the questions of both law and fact in the case. Both Kittel and Cottrell were present in person and testified. The trial judge had the opportunity to observe the demeanor of the witnesses on the stand while under oath, he could note their candor or want of candor, the willingness with which they testified, and many other characteristics or qualities of the witnesses. This court has no such opportunity, and while the judgment of the trial court is not conclusive as against this court, nevertheless the judgment of the trial court is entitled to very careful consideration, and especially so where there is a direct conflict of testimony relating to the same subject-matter, for in such case the determination and judgment of the trial court may be of inestimable value in finally determining the merits of the controversy in a case such as the one at bar. Where there are just two witnesses testifying concerning the subject-matter of the action, and their testimony is in diametric conflict, by what rule of construction can this court say from the paper testimony which of such witnesses is really making the truthful statement. A case such as the one at bar has the character of a case in which weight should be given, if ever, to the judgment of the trial court. Adopting the findings of the trial court in this case, the Drexel State Bank rightfully

held the notes and mortgage in question as collateral security to the individual debt of Richard C. Kittel. The notes in question were indorsed in blank by Murray Bros. & Ward Land Company, and an assignment of the mortgage was also made by them in blank, and where the indorsement is made in blank and no indorsee is specified, such an instrument so indorsed is, by law, payable to bearer and may be negotiated by delivery. Comp. Laws 1913, § 6919. Where one has possession of an instrument, the presumption is that he has a valid title thereto and that it was delivered to him. Comp. Laws of 1913, § 6901. Every holder of negotiable paper is presumed to be a holder in due course. Comp. Laws 1913, § 6944. Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724. In the case at bar the defendant is not only presumed to be the holder in due course, but his testimony shows that he came into the possession of such paper in due course before the maturity of such notes and mortgage for a valuable consideration, as defined by § 6910, Compiled Laws of 1913; and the testimony of the defendant further shows that at the time he came into the possession of such paper he had no notice of any defect of the title, or, in other words, that he had no notice of any claim of the Northern Trading Company to such notes and mortgage. The case of Porter v. Andrus, 10 N. D. 558, 88 N. W. 567, was a case in which the opinion was filed December 17, 1901, and said action was upon a cause of action which had accrued in the year 1893, which was prior to the time the Negotiable Instruments Law became effective, and prior to the time of its adoption. Under § 6910 of the Compiled Laws of 1913, an antecedent or pre-existing debt constitutes value and is sufficient to support a simple contract. The appellant claims that their theory is corroborated by the fact that the notes in question were not indorsed. This, however, is not borne out by a thorough analysis of the instruments themselves. The notes were indorsed in blank, and, being in that state, they would therefore be of the same nature as if they were made payable to bearer so far as their negotiability is concerned. The mortgage securing said notes was also assigned in blank, so that the notes indorsed as they were, were negotiable without any further signature, just the same as if they had been made payable to bearer. The blank assignment being with such mortgage, there was

no need of any other assignment of the mortgage in order to turn the whole transaction over to Drexel State Bank as collateral security, and § 6915, Compiled Laws of 1913, provides, where an instrument is payable to bearer, it is negotiated by delivery. Section 6919, Compiled Laws of 1913, provides among other things as follows: "An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery." In the Supreme Court of the United States the rule has been made by its decision that a bona fide holder taking a negotiable instrument as payment of or as security for an antecedent debt is a holder for valuable consideration, and entitled to protection against all equities between the antecedent parties. Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61. The same rule is followed in many of the states.

As before stated the trial court in this case was in more advantageous position, and had better opportunity, to pass upon the credibility of the witnesses than we; and while we are not bound to do so, we are convinced that, in view of all the testimony in this case, its contradictory character, the limited number of witnesses, and all the facts and circumstances connected with the case, we must accord considerable weight to the judgment of the trial court in the case.

The judgment appealed from, therefore, is in all things affirmed, with costs.

STATE BANK OF MENAGHA v. A. J. O'LAUGHLIN.

(164 N. W. 135.)

Default judgment — application for — relief from — mistake — inadvertence — surprise or excusable neglect — discretion of court — addressed to — particular facts in each case — order on — will not be disturbed — — except for abuse.

1. An application, under § 7483, Comp. Laws 1913, to be relieved from a default judgment on the ground of mistake, in advertence, surprise, or excusable neglect, is addressed to the sound judicial discretion of the trial court on the particular facts existing in the case, and the trial court's ruling will not be disturbed on appeal unless an abuse of discretion is shown.

Default judgment — invocation of statute — due diligence — in moving.

2. A party who desires to invoke this statute must exercise reasonable diligence in presenting the application to vacate the default judgment.

Opinion filed July 21, 1917.

Appeal from District Court of Cass County, North Dakota, *Pollock*, J.

From an order refusing to vacate a default judgment, defendant appeals.

Affirmed.

Spalding & Shure and *Garfield Rustad*, for appellant.

Fowler & Green, for respondent.

CHRISTIANSON, J. This is an appeal from an order denying defendant's application to set aside a default judgment. The summons and complaint in the action were served upon the defendant on March 3, 1915. The complaint alleges that the defendant had converted a certain horse upon which the plaintiff held a chattel-mortgage lien for the sum of $200.

It appears from the affidavits and the evidence offered upon the hearing of the motion to set aside the default judgment, that a few days after the service of the summons and complaint, the defendant had a conversation with Green, one of the attorneys for the plaintiff, but the affidavits are to some extent in conflict as to what was said during such conversation. The defendant in his affidavit claims that he exhibited to Green the horse which he had purchased from plaintiff's mortgagor, and called Green's attention to certain matters which defendant claims tended to show that the horse purchased by defendant was a different horse from the one covered by plaintiff's mortgage. Defendant further claims that he believed that he had succeeded in convincing Green of the correctness of his position. Green in his affidavit gives a somewhat different version of the conversation, and states that he informed the defendant that he (Green) knew nothing about the transaction, that his partner, Mr. Fowler, handled the case, and that the defendant had better see Fowler in regard thereto.

It is undisputed, however, that on December 11, 1915, attorney Green again met the defendant, and had a conversation with him in the courthouse in Moorhead, Minnesota, and called defendant's attention to the fact that the case was still pending and that something must be done

about it. Defendant again referred to the former conversation, and made the same claim with respect to the horse, Green than stated that defendant must be mistaken in his contentions, and that he ought to come over and see Fowler and talk the matter over with him. At a later date, Green called defendant on the telephone, and informed the person answering the phone, at defendant's residence in Moorhead, Minnesota, that the defendant would have to take care of the matter or judgment would be entered. Defendant paid no further attention to the matter, and on January 5, 1916, plaintiff's attorney sent the following letter to the defendant:

January 5, 1916.

State Bank of Menagha,

vs.

A. J. O'Laughlin.

A. J. O'Laughlin, Esq.,
317 7th St. S.,
Moorhead, Minn.

Dear Sir:

Will you please come over to the office to-morrow so that we can talk over that horse matter? Our clients are urging us to take some action, and we will have to enter judgment unless some disposition is made of it.

You had better call up our Mr. Fowler so that he will be sure to be in the office when you come over.

Very truly yours,
Fowler & Green.

The defendant does not deny that he received this letter; but he paid no attention to the matter, and on March 6, 1916, or about two months thereafter, judgment was entered against him upon proofs duly made before the court. On March 15, 1916, plaintiff's attorneys wrote a letter to defendant, advising him of the entry of the judgment, and further notifying him that, unless it was paid, execution would be issued. On the same date the defendant called upon Attorney Rustad, of Moorhead, Minnesota, and Rustad wrote a letter to plaintiff's counsel with respect to the matter. Shortly thereafter Rustad requested plaintiff's attorneys to stipulate for a vacation of the judgment, but plaintiff's counsel refused to so stipulate.

No further attention was paid to the matter either by defendant or his attorney until after September 1, 1916, when plaintiff instituted a garnishment action against the county of Cass as garnishee, and garnished certain moneys belonging to the defendant. The motion to vacate the default judgment was made within a short time thereafter.

Under our statute (Comp. Laws 1913, § 7483) an application to be relieved from a default judgment on the ground of mistake, inadvertence, surprise, or excusable neglect is addressed to the sound judicial discretion of the trial court on the particular facts existing in the case, and consequently the ruling will not be disturbed on appeal unless it is plain that the trial court abused its discretion in determining the motion. See Wakeland v. Hanson, 36 N. D. 129, 161 N. W. 1012.

The rules of law governing applications of this kind are well settled. While it is true that such applications are ordinarily granted where the moving papers disclose a good defense upon the merits, and a reasonable excuse for the mistake, inadvertence, surprise, or neglect which occasioned the default, it is also true that the moving party must show himself entitled to the relief which he seeks. And to do this he must show: (1) That he has a good defense upon the merits; (2) a reasonable excuse for the mistake, inadvertence, surprise, or neglect which occasioned the default; and (3) reasonable diligence in presenting the application to vacate after knowledge of the judgment. "If the party actually knows that a judgment has been rendered against him," says Black (Black, Judgm. § 313), "and the judgment is not simply and merely void, it is the undoubted rule that he must exercise reasonable diligence in procuring its vacation, and that his unexcused laches or delay, unduly protracted, will preclude him from obtaining the relief sought. In deciding upon an application to strike out a judgment after the term is past, for fraud, irregularity, deceit, or surprise, the court acts in the exercise of its quasi equitable powers, and in every such case requires the party making the application to act in good faith and with ordinary diligence."

In the case at bar the undisputed facts negative, rather than affirm, reasonable diligence in moving to set aside the judgment. It is undisputed that the defendant was informed on December 11, 1915, that he must take some steps to protect his interests in the action; that he was informed to the same effect by letter on January 5, 1916, and that on

March 15, 1916, he was informed that judgment had been entered; that immediately thereafter he and his counsel were informed by plaintiff's attorneys that it would be essential for the defendant to move to vacate the judgment, and that plaintiff's counsel would not stipulate for a vacation of the judgment. The defendant and his counsel paid no further attention whatever to the matter until after the garnishment action had been brought in September, 1916; and there is absolutely no attempt on the part of the defendant or his attorney to excuse the delay in moving to set aside the default. The defendant and his attorney had full knowledge of the attitude of plaintiff's counsel. Plaintiff's attorneys in no manner imposed upon or sought to take any undue advantage of the defendant; they dealt with him in the utmost fairness.

We are agreed that the trial court properly denied the application to vacate the judgment. Order affirmed.

J. C. SORENSON, Plaintiff and Respondent, v. I. W. SWITZER, Defendant and Appellant, N. VAN DE KLASHORST, Defendant.

(164 N. W. 136.)

Woods — marsh — prairie — set on fire — negligence — injury from — liability — landowner — fire set by another — not an employee — or acting under direction of landowner — cause of employment.

Compiled Laws 1913, §§ 2797 and 2798, providing that any person who shall wilfully, negligently, or carelessly set or cause or allow to be set on fire any woods, marsh, or prairie; or any person who shall leave any camp or other fire without thoroughly extinguishing the same, so that such fire shall not spread therefrom,—shall be liable to any person injured for any injury sustained by reason of such fire,—do not render a landowner liable for a fire set upon his premises by another, unless the person who set the fire was acting

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NOTE.—On duty of one responsible for kindling of fire to prevent its spread from his premises, see notes in 6 L.R.A.(N.S.) 882 and 45 L.R.A.(N.S.) 215.

On liability for setting fire which spread to property of others, see notes in 21 L.R.A. 255, and 36 L.R.A.(N.S.) 194.

On liability of landlord for acts of independent contractor in setting out fire, see notes in 17 L.R.A.(N.S.) 788 and 38 L.R.A.(N.S.) 175.

On liability of private persons for fire, see note in 30 Am. St. Rep. 501.

under the direction of the landowner, or was in the landowner's employ and acting within the course of his employment in setting such fire.

Opinion filed July 21, 1917.

From a judgment of the District Court of Morton County, *J. M. Hanley,* Judge, appellant appeals.

Reversed and dismissed.

Sullivan & Sullivan, for appellant.

The findings of fact are wholly insufficient to sustain the conclusions of law. The statutes fix the liability for damages resulting from the setting of fires. Comp. Laws 1913, §§ 2791–2793, and 2808.

The defendant Switzer, under the oral lease, had no authority to direct Van de Klashorst in the use of the premises, and he was not subject to the orders of Switzer, nor was he a servant or agent. 24 Cyc. 880, 1061.

The landowner is not liable for damages resulting from fire caused or set by an independent contractor, by one not in his employ or acting under his directions, or in the due course of his employment. Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Charlebois v. Gogebic & M. River R. Co. 91 Mich. 59, 51 N. W. 812; Piette v. Bavarian Brewing Co. 91 Mich. 605, 52 N. W. 152; St. Louis, I. M. & S. R. Co. v. Yonley, 53 Ark. 503, 9 L.R.A. 604, 13 S. W. 333, 14 S. W. 800.

The landlord is not responsible for injuries arising on account of the acts of the tenant after the leasing of the premises. Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422; Harris v. Cohen, 50 Mich. 324, 15 N. W. 493; Johnson v. McMillan, 69 Mich. 36, 36 N. W. 803; 24 Cyc. 1129; Rogers v. Parker, 159 Mich. 278, 34 L.R.A.(N.S.) 955, 123 N. W. 1109, 18 Ann. Cas. 753; Langabaugh v. Anderson, 68 Ohio St. 131, 62 L.R.A. 948, 67 N. E. 286, 14 Am. Neg. Rep. 170.

Facts not included in the findings of fact by the trial court must be presumed to have been found against the party having the burden of proof. McAdams v. Bailey, 169 Ind. 518, 13 L.R.A.(N.S.) 1003, 124 Am. St. Rep. 240, 82 N. E. 1057; Comp. Laws 1913, § 7936; Fried v. Olsen, 22 N. D. 381, 133 N. W. 1041.

The statutes of this state refer only to the person setting the fire, and

not to any person who merely permits the fire to be set, to straw or stubble. Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224.

Langer & Nuchols and *C. F. Kelsch,* for respondent.

When the wrong of two persons jointly contributes to an injury, both of such persons are liable.

If a man discovers a fire upon his premises, whether set or caused to be set by himself, it is his duty to use every reasonable effort of a careful, prudent man to prevent such fire from injuring his neighbors, and, failing in this, he is liable. Baird Bros. v. Chambers, 15 N. D. 618, 6 L.R.A.(N.S.) 882, 125 Am. St. Rep. 620, 109 N. W. 61.

Any person who sets fire to any stubble or prairie, except at the times and for the purposes mentioned in the statutes, is liable for injuries sustained by others. Comp. Laws 1913, §§ 2791, 2808; Seckerson v. Sinclair, 24 N. D. 625, 140 N. W. 239; Kelley v. Anderson, 15 S. D. 107, 87 N. W. 579.

CHRISTIANSON, J. This is an action to recover compensation for the destruction of plaintiff's property by a prairie fire. The case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for $200. The defendant Switzer alone appeals. The findings of fact are conceded to be correct, and appellant's sole contention is that the conclusions of law are not warranted by the facts found.

The material facts as found by the trial court are substantially as follows: The defendant Switzer was the owner of a farm in Morton county, which he leased to his codefendant, Van De Klashorst, for the farming season of 1915, by a verbal contract, under the terms of which Van De Klashorst agreed to cultivate the premises, harvest and thresh the crops grown thereon, and deliver one half of such crops to defendant as a rent for said premises. Van De Klashorst, during the times involved in this controversy, occupied the premises under the terms of said contract. The premises had not been cropped the preceding season, and there were situated thereon some straw stacks from former years. These straw stacks presumably belonged to Switzer. Van De Klashorst desired to burn these straw stacks, and saw Switzer, and obtained his verbal permission to do so. After having obtained such permission, Van De Klashorst on April 6, 1915, set fire to the straw stacks. On April 9, 1915, a strong wind scattered fire which remained smoldering

in such straw stacks, to the stubble adjacent thereto, and caused a prairie fire, which spread over adjacent territory and upon the land of the plaintiff, and burned a stack of hay and also burned over certain hay land and pasture land belonging to the plaintiff, thereby damaging plaintiff in the amount of $200. The defendant Switzer was not present at the time the fire was set. No strip of land was plowed or burned encompassing the straw stacks before the fire was set, nor were any fire breaks of any kind plowed around the stacks.

Plaintiff contends that under these facts he was entitled to judgment against both Van De Klashorst and Switzer, under the provisions of §§ 2791–2808, Comp. Laws 1913. It is conceded by Switzer that plaintiff was entitled to recover against Van De Klashorst, but it is earnestly contended that Switzer was in no manner responsible for the acts of Van De Klashorst, either in setting the fire or permitting it to spread. Plaintiff virtually concedes that Switzer would not be responsible under the facts in this case, in the absence of a qualifying statute; but it is contended that under the provisions of §§ 2797, 2798, Comp. Laws 1913, the owner of real property who permits or allows another to set fire thereon becomes liable for all damages occasioned by the fire. These statutory provisions read as follows: "If any person shall wilfully, negligently, or carelessly set or cause to be set on fire any woods, marsh or prairie in this state, or if any person having made any camp or other fire, shall leave such fire without having thoroughly extinguished the same, so that the fire shall spread and burn any wood, marsh or prairie, the persons guilty of setting or causing to be set such fire or leaving such camp or other fire without having thoroughly extinguished the same, so that the fire shall not spread therefrom, is guilty of a misdemeanor, and upon conviction thereof is punishable by a fine not exceeding $200 or by imprisonment in the county jail not exceeding one year, or by both in the discretion of the court, and shall also be liable in a civil action to any person damaged by such fire to the amount of such damage." Comp. Laws 1913, § 2797.

"If the ranch, building, improvements, fences, timber, marsh or other property of any person shall be injured or destroyed by any such fire, the person who causes or allows the same shall be responsible to the person injured thereby for all damage or injury caused or sustained by reason of such fire. If the cattle range or improvements of any person

are injured or destroyed by any such fire, or if the hay upon any such range or the grass growing thereon shall be injured as aforesaid, the person causing or allowing the same shall be responsible to the person owning or claiming the same and injured thereby, for all the damage or injury caused or sustained by reason of any such fire." Comp. Laws 1913, § 2798.

These provisions were enacted and became a part of the laws of the territory of Dakota in 1881, and have with certain modifications been retained as part of the statutory law of this state. As originally enacted, these provisions applied to certain specified counties only. It could not have been the intention of the legislature in the first place to enact a rule of liability such as plaintiff contends for, nor do we believe that the subsequent modification of these sections by the codifiers accomplished any such purpose. The question of liability of the owner or premises on which a prairie fire is kindled and permitted to escape and injure adjacent property owners has twice been considered by this court. The question first arose in Baird Bros. v. Chambers, 15 N. D. 618, 6 L.R.A.(N.S.) 882, 125 Am. St. Rep. 620, 109 N. W. 61, where it was held that the owner of premises on which a prairie fire had been kindled, but who was not responsible for such kindling, was not bound to exercise more than ordinary care and diligence to prevent the fire from spreading. The question again arose in Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224, wherein this court held that in order to hold a party liable for loss occasioned by a prairie fire which it is undisputed he did not set or negligently permit to escape from his control, it must appear that the parties who originated and tended the fire were, in so doing, acting under his express or immediate direction, or that they were at such time in his employ, and required or directed by him to do certain work the due performance of which, in the ordinary course, involved the setting of fire to the prairie grass.

The statutory provisions above quoted were in full force and effect at the time this court promulgated the two decisions above referred to; and while it does not appear from the opinions that they were relied upon, it is difficult to believe that these provisions, familiar as they are to every practising attorney and trial judge in the state, could have escaped the attention of the then members of this court. It will be noted that § 2797, Comp. Laws 1913, makes the wilful, negligent, or careless

setting of fire or causing the same to be set, or the leaving of such fire without having thoroughly extinguishing the same, so that the fire spreads therefrom, a basis of liability. Section 2798, Comp. Laws 1913, makes the person who causes or allows the fire to destroy property responsible to the person injured for the damage sustained by reason of the fire. While the statutes of this state throw a number of restrictions around the setting of prairie fires, and fix certain rules of liability with respect to persons who set or cause fires to be set at a time, or in a manner prohibited by the laws of this state, we are wholly unable to see wherein the legislature has in any of these statutes expressed any intent to enlarge the liability of the owner of the premises on which a prairie fire is kindled to any such degree—as that contended for by the plaintiff. In our opinion these statutory provisions do not render a landowner liable for a fire set by others upon his premises, unless the person setting fire was acting under the direction of the landowner or was employed by him, and required or directed to do certain work the due performance of which in the ordinary course involved the setting of such fire.

In the case at bar there is no finding that the defendant Switzer had any knowledge of the setting of the fire, or of the subsequent existence thereof. The only finding is to the effect that he gave his verbal permission to Van De Klashorst to burn the straw stacks—obviously for the purpose of removing them from the fields where they interfered with cultivation. There is no finding, nor is there any contention, that Switzer in any manner directed the setting of the fire, or had anything to do therewith further than to give his permission that the straw stacks might be burned.

Van De Klashorst had already entered into possession of and was occupying the premises. He had entered into an agreement to cultivate the land on which the straw stacks were situated. Such work would be under his direction and control. He could choose the manner, and employ such means as to him seemed best. So far as the findings show, Switzer had no right to direct or control such work in any manner. The only reason for asking Switzer's permission to burn the straw stacks was that they were Switzer's property, and hence could not be destroyed without his permission. The removal of the straw stacks would facilitate Van De Klashorst's work. He was primarily interested in their

removal. There can be no question but that these straw stacks could have been burned without the least danger, if proper precautions had been taken to prevent the escape of the fire. It will be noted that the prairie fire did not originate until three days after the fire was set, and the spread of the fire was occasioned by a strong wind which again fanned into being and scattered the fire which had remained smoldering in the ash heaps or bottoms of the straw stacks.

It is difficult to understand how negligence can be imputed to Switzer merely because he gave Van De Klashorst permission to do a thing which, if properly done, would have caused injury to no one,—unless it were to Switzer himself. Manifestly Van De Klashorst was not Switzer's servant, or acting under his direction or in his employment. Whether the doctrine applicable to independent contractors or the doctrine applicable to landlord and tenant be applied is immaterial, as in either case no liability would exist so far as Switzer is concerned.

Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224; Ferguson v. Hubbell, 97 N. Y. 507, 49 Am. Rep. 544; Rogers v. Parker, 159 Mich. 278, 34 L.R.A.(N.S.) 955, 123 N. W. 1109, 18 Ann. Cas. 753; Shute v. Princeton Twp. 58 Minn. 337, 59 N. W. 1050; 11 R. C. L. p. 942; Thomp. Neg. § 1164; 2 Underhill, Land. & T. p. 793; Jones, Land. & T. §§ 599, 605, et seq; Anderson v. Boyer, 156 N. Y. 93, 50 N. E. 976; Dooley v. Healey, 95 App. Div. 271, 88 N. Y. Supp. 965; Langabaugh v. Anderson, 68 Ohio St. 131, 62 L.R.A. 948, 67 N. E. 286, 14 Am. Neg. Rep. 170.

The judgment appealed from must be reversed and the action dismissed as against Switzer. It is so ordered.

NORTHERN COMMERCIAL COMPANY v. BEN GOLDMAN.

(164 N. W. 133.)

Judgment — vacation — discretion of court — abuse of — merits — affidavit — sufficiency of — tender of answer — disclosing good defense — default explained — reasonable excuse — no prejudice shown.

1. It is the general rule upon application to vacate a judgment entered by default, where there is a sufficient affidavit of merits, and the answer tendered

discloses a meritorious defense, and a reasonable excuse is shown for the default, and no substantial prejudice is shown to have arisen from the delay, to open the default judgment and permit the case to be tried upon the merits. It is *held* in this case that the court abused its discretion in not vacating the judgment; the affidavit showing, and the answer tendering, a good defense upon the merits, and sufficient excuse is shown for the default.

Action — pleadings — answer — bankruptcy — provable claim — good defense — bankruptcy court — judgment of — full faith and credit — entitled to.

2. A discharge in bankruptcy on a claim which was provable against the bankrupt estate at the time of the adjudication in bankruptcy is a good and meritorious defense. The judgment of the court of bankruptcy is entitled to full faith and credit, and just as much respect as any other judgment.

Opinion filed July 24, 1917.

Appeal from order denying defendant's motion to vacate judgment of the County Court of Cass County, *A. G. Hansen,* Judge.

Reversed.

William Lemke, for appellant.

The assignment of the claim which entered into the judgment here in question was not made in good faith. It was an attempt to evade the adjudication in bankruptcy. A provable claim in bankruptcy proceedings will not sustain a judgment thereafter entered upon it, by default, and the judgment on proper motion of defendant should be set aside or reopened to such meritorious defense. Williams v. Fairmount School Dist. 21 N. D. 198, 129 N. W. 1027; Rosebud Lumber Co. v. Serr, 22 S. D. 389, 117 N. W. 1042; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; First State Bank v. Krenelka, 23 N. D. 568, 137 N. W. 824.

The power to vacate and set aside default judgments has always been liberally exercised in the furtherance of justice. Bucknell v. Archer, 29 S. D. 22, 135 N. W. 675.

Where a motion to reopen, vacate, or set aside a default judgment is timely and properly made, and supported by an affidavit of merits and the tender of an answer showing a meritorious defense, it is an abuse of discretion to refuse or deny such motion. Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; Braseth v. Bottineau County, 13 N. D. 344, 100 N. W. 1082; G. S.

Congdon Hardware Co. v. Consolidated Apex Min. Co. 11 S. D. 376, 77 N. W. 1022; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75.

H. R. Turner, for respondent.

The affidavit does not show that defendant was mistaken. He claims no conditions which rendered it impossible for him to have appeared and defended. He presents nothing that calls for the exercise of discretion on the part of the court. He does not bring himself within any rule for the exercise of discretion. Defendant knew what was pending, because he says, "Aaberg showed him the note in dispute." There is no excuse shown for default. Comp. Laws 1913, § 7483; 15 R. C. L. p. 707, § 159.

GRACE, J. This is an appeal from the order of the judge of the county court of Cass county, North Dakota, denying defendant's motion for vacating a judgment entered against him on the 8th day of July 1915, in favor of the Northern Commercial Company.

The facts as they appear from the pleadings and the affidavits are about as follows: On the 10th day of December, 1910, the defendant executed and delivered to Bruegger Mercantile Company his promissory note of that date, due on the 1st day of January, 1911, for $600.34, at 10 per cent interest. On the 28th day of July, 1913, at Fargo, North Dakota, in the United States district court for the district of North Dakota, before Honorable C. F. Amidon, the district judge of said court, it was decreed by the court and adjudged, and judgment was duly rendered and entered, that said Ben Goldman be discharged from all his debts and claims which existed on the 20th day of January, 1913, which was the day on which there was filed in said court a petition for an adjudication and discharge from all his debts under the act of Congress relating to bankruptcy. The indebtedness to the Bruegger Mercantile Company accrued before the granting of such discharge, and the indebtedness was one which was provable against the estate of the defendant in the proceedings in such bankruptcy in which said discharge was granted, and was not such an indebtedness as came within any of the exceptions set forth in the bankruptcy act from which discharge would not be granted. On the 7th day of July, 1913, the Honorable C. F. Amidon, proceeding in said district court of the United States for the district of North Dakota, in the city of Fargo, North

Dakota, duly ordered that the said Ben Goldman be discharged from all debts and claims which were made provable by said act against his estate, and which existed on the 20th day of January, 1913.

The proposed answer of the defendant pleads and sets forth his discharge in bankruptcy by the district court of the United States for the district of North Dakota, from all debts which existed and were provable against his estate in bankruptcy on the 20th day of January, 1913. Defendant's affidavit, in connection with his application to open up and set aside such default judgment obtained by plaintiff, also refers to his discharge in bankruptcy and the knowledge which H. A. Aaberg had thereof, who was the person claiming to have served the summons and complaint in plaintiff's action. The defendant's affidavit further discloses that he cannot read and write the English language, that he came from Southern Russia in 1906, that he speaks the Russian-Jewish language, and in his affidavit says that neither the summons nor complaint in the action were ever served on him, and that the affidavit in regard to the service is wholly untrue. That he knew nothing of the commencement of this action or the judgment therein until the 6th day of October, 1916, at which time the sheriff of McKenzie county came to his place in said county with a writ of execution purporting to have been issued out of the district court of Cass county. The plaintiff in this action claims that the summons and complaint were regularly served, and that defendant was notified by several letters after the entry of such judgment, one of which was registered May 10, 1916.

The question presented in this case is one which is addressed to the sound discretion of the court. It is, however, the general rule upon application to vacate a judgment entered by default, where there is a sufficient affidavit of merits, and where the answer presented discloses a good defense upon the merits, and a reasonable excuse for delay occasioning default is shown, and no substantial prejudice is shown to have arisen from the delay, the court should open the default and permit the case to be tried upon the merits. Where the circumstances are such as to place the court in doubt, it is the better rule to resolve the doubt in favor of the application to open the judgment. There is not much room for complaint where the action is tried upon the merits. A discharge in bankruptcy from a claim which was provable against the bankrupt estate at the time of the adjudication in bankruptcy is a good and

meritorious defense. The judgment of the court of bankruptcy is entitled to full faith and credit, and just as much respect as any other judgment. In the case at bar the defendant pleads in his answer, and shows by other circumstances and allegations in his affidavit, that he cannot read or write the English language; he positively says that no summons and complaint were served upon him; he claims that he had no knowledge of the suit against him until the levy of the execution. The matter of sending the letters to him if he could not read or write, even though registered, does not necessarily bring the knowledge to him that any judgment had been entered, for the letters would mean nothing to him unless someone interpreted them to him and interpreted in such a manner as to convey the actual knowledge, and the letters, although one of them was registered, would not overcome the statement of the defendant himself in his answer, nor his positive allegations under oath in his affidavit, that no summons and complaint were ever served upon him; nor overcome his allegations in his affidavit that H. A. Aaberg, when he came to the farm where the defendant resides and to the field where he was at work, and showed him the note in question, the defendant said to him, "The note is no good, because I have gone through bankruptcy," and he said, "Oh, yes, I forgot it." If the defendant, as appears from his answer and affidavit, believed he had never been served with the summons and complaint, and that the paper shown him by Aaberg was a note, and not a summons and complaint, it was excusable neglect, and the defendant should have been allowed to answer and try the case upon its merits, having disclosed a meritorious defense in his answer; and a discharge in bankruptcy is a meritorious defense.

A thorough consideration of the whole case, the circumstances and conditions surrounding the same in regard to the inability of the defendant to read or write the English language, and the fact that he disclosed in his answer a meritorious defense, seem to leave but little doubt that the defendant is entitled to the relief of having the judgment vacated and set aside, and his answer filed, and the case tried upon its merits. The further fact that the discharge in bankruptcy discharged all debts provable against the defendant on the 20th day of January, 1913, does include all debts prior to that date provable against such estate; and all proceedings in such bankruptcy will be presumed

to have been regular, and that due and sufficient notice to all creditors existing at that time whose debts were provable in such estate was properly and legally given. We think the county court from which this case was appealed erred, and the judgment he gave in such case refusing to vacate such order was an abuse of discretion in view of the well-settled rule of liberality in such cases. The following are some of the cases supporting such rule: Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; Braseth v. Bottineau County, 13 N. D. 344, 100 N. W. 1082; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75.

The judgment of the County Court is in all things reversed, the case is remanded to such court, with instructions that the order heretofore made by such county court, from which this appeal is taken, be vacated and set aside, and that the defendant be permitted to answer in such case, and that the case be tried upon its merits after the answer has been so filed in such case.

Mr. Justice ROBINSON, being disqualified, did not participate, Honorable J. A. COFFEY, Judge of Fifth Judicial District, sitting in his stead by request.

A. Y. MORE and J. L. More, a Copartnership Doing Business under the Firm Name and Style of More Brothers, v. WESTERN GRAIN COMPANY, a Corporation.

(164 N. W. 294.)

Real estate mortgage — foreclosure of — by action — receiver appointed — crops sold by — chattel mortgage on — valid and subsisting lien — verdict — court erred in directing.

The complaint shows that in an action to foreclose a real estate mortgage on certain land a receiver was appointed and he took and sold to the defendant the grain crops on the land. The plaintiffs had a valid mortgage lien on the crops for $1,300 and interest. Hence, the court erred by directing a verdict for the defendant.

Opinion filed July 25, 1917.

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

Plaintiffs appeal.

Reversed.

Jacobsen & Murray, for appellants.

Appellants contend that in motions to strike out testimony and for direction of verdict, it is necessary for the movant to specify the ground or grounds upon which such motions are based. Howie v. Bratrud, 14 S. D. 648, 86 N. W. 747; Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 799; Minder & J. Land Co. v. Brustuen, 31 S. D. 211, 140 N. W. 251; Yeager v. South Dakota C. R. Co. 31 S. D. 304, 140 N. W. 690; Davis v. C. & J. Michel Brewing Co. 31 S. D. 284, 140 N. W. 694; McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243; Drake v. Great Northern R. Co. 24 S. D. 19, 123 N. W. 82; Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419, 16 Mor. Min. Rep. 26; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Updegraff v. Tucker, 24 N. D. 171, 139 N. W. 366; Taylor v. Bell, 128 Cal. 306, 60 Pac. 853; Haight v. Tryon, 112 Cal. 4, 44 Pac. 318; Jackson v. Ellerson, 15 N. D. 533, 108 N. W. 241.

The phrase "More Brothers" in the mortgage does not amount to a misdescription of the payee. 6 Cyc. 1016, ¶ 4.

Such a description is not fatal, and parol evidence is admissible to identify the notes with the notes described in the mortgage. Jones, Mortg. 5th ed. §§ 86, 89 and 90, pp. 136 to 139; Paine v. Benton, 32 Wis. 491; 6 Cyc. 1017, ¶ 4; 27 Cyc. 1096, 1098, ¶ 5, note 78; Gorder v. Hilliboe, 17 N. D. 281, 115 N. W. 843; French v. State Farmers' Mut. Hail Ins. Co. 29 N. D. 427, L.R.A.1915D, 766, 151 N. W. 7.

A clause in a mortgage authorizing the holder to declare the whole sum secured to be due and payable in case of default in any payment as therein provided is good, and gives to the holder the right to so declare the whole sum due, and such election was made and acted upon in this case. 7 Cyc. 858, 859, 862, also see note 13 of p. 859.

The receivership constitutes no defense as against our mortgage, and any order made by the court authorizing the receiver to take possession of the crops, as against our chattel mortgage, was void. Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631.

"A mortgage on lands not expressly mortgaging rents and profits gives to the mortgagee no right to growing crops gathered before the decree of foreclosure." Locke v. Klunker, 123 Cal. 231, 55 Pac. 993; Comp. Laws 1913, §§ 7588 et seq; 3 Kerr's Cyc. Codes (Cal.) §§ 564 et seq. pp. 919 to 949 inc.; Golden Valley Land & Cattle Co. v. Johnstone, supra; Bank of Woodland v. Heron, 120 Cal. 614, 52 Pac. 1006; Simpson v. Ferguson, 112 Cal. 184, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484.

Any order the court may make with respect to property not involved in the litigation before it is void. Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546.

"If the court is without jurisdiction to appoint a receiver, the order is void and may be attacked or disregarded. The right to possession in the character of receivership cannot be enforced or defended under it." Smith v. Wells, 20 How Pr. 158; State v. Union Nat. Bank, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585; 34 Cyc. 168, 190; Anderson v. Robinson, 63 Or. 228, 126 Pac. 988, 127 Pac. 546; Dabney Oil Co. v. Providence Oil Co. 22 Cal. App. 233, 133 Pac. 1155; Staples v. May, 87 Cal. 178, 25 Pac. 346; 27 Cyc. 1630; State ex rel. Hunt v. Superior Ct. 8 Wash. 210, 25 L.R.A. 354, 35 Pac. 1087.

A person not made a party to an action in which a receiver is appointed is not bound by the order of appointment. Elwell v. Goodnow, 71 Minn. 390, 73 N. W. 1095.

A void order of the court may be attacked collaterally, and it is not contempt to disobey it. State ex rel. Johnston v. District Ct. 21 Mont. 155, 69 Am. St. Rep. 645, 53 Pac. 273; J. W. Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347; Freeman, Judgm. § 617; Waples, Proceedings in Rem. §§ 64, 572; State ex rel. Shepard v. Sullivan, 120 Ind. 197, 21 N. E. 1093, 22 N. E. 325.

The taking of property by the receiver constitutes no defense to an action for conversion by the holder of the mortgage. Coburn v. Watson, 48 Neb. 257, 67 N. W. 173, 35 Neb. 492, 53 N. W. 477.

Liens and encumbrances are not affected by the receivership. 34 Cyc. 348; Cramer v. Iler, 63 Kan. 579, 66 Pac. 617; Bowman v. Hazen, 69 Kan. 682, 77 Pac. 589; Albien v. Smith, 24 S. D. 203, 123 N. W. 675; J. W. Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347; Kenney v. Ranney, 96 Mich. 617, 55 N. W. 982; Gutsch v.

McIlhargey, 69 Mich. 377, 37 N. W. 303; Longfellow v. Barnard, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255; Bank of Woodland v. Heron, 120 Cal. 614, 52 Pac. 1007.

The order appointing a receiver does not create any lien in behalf of the receiver. Bank of Woodland v. Heron, supra.

There was no showing that the defendant purchased those mortgages and had them assigned to it, or that the holder of those mortgages ever made any claim by virtue thereof. Citizens' Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 335, 131 N. W. 266.

The plaintiffs, in their notice of appeal, have demanded judgment notwithstanding the verdict. This court has power to grant same. Houston v. Minneapolis, St. P. & S. Ste. M. R. Co. 25 N. D. 469, 46 L.R.A. (N.S.) 589, 141 N. W. 995, Ann. Cas. 1915C, 529.

F. C. Heffron and *Emil Scow,* for respondent.

The plaintiffs made no attempt to amend their pleadings so as to admit certain exhibits in evidence. On this ground alone defendant was entitled to a directed verdict. French v. State Farmers' Mut. Hail Ins. Co. 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7; Woodward v. Northern P. R. Co. 16 N. D. 38, 111 N. W. 627; Johnson v. Moss, 45 Cal. 515; Davenport v. Henderson, 84 Ga. 313, 10 S. E. 920; Robinson Consol. Min. Co. v. Johnson, 13 Colo. 258, 5 L.R.A. 769, 22 Pac. 459; Washington v. Timberlake, 74 Ala. 259; Roop v. Seaton, 4 G. Greene, 252; Roberts v. Jones, 2 Litt. (Ky.) 88; Smith v. Clarke, 4 Cranch, C. C. 293, Fed. Cas. No. 13,028; McKinzie v. Stafford, 8 Tex. Civ. App. 121, 27 S. W. 790; People's Min. & Mill. Co. v. Central Consol. Mine Corp. 20 Colo. App. 561, 80 Pac. 479; Heim v. Russell, 162 Iowa, 75, 143 N. W. 823; 1 Elliott, Ev. § 198; 31 Cyc. 712.

"In order that parol evidence may be admissible to show a mistake in a written instrument, the existence of such mistake must have been alleged in the pleadings." French v. State Farmers' Mut. Hail Ins. Co. 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7; 31 Cyc. 712.

In this case the court has no power to reform a written instrument, nor have plaintiffs ever asked for such relief. Mares v. Wormington, 8 N. D. 329, 79 N. W. 441; Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Anderson v. Chilson, 8 S. D. 64, 65 N. W. 435; Sykes v. First Nat. Bank, 2 S. D. 242, 49 N. W. 1058.

"The execution of a writing is the subscribing and delivering it, with or without affixing a seal." 1 Words & Phrases, 559, 560; 3 Words & Phrases, 2558–2560; Drinkall v. Movins State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724; Maddox v. Duncan, 143 Mo. 613, 41 L.R.A. 581, 65 Am. St. Rep. 678, 45 S. W. 688.

A mortgage containing a statement of fact admitted to be untrue cannot be foreclosed as drawn, even in a court of equity. Ogden v. Ogden, 180 Ill. 543, 54 N. E. 750; Bowen v. Ratcliff, 140 Ind. 393, 49 Am. St. Rep. 203, 39 N. E. 860; New v. Sailors, 114 Ind. 407, 5 Am. St. Rep. 632, 16 N. E. 609.

It is too late to reform a written instrument after the maker is insolvent and a receiver has been appointed for him. Miller v. Savage, 62 N. J. Eq. 746, 48 Atl. 1004.

The appointment of a receiver of an insolvent is notice to all persons having contractual relations with such insolvent. 34 Cyc. 216, 217, 411, note 79; Day v. Postal Teleg. Co. 66 Md. 369, 7 Atl. 608; Reed v. Axtell, 84 Va. 231, 4 S. E. 587, 10 Am. Neg. Cas. 346; Walling v. Miller, 108 N. Y. 173, 2 Am. St. Rep. 400, 15 N. E. 65; Martin v. Atchison, 2 Idaho, 624, 33 Pac. 470; Robinson v. Atlantic & G. W. R. Co. 66 Pa. 160; Baker v. Carraway, 133 Ala. 502, 31 So. 933; Coleman v. Glanville, 18 Grant, Ch. (U. C.) 42.

Nor can the appointment of a receiver by a court of competent jurisdiction be attacked collaterally. Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261; Comp. Laws 1913, § 7588, subd. 2; Societe Francaise v. Selhaimer, 57 Cal. 623.

Nor can a tort action be maintained against a receiver either in his representative or individual capacity, based upon acts done by him pursuant to the orders of the court. Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225.

The real estate mortgage in controversy having been on record long prior to the execution and filing of plaintiffs' alleged crop mortgage, plaintiffs took such mortgage subject to the contingency that in the case set forth in the statute said premises might be seized and placed in the hands of a receiver at any time before the crops were severed from the land. Moncrieff v. Hare, 7 L.R.A.(N.S.) 1001, and notes, 38 Colo. 221, 87 Pac. 1082.

ROBINSON, J. In this case the plaintiffs appeal from a directed verdict and judgment against them. It appears that on August 19, 1912, Charles Procise made to the Hart-Parr Company a chattel mortgage to secure five promissory notes, to wit: $500 due October 15, 1912; $400 due September 15, 1913; $400 due October 15, 1913; $400 due September 15, 1914; $400 due October 15, 1914. The Hart-Parr Company indorsed to the plaintiffs the first three notes. Then to secure the same or the amount due on said notes, Charles Procise made to the plaintiffs a mortgage on all crops of grain to be grown during the year 1913 on section 1–133–95. The mortgage was duly made and filed. Then an action was commenced to foreclose a mortgage on the same land, and by order of the court dated August 1, 1913, a receiver of the land was appointed and directed to take possession of the land and the crops. The plaintiffs were not parties to that action, and of course their mortgage lien was not in any manner devested or affected by the appointment of the receiver. The court had undoubted jurisdiction to appoint the receiver and to take possession of the land, but it had no right or jurisdiction to direct the receiver to take the crops or the property of a third person.

As it appears the crops produced on said land during the year 1913 consisted of a large amount of wheat and barley, and defendant took and sold the same,—wheat, 1,331 bushels; barley, 366 bushels,—and the plaintiff sues to recover the value of the same to the amount of his liens. The answer sets forth the appointment of a receiver, and that by order of the court he took the grain and sold it to the defendant. Also that the plaintiff made no claim for the crops until the receiver had expended large sums of money in harvesting, threshing, and delivering the same to the defendant. To make the crops available it was necessary for the mortgagee, the receiver, or some party to pay the expense of harvesting, threshing, and hauling the same to market, and the receiver, paying such necessary expenses, must be permitted to prove the same and to retain it from the proceeds of the crops, and, on the same principle, so far as the mortgagees pay the labor expenses for producing the crops and discharging labor liens they should be reimbursed from the crops. As it appears from the record, the crops sold were about sufficient to pay the liens of the plaintiff and the expenses necessarily paid by the receiver.

The mortgagees seem to feel that they were put between the devil and the deep sea. They did not know which way to jump, and so they brought one action against the receiver and another action against the defendant for receiving and purchasing their grain. In each case the court erroneously decided against them. The reasoning in the other case will apply with equal force to this case. The mortgage to the plaintiffs was made to secure $1,300 and interest from August 19, 1912, according to three promissory notes, which were sufficiently described in the mortgage. Much ado is made of the fact that the mortgage described the three notes as *executed* to More Brothers, instead of *indorsed* to More Brothers; but it is much ado about nothing. The use of the printed word "executed" in lieu of "indorsed" or "owned by" deceives no person, and the validity of the mortgage does not depend on the notes. It was made to secure $1,300, and interest, and in case of default the mortgagees are authorized to sell the mortgaged property and to retain the amount due on the debt, and the mortgagee is also given the right to pay from the sale the necessary expenses of harvesting, threshing, and caring for the crops.

The case turns on principles which are simple and elementary, and it is needless to quote from Cyc. or any other book. We search in vain for any note or memorandum showing the grounds, upon which the judge directed a verdict in favor of the defendant. It is needless to say that, while the mortgagees may recover against wrongdoers two judgments for the same debt or claim, they can have but one payment of the debt. The defendant may thank itself for incurring the expense of a groundless defense and two appeals in actions which might have been consolidated. However, the record shows no excuse for the defense made to either action.

Judgment reversed.

CHRISTIANSON, J. (concurring specially). This is a companion case to More v. Lane, post, 563, 164 N. W. 292, and is virtually controlled by the decision in that case. The evidence shows that the receiver delivered and sold the grain involved in this litigation to the defendant prior to the commencement of this action; that proper demand was made on the defendant by the plaintiffs for the grain before the present action was instituted, and that such demand was refused. As stated in More v. Lane, the evidence clearly shows that

the plaintiffs had a valid first mortgage lien on the grain, and also that they are assignees of certain farm laborers' liens. The receiver could convey to the defendant no better title to this grain than he possessed, and defendant therefore purchased the grain subject to whatever valid liens existed against it (34 Cyc. 332–334). As the two actions involved the same grain, and as the ownership of such grain and plaintiffs' special property therein is primarily involved in the case of More v. Lane, I agree with Mr. Justice Robinson that under the facts in this case plaintiffs' recovery should be measured by their recovery in the case of More v. Lane, and that a payment of the judgment in that case should also operate as a payment of the judgment in this case.

WINSTON, HARPER, FISHER COMPANY, a Corporation, v. T. A. PRICE, as Sheriff of Kidder County, North Dakota.

(164 N. W. 101.)

County court — appeal from — sheriff — amercement of — execution — levy under — refusal to make — judgment — not docketed in sheriff's county.

This is an appeal from an order of the county court of Wells county denying a motion to amerce or fine the sheriff of Kidder county for refusing to levy an execution for $11.02 on real property, when the judgment was not docketed in his county. The order is clearly right, and it is affirmed with costs, and the case remanded.

Opinion filed July 25, 1917.

An appeal from the County Court of Wells County, Honorable *Fred Jansonious,* Judge.

Affirmed.

Geo. H. Stillman, attorney for appellant.

The Constitution provides for county courts, and they shall have concurrent jurisdiction with the district courts in civil actions not involving more than $1,000. Mead v. First Nat. Bank, 24 N. D. 12, 138 N. W. 365.

"Concurrent" means "that jurisdiction exercised by different courts

at the same time over the same subject-matter and within the same territory and wherein litigants may, in the first instance, resort to either court, indifferently." 11 Cyc. 661.

Such courts are guided by the Practice Act of this state. N. D. Laws 1895, §§ 1, 10, chap. 43; N. D. Laws 1909, §§ 2, 21, chap. 80.

"Where, however, land is levied on under an execution issued on a judgment which is not a lien on such land, the execution levy creates a lien on it." 17 Cyc. 1050; Riland v. Eckert, 23 Pa. 215; Fry v. Wurtzel, 1 Woodw. Dec. 147; Low v. Adams, 6 Cal. 277; Bagley v. Ward, 37 Cal. 122, 99 Am. Dec. 256.

County courts derive their basic foundation from the same source as the district courts, and they shall follow the same procedure except where inapplicable by constitutional or statutory provisions. Comp. Laws 1913, § 8950.

Fordyce C. Eastwold (*J. J. Youngblood,* of counsel), for respondent.

A judgment in or on which an execution is sought to be enforced must be docketed in the county where enforcement is sought, and especially is this the law where the levy is sought against real property.

The officer called upon to enforce such execution has the right to look into the records, and to determine therefrom the validity of the execution upon which he is to act. Comp. Laws 1913, §§ 7716 and 7718.

Robinson, J. This is an appeal from an order of the county court of Wells county denying a motion to amerce the sheriff for a failure to levy an execution on real property in Kidder county. The execution was for $11.02. The sheriff refused to make the levy for the reason that the judgment had not been docketed in his county. The sheriff was perfectly right. The statute is that when an execution is against the property of a judgment debtor it may be issued to the sheriff of any county where the judgment is docketed. Comp. Laws 1913, § 7715. And when a judgment is rendered by a county court a certified transcript of the same may be filed in the office of the clerk of the district court and the judgment docketed therein, and from the time of docketing it becomes a judgment of the district court for the purpose of an execution and a lien upon real property owned by the judgment debtor. Then the clerk of the district court may give a

certified transcript of the judgment to be docketed in any other county, and no execution shall issue out of the county court upon any judgment upon which an abstract has been issued and filed in the district court. Comp. Laws 1913, § 8943. The sheriff was clearly right.

And this, for himself, the writer declares: That it is in no way proper for an attorney to belittle himself and the court by taking an appeal on such a small matter; and also that the statute in regard to the amercement of a sheriff is of barbarous and despotic origin, and it is contrary to the spirit of our Constitution, and the amercement or fine should never be imposed except in cases of grave and wilful fault, resulting in grave injury. The true purpose of the law is to administer fair and honest and honorable justice, and not to aid in robbing a sheriff or a bank or any party. The order is affirmed, with costs.

GRACE, J. I concur in the result.

FREDERICK HUBER v. GEORGE ZEISZLER.

(164 N. W. 131.)

Court — instructions — nondirection — misdirection — must be — to cause reversible error — attorneys — duty to request instructions.

1. Nondirection, unless it amounts to misdirection, of the law concerning any subject-matter which may come before the court in the trial of a case, is not reversible error. If the defendant party to the case desires an instruction as to the law upon any particular subject-matter, it is the duty of the party or attorney, if such instruction is desired, to prepare such instruction and present it to the court, with the request that it be given. If this is not done, no error can be predicated upon the neglect or omission of the trial court to give an instruction or explanation of the law concerning such subject-matter or portion thereof.

NOTE.—As to availability of advice of counsel as a defense in an action for malicious prosecution, see notes in 18 L.R.A.(N.S.) 49 and 39 L.R.A.(N.S.) 207.

On power of appellate court to grant new trial for excessive damages, see note in 26 L.R.A. 391.

Malicious prosecution — damages — action to recover — verdict — not excessive — no passion or prejudice shown.

2. A suit for malicious prosecution, where the suit was brought to recover damages alleged to be in excess of $8,000, and a verdict is returned for $1,850, and costs aggregating $170.90, in all $2,020.90, it is *held* that such judgment is not excessive, and there is nothing in the record to disclose or indicate that such verdict was returned by reason of any passion or prejudice of the jury.

Opinion filed July 25, 1917.

Appeal from the judgment of the District Court of Mercer County, *J. M. Hanley,* Judge.

Affirmed.

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

It is true that malice is a question for the jury, and it may be proved by facts or inferred from the relation of the parties, the defendant's acts and ill will manifested toward plaintiff, or it may be inferred for want of probable cause. It is further conceded that legal malice will sustain an action for malicious prosecution, the only difference being the degree of proof required. But appellant contends that plaintiff has failed to prove these facts or conditions. Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558; Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574, and authorities cited; Wuest v. American Tobacco Co. 10 S. D. 394, 73 N. W. 903; Krause v. Bishop, 18 S. D. 298, 100 N. W. 434; Van Meter v. Bass, 18 L.R.A.(N.S.) 49, and note, 40 Colo. 78, 90 Pac. 637; Ross v. Hixon, 46 Kan. 550, 12 L.R.A. 760, 26 Am. St. Rep. 123, 26 Pac. 955; Bauer v. Clay, 8 Kan. 585.

"The fact that defendant was bound over to the district court is prima facie evidence of the existence of probable cause." Such is the law in most jurisdictions. Ross v. Hixon, 46 Kan. 550, 12 L.R.A. 760, 26 Am. St. Rep. 123, 26 Pac. 955; Bauer v. Clay, 8 Kan. 585; Ganea v. Southern P. R. Co. 51 Cal. 140; Diemer v. Herber, 75 Cal. 287, 17 Pac. 205; Ash v. Marlow, 20 Ohio, 119.

"All instructions to the jury, whether given in writing or orally, shall be deemed excepted to." Comp. Laws 1913, § 7621.

The court should instruct on all appropriate matters, and the court is not relieved from this duty by failure of the parties to make requests.

38 Cyc. 691 (B); York Park Bldg. Asso. v. Barnes, 39 Neb. 834, 58 N. W. 440; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1.

Appellate courts will reverse and vacate judgment on the sole ground that the verdict is so excessive as to indicate passion, bias, or prejudice on the part of the jury. Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574; Smith v. Times Pub. Co. 178 Pa. 481, 35 L.R.A. 819, 36 Atl. 296, and cases cited.

H. L. Berry and *Hyland & Madden,* for respondent.

In malicious prosecution cases it is a question for the jury whether the disclosure to counsel is in good faith. Wren v. Rehfield, 37 S. D. 201, 157 N. W. 323; Snyder v. Mount, — Iowa, —, 159 N. W. 634; Wells v. Parker, 76 Ark. 41, 88 S. W. 602, 6 Ann. Cas. 259; Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574.

It is true that appellant threatened his wife until he made her say that Huber had intercourse with her; then it is evident that defendant must have known that there was no foundation for the prosecution, and the statement to his counsel was neither complete nor accurate, and no defense to the action. Comeford v. Morwood, 34 N. D. 276, 158 N. W. 258; Wells v. Parker, 76 Ark. 41, 88 S. W. 602, 6 Ann. Cas. 259.

The defendant in an action for malicious prosecution who seeks to rely upon the advice of counsel as a defense must show that he communicated to such counsel all of the facts within his knowledge. Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574.

The binding over of plaintiff is conclusive of no fact against him in such actions. Wells v. Parker, 6 Ann. Cas. 259, and note, 76 Ark. 41, 88 S. W. 602; Bechel v. Pacific Exp. Co. 65 Neb. 827, 91 N. W. 853.

The question of whether the prosecution was malicious or not is, as a general rule, one for the jury. Snyder v. Mount, — Iowa, —, 159 N. W. 634; 26 Cyc. 109.

Where the jury finds that the criminal action was instituted without probable cause, it might and naturally would draw the inference that the defendant was actuated by malice in causing plaintiff's arrest and prosecution for an alleged crime, which there was no probable cause or reason to believe plaintiff had committed. Kolka v. Jones, 6 N. D.

461, 66 Am. St. Rep. 615, 71 N. W. 558; Comeford v. Morwood, supra.

Error in failing to instruct fully upon a particular issue is waived by failure to request additional instructions. Quinn v. Chicago, M. & St. P. R. Co. 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884; Connell v. Canton, 24 S. D. 572, 124 N. W. 839; Belknap v. Belknap, 20 S. D. 482, 107 N. W. 692; Lunschen v. Ullom, 25 S. D. 454, 127 N. W. 463; Landis v. Fyles, 18 N. D. 587, 120 N. W. 566; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972.

The question of the false testimony before the magistrate was squarely put before the jury by proper instructions. Casey v. First Nat. Bank, 20 N. D. 211, 126 N. W. 1011.

In fixing the damages it must clearly appear that the jury went beyond the exercise of a sound judgment and discretion before its verdict will be held excessive. Merchant v. Pielke, supra; Rule v. McGregor, 115 Iowa, 323, 88 N. W. 814; Fiola v. McDonald, 85 Minn. 147, 88 N. W. 431; Neys v. Taylor, 12 S. D. 488, 81 N. W. 901.

GRACE, J. The action is one for malicious prosecution. The complaint alleges that on the 17th day of July, 1915, the defendant maliciously and without probable cause falsely charged the plaintiff herein with the crime of adultery, before a justice of the peace within and for the county of Mercer, and also swore to a criminal complaint before such justice, charging the same crime. Such complaint further shows that such charge was false, and that the defendant knew it was false at the time he made the complaint. The plaintiff further shows his arrest by reason of the making of such complaint and the issuance of such warrant. That, when the preliminary hearing was had, the plaintiff was bound over to the district court, and was tried by a jury, by whom he was acquitted. Plaintiff alleges damages by reason of money expended in employing counsel to defend him in said action, and the payment of witness fees, and alleges general damages in the sum of $7,500, and makes demand for judgment in the sum of $8,350.

The answer admits the arrest of the plaintiff by reason of the warrant, and states further by way of defense the binding over of the plaintiff upon the preliminary hearing. Defendant alleges further

by way of defense that he had good grounds to believe the plaintiff guilty of the crime charged, and in the manner charged in the complaint. Further by way of defense defendant alleges that, before the filing of such complaint and the issuance of such warrant, defendant consulted counsel and stated to them fully and fairly all facts and circumstances known to him in relation to such charge, and that such attorneys advised the defendant that he had probable cause for commencing such criminal proceedings.

Trial was had in the district court of Mercer county of all the issues in the case, and the jury returned a verdict in favor of the plaintiff for the sum of $1,850, and the costs and disbursements of the action taxed at $170.90, in all $2,020.90. Motion for a new trial was made, which was based upon the alleged passion and prejudice of the jury and the excessiveness of the verdict, and upon other grounds. An order was made denying the motion for a new trial, and judgment was entered. From the order denying a new trial and from the judgment the defendant appeals and assigns four specifications of error. First, that the court erred in denying the motion of the defendant for a new trial of the action, and in refusing to order a new trial of the action. The granting or refusing to grant a new trial rests largely in the discretion of the trial court, and unless there is plain abuse of such discretion, its order in such matter will not be disturbed. There appears to be no abuse of such discretion in this case. As to the second assignment of error, which is that the damages awarded by the jury are so excessive as to appear to have been given under the influence of passion and prejudice, we conclude there is no merit in such assignment of error. There is nothing in the record to indicate any passion or prejudice on the part of the jury, and the verdict is not excessive under all the circumstances of the case. As to the third assignment of error, which claims that the evidence is insufficient to justify the verdict, we are of the opinion that the verdict is amply sustained by the evidence in the case. There was sufficient evidence in the case to support the allegations of the complaint, and there was conflicting evidence as to certain material matters connected with the case; and it was the province of the jury to pass upon all disputed questions of fact presented to them, which they did, and returned a verdict in favor of the plaintiff, which is amply supported by the

testimony in the case. The fourth assignment of error, relating to the failure of the court to instruct the jury that the fact that the plaintiff had been held to answer the charge of the criminal action in district court after a preliminary hearing before a justice of the peace was prima facie evidence of the guilt of the plaintiff, is also without merit. It does not appear that the defendant requested any such instruction, and nondirection, unless it amounts to misdirection, in a matter of law in a civil case, is not reversible error. If defendant had desired any instruction, all he needed to do was to call the matter to the attention of the court, or prepare a written instruction himself upon the subject on which he desired the instruction of law by the court, and present it to the court and request the court to give such instruction. If the court refused to give such instruction, and it was an instruction which could or might have been properly given, or if the failure to give it in any way materially adversely affected defendant's cause, the defendant could then present to this court the failure of the court below to give such instruction as a ground for reversible error. Otherwise, if the court fails to explain or expound the law to the jury relating to some of the subject-matter of the action, and the defendant makes no request for instructions upon such subject, the defendant is not in position to complain, and cannot afterwards in the appellate court successfully contend that the failure of the trial court to give such instruction is reversible error. Thompson on Trials, vol. 2, § 2338, says: "In civil cases the judge is not bound to give his opinion to the jury upon any matter of law arising upon the evidence unless requested to do so by one of the parties. Where no such request is preferred, the presumption is that the jurors are acquainted with the rules of the law applicable to the case, and the failure to instruct them cannot be assignment for error." Our court passed upon the same subject in the following cases: Buchanan v. Occident Elevator Co. 33 N. D. 346, and 351, 157 N. W. 122; Halverson v. Lasell, 33 N. D. 613, 157 N. W. 682; McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261; State v. Haynes, 7 N. D. 353, 75 N. W. 267. It is not necessary to discuss any of the testimony in this case. All such testimony came before the jury, and was weighed by them in arriving at their verdict. They were

the exclusive judges of all the facts and the credibility of the witnesses, and their judgment is conclusive upon such matters.

The judgment is affirmed, with costs.

ROBINSON, J. (concurring). This is an appeal from an order and judgment denying a new trial in favor of the plaintiff in a suit for malicious prosecution. The complaint charges that in 1915, without probable cause, the defendant falsely and maliciously charged the plaintiff with the crime of adultery, caused his arrest, procured false evidence against him, so that he was bound over and put on trial in the district court, and that on the trial the plaintiff was acquitted and discharged. Special damages were alleged and proved to the amount of $850, and the jury found a verdict in favor of the plaintiff for $1,850. The strong presumption is that the evidence was sufficient to sustain the verdict, and that presumption is well fortified by reading the evidence.

Defendant charged that on December 3, 1914, the plaintiff committed adultery, and he circulated a report to that effect. The plaintiff commenced an action against him for slander. Then on July 17, 1915, the defendant made complaint and caused the arrest.

Defendant's wife was a sickly woman, who had been for years subject to epileptic fits. Apparently defendant wanted a new wife, and forced her to say that the plaintiff had been with her, which was not true. Subsequently, in presence of the defendant and of numerous other parties, she stated positively that she was forced to say what she said; that defendant stood before her with a butcher knife and forced her to say it; and she made the declaration in presence of the defendant and of nearly a dozen other parties, and said it in a loud voice, and was crying when she said it. She wept for the disgrace and shame which the defendant had brought upon her, and which probably shortened her life. It is true she was called as a witness for her husband, and directly contradicted the testimony of all the numerous witnesses as to what she had said in their presence. Then she was taken with one of her fits and had to leave the witness stand. Her statements are so well disproved that her denial simply shows the fear she had of her husband.

The jury saw the poor, sickly woman, and heard her testimony and

that of all the other witnesses; and they had a right to conclude as they did, that the plaintiff was perfectly innocent, and that defendant put up a job and forced his wife to aid him, and that the prosecution was causeless, and not in good faith; and such is the convincing evidence. Hence, the conclusion is that defendant had a fair trial. The charge of the court was manifestly fair. The verdict is far from being excessive. It might well have been for $5,000.

Judgment affirmed.

A. Y. MORE and J. L. More, a Copartnership Doing Business under the Firm Name and Style of More Brothers, v. A. L. LANE, Receiver of Charles Procise, and A. L. Lane.

(164 N. W. 292.)

Real estate mortgage — action to foreclose — chattel mortgage on crops — receiver under foreclosure — lien of chattel mortgage — not affected by — receiver takes subject to such lien — action against receiver — for conversion — not protected by receivership.

In an action to foreclose on real property, the appointment of a receiver does not devest or affect the lien of a chattel mortgage on the crops. When a receiver takes and sells crops subject to the lien of a third party, he is not protected from an action by the lien holder to recover the value of the crops to the amount due on the lien.

Opinion filed July 25, 1917.

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

Plaintiffs appeal.

Reversed.

Jacobsen & Murray, for appellants.

Conceding that there was a misdescription of the notes in the chattel mortgage, still such does not avoid the mortgage, and oral evidence was admissible to identify the notes. Jones, Mortg. 5th ed. §§ 86, 89, and 90, pp. 136 to 139; Paine v. Benton, 32 Wis. 491; 6 Cyc. 1016, ¶4; 27 Cyc. 1096, 1098, ¶ 5, note 78; Moore v. Russell, 133 Cal.

297, 85 Am. St. Rep. 166, 65 Pac. 625; Rock v. Collins, 99 Wis. 630, 67 Am. St. Rep. 885, 75 N. W. 426; Lierman v. O'Hara, 153 Wis. 140, 44 L.R.A.(N.S.) 1153, 140 N. W. 1057; Catlett v. Stokes, 33 S. D. 278, 145 N. W. 554.

The receiver was not an innocent purchaser of the grain covered by plaintiffs' mortgage. He stands in the same place as the mortgagor. Therefore the mortgage could be reformed in the same action, so as to conform to the notes. French v. State Farmers' Mut. Hail Ins. Co. 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7.

The agreement between the plaintiffs and the mortgagor relative to the application of the proceeds of the money derived from the foreclosure sale of the engine was clearly admissible. Comp. Laws 1913, § 5799.

A receiver has no authority over or right to possession of crops unless the plaintiff in the receivership action has a lien thereon. Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631.

In an action to foreclose a real estate mortgage, a receiver appointed therein has no authority or control over the crops on the land covered by the mortgage, where the mortgage is only on the land. Locke v. Klunker, 123 Cal. 231, 55 Pac. 993; Bank of Woodland v. Heron, 120 Cal. 614, 52 Pac. 1006.

The California statutes as to receivers are the same as here. Comp. Laws 1913, §§ 7588 et seq.; 3 Kerr's Cyc. Codes (Cal.) §§ 564 et seq. pp. 919 to 949 inc.; Golden Valley Land & Cattle Co. v. Johnstone, supra.

The court had no authority to appoint a receiver over property upon which the plaintiffs there had no lien. The court could not authorize the receiver to take charge of property which was not involved in the litigation before it. Its order in this respect was void, and the acts of the receiver thereunder were unlawful. Kreling v. Kreling, 118 Cal. 421, 50 Pac. 549; Bowman v. Hazen, 69 Kan. 682, 77 Pac. 589; Vila v. Grand Island Electric Light Ice & Cold Storage Co. 68 Neb. 222, 63 L.R.A. 791, 110 Am. St. Rep. 400, 94 N. W. 136, 97 N. W. 613, 4 Ann. Cas. 59; Anderson v. Robinson, 163 Or. 228, 126 Pac. 988, 127 Pac. 546; 34 Cyc. 168; Dabney Oil Co. v. Providence Oil Co. 22 Cal. App. 233, 133 Pac. 1155; Baker v. Varney, 129

Cal. 564, 79 Am. St. Rep. 140, 62 Pac. 100; State ex rel. Johnston v. District Ct. 21 Mont. 155, 69 Am. St. Rep. 645, 53 Pac. 272; Staples v. May, 87 Cal. 178, 25 Pac. 346; 27 Cyc. 1630; Elwell v. Goodnow, 71 Minn. 390, 73 N. W. 1095.

The appointment of a receiver has no effect over parties who were not made parties to the receivership action. State ex rel. Hunt v. Superior Ct. 8 Wash. 210, 25 L.R.A. 354, 35 Pac. 1087; J. W. Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347.

Liens and encumbrances are not affected by the appointment of a receiver, and he takes possession of the property covered thereby subject thereto. 34 Cyc. 348; Cramer v. Iler, 63 Kan. 579, 66 Pac. 617; Bowman v. Hazen, 69 Kan. 682, 77 Pac. 589; Albien v. Smith, 24 S. D. 203, 123 N. W. 675; High, Receivers, § 138, p. 159; Re Binghamton General Electric Co. 143 N. Y. 261, 38 N. E. 297; Hammond v. Solliday, 8 Colo. 610, 9 Pac. 781; Petaluma Sav. Bank v. Superior Ct. 111 Cal. 488, 44 Pac. 177.

A party holding a lien on property may proceed by independent action against the receiver to recover on his lien. Petaluma Sav. Bank v. Superior Ct. supra; Coburn v. Watson, 48 Neb. 257, 67 N. W. 171, 35 Neb. 492, 53 N. W. 477; 34 Cyc. 217, 409, ¶ 6; Kenney v. Ranney, 96 Mich. 617, 55 N. W. 982; Gutsch v. McIlhargey, 69 Mich. 377, 37 N. W. 303.

The plaintiffs proved and offered to prove a prima facie case of conversion. The demand was made and the action instituted promptly, and they were entitled to recover the highest market value of the property. Chaffee Bros. Co. v. Powers Elevator Co. 33 N. D. 550, 157 N. W. 689; Dammann v. Schibsby Implement Co. 30 N. D. 15, 151 N. W. 985.

The appointment of defendant as receiver is no defense, because the order was void. Comp. Laws 1913, § 6857.

Nor could such appointment affect the rights of laborers to file liens for their labor. Bank of Woodland v. Heron, supra.

The sale of the crops by the receiver had no effect on valid liens and chattel mortgages thereon. High, Receivers, §§ 191, and 199a; Totten & H. Iron & Steel Foundry Co. v. Muncie Nail Co. 148 Ind. 372, 47 N. E. 703; J. W. Dann Mfg. Co. v. Parkhurst, 125 Ind. 317, 25 N. E. 347; 34 Cyc. 334.

Such sale was made subject to all valid liens. 34 Cyc. 350.

F. C. Heffron and *Emil Scow,* for respondent.

The plaintiffs offered in evidence a mortgage which was given to them to secure the payment of notes payable to another person. Objection was made and sustained, and no motion was made to amend the complaint.

On this ground alone defendant was entitled to a directed verdict. French v. State Farmers' Mut. Hail Ins. Co. 29 N. D. 426, L.R.A. 1915D, 766, 151 N. W. 7; Woodward v. Northern P. R. Co. 16 N. D. 38, 111 N. W. 627; Johnson v. Moss, 45 Cal. 515; Davenport v. Henderson, 84 Ga. 313, 10 S. E. 920; Robinson Consol. Min. Co. v. Johnson, 13 Colo. 258, 5 L.R.A. 769, 22 Pac. 459; Washington v. Timberlake, 74 Ala. 259; Roop v. Seaton, 4 G. Greene, 252; Roberts v. Jones, 2 Litt. (Ky.) 88; Smith v. Clarke, 4 Cranch, C. C. 293, Fed. Cas. No. 13,028; McKinzie v. Stafford, 8 Tex. Civ. App. 121, 27 S. W. 790; People's Min. & Mill. Co. v. Central Consol. Mines Corp. 20 Colo. App. 561, 80 Pac. 479; Heim v. Ressel, 162 Iowa, 75, 143 N. W. 823; 1 Elliott, Ev. § 198; 31 Cyc. 712.

The alleged parties to an instrument described in the pleadings must be identically the same as those shown by the instrument when put in evidence. French v. State Farmers' Mut. Hail Ins. Co. 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7; 31 Cyc. 712.

The court has no power in this action to reform a written instrument, nor have plaintiffs ever asked for such relief. Mares v. Wormington, 8 N. D. 329, 79 N. W. 441; Prondzinski v. Garbutt, 8 N. D. 191, 77 N. W. 1012; Anderson v. Chilson, 8 S. D. 64, 65 N. W. 435; Sykes v. First Nat. Bank, 2 S. D. 242, 49 N. W. 1058; Tourtelot v. Whithed, 9 N. D. 467, 84 N. W. 8; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1, 119 U. S. 491, 30 L. ed. 476, 7 Sup. Ct. Rep. 305.

"The execution of a writing is the subscribing and delivering of it with or without affixing a seal." 1 Words & Phrases, 559, 560; 3 Words & Phrases, 2558–2560; Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724; Maddox v. Duncan, 143 Mo. 613, 41 L.R.A. 581, 65 Am. St. Rep. 678, 45 S. W. 688.

"A mortgage containing a statement of fact admitted to be untrue

cannot be foreclosed as drawn even by a court of equity." Ogden v. Ogden, 180 Ill. 543, 54 N. E. 750; Bowen v. Ratcliff, 140 Ind. 393, 49 Am. St. Rep. 203, 39 N. E. 860.

It is too late to reform a written instrument after the maker has become insolvent and a receiver has been appointed for him. Miller v. Savage, 62 N. J. Eq. 746, 48 Atl. 1004.

It is not claimed that the receiver has not faithfully carried out all the orders of the court. Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225; Montgomery v. Enslen, 126 Ala. 654, 28 So. 626; Remington Paper Co. v. Watson, 49 La. Ann. 1296, 22 So. 355.

The court had jurisdiction of the mortgagor and mortgagee in the action in which the receiver was appointed, and of the land on which the crops seized were growing at the time of his appointment. Comp. Laws 1913, § 7588, subd. 2; Societe Francaise v. Selhaimer, 57 Cal. 623.

His appointment cannot be collaterally attacked, no matter how erroneous it may have been. 34 Cyc. 217, notes 97 and 98; Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261; Comp. Laws 1913, § 7588, subd. 2.

Plaintiffs took the chattel mortgage subject to the contingency that, in the case set forth in the statute, said premises might be seized and placed in the hands of a receiver at any time before the crops thereon were severed from the soil. Moncrieff v. Hare, 7 L.R.A.(N.S.) 1001, and note, 38 Colo. 221, 87 Pac. 1082.

Robinson, J. The plaintiff brings this action, claiming title to certain crops of grain under a chattel mortgage made to them by Charles Procise. The plaintiff appeals from a judgment in favor of the defendant. The mortgage was on all grain crops to be grown during the year 1913 on section 1, township 133, range 95. A prior mortgage was made to Hart-Parr Company to secure five promissory notes each dated August 19, 1912, to wit: $500 due October 15, 1912; $400 due September 15, 1913; $400 due October 15, 1913; $400 due September 15, 1914; $400 due October 15, 1914. Interest at 8 per cent. The mortgage was duly witnessed, acknowledged, and filed for record. This mortgage was on a gasolene engine and on some crops, and on foreclosure of the same there was due about $1,300.

On February 4, 1913, Charles Procise made another mortgage to secure payment of $1,300, on all crops to be grown during the year 1913 on sec. 1–133–95 according to the conditions of three promissory notes, *executed* to More Brothers, dated August 19, 1912; $500 due October 15, 1912; $400 due September 15, 1913; $400 due October 15, 1913.

Manifestly this second mortgage was made to secure three of the notes described in the first mortgage, which notes had been transferred to More Brothers by Hart-Parr Company. The notes were made payable to the order of Hart-Parr Company, and were indorsed by them to the plaintiffs, and when so indorsed they were in reality made and executed to the plaintiffs. In the brief of counsel for defendant it is claimed that the second mortgage is fatally defective because it describes the notes as executed to More Brothers, and not as made to Hart-Parr Company and by them indorsed to More Brothers. The point amounts to nothing. No person was deceived by the description of the notes, and when indorsed by Hart-Parr Company to the plaintiffs the legal effect was precisely the same as if the notes had been made payable to the plaintiffs. The receiver stands in the shoes of the mortgagor. He is in no position to assert any claim as a purchaser in good faith and for value. The mortgage needed no reforming. It sufficiently described its notes, and it covered the crops in question and gave notice to every person.

It is also claimed that a mortgagee of land which is insufficient to secure the mortgage debt may, by a receiver, take the crops grown on the land regardless of any mortgage. That is not the law. The yearly crops are produced at a great expense, and the party producing them has a perfect right to mortgage the crops, and the right of a receiver is necessarily subject to the rights of any prior mortgage. In other words, a valid mortgage lien is not in any way devested by the appointment of a receiver, and when a receiver wrongfully takes property subject to the lien of a third party, of course he must pay for the property to the extent of the lien. When a receiver is appointed in a suit to foreclose a mortgage, the court has no right or jurisdiction to order him to take the property of third parties.

In this case the plaintiff makes no collateral attack on the order appointing the receiver. That was a matter entirely within the juris-

diction of the court, but when direction is given to a receiver, by inadvertence or otherwise, to take property not belonging to the mortgagor nor subject to the mortgage lien, then the court surpasses its jurisdiction. A party is not protected in wrongdoing because he is a receiver or an officer of a court.

But it is claimed that a receiver should be dealt with very gently, and that when acting under the order of a court he cannot be held in an action of tort. The answer is that, under our modern practice, the twilight distinction between actions in tort and the contract is of little consequence. This is an action to recover money which the receiver has wrongfully put into his pocket. When a receiver takes and sells property of a third party, the purpose of any action that can be brought against him is to recover the property, or its value, or the money received for it. He should not be permitted to sell the property of others, and to retain its price, and to make nice distinctions regarding the procedure to recover the property or its value.

The remedy of the plaintiffs was by a summary motion to the court or by a civil action, and hence, with the express permission of the court, this action was brought. On the record and proceedings it is hard to conceive of any ground for denying plaintiffs' right to recover. In regard to the labor liens, if they were valid liens against the crop, and the plaintiffs paid them under the mortgage or took an assignment of such liens, of course they are entitled to recover the same from the proceeds of the crop. It seems the defendant has sold the crops of grain, and now he refuses to pay either the mortgage liens or the hire of the laborers who produced or harvested the crops. To make the crops available it was necessary for the mortgagee, the receiver, or some party to pay the expense of harvesting, threshing, and hauling the same to market; and the receiver, paying such necessary expenses, must be permitted to prove the same and to retain it from the proceeds of the crops. And the same is true of a purchaser from the receiver.

Judgment reversed.

CHRISTIANSON, J. (concurring specially). I concur in the result reached in the opinion prepared by Mr. Justice Robinson, for the following reasons: It clearly appears that the plaintiffs had a valid chattel mortgage lien on the grain seized by the receiver. I agree with Mr.

Justice Robinson that the alleged misdescription of the notes is not fatal to plaintiffs' mortgage lien. It is undisputed that the plaintiffs are the owners and holders of the notes secured by the mortgage, and were such owners and holders at the time the mortgage was executed. The mortgage was properly executed and filed for record, and was a valid lien on the grain involved in this case. The plaintiffs were not made parties to the action in which the receiver was appointed. The receiver was appointed in an action for the foreclosure of a mortgage upon the land on which the crops were grown. At the time such action was commenced and the receiver appointed, the grains in controversy were growing crops thereon, and the lien of plaintiffs' mortgage had attached thereto. While the mortgage sought to be foreclosed in the action in which the defendant receiver was appointed did not cover the crops, I am by no means satisfied that the order appointing the receiver and directing him to take possession of the crops was void and can be either disregarded or attacked collaterally. The power of the district court to appoint a receiver in an action for the foreclosure of a mortgage is unquestioned. Comp. Laws 1913, § 7588. The mere fact that the order is irregular or erroneous on facts does not make it void. 17 Enc. Pl. & Pr. 753; 34 Cyc. 164 et seq. In the case at bar, however, the plaintiffs expressly recognized the appointment of the receiver, and obtained the court's permission to bring the present action against him in his representative capacity. Having recognized the order as valid, it would seem that the plaintiffs are in no position to assert that it is invalid. 34 Cyc. 162.

The questions presented in this action could probably have been determined by the court on a motion in the receivership proceedings. But the court was not required to pursue this method. It could permit or require that such issues be determined in an ordinary action.

It is unnecessary to determine whether the court could in its discretion have refused to grant permission to maintain such action, as that question is not presented here. The fact is that the plaintiffs applied for, and the court gave, permission that such action be maintained. In this state, where forms of civil action have been abolished, there is no good reason why the trial court may not permit the ownership of property to which the receiver and some third party make conflicting

claims, to be determined in an action for a conversion of the property. The court having granted permission to the plaintiffs to maintain such action, they are entitled to an adjudication of their rights as established by the evidence, under the issues framed by the pleadings.

I agree with the contentions of the respondent that a receiver acting in accordance with the directions of the order of his appointment cannot be held individually liable for such acts,—at least not unless the order of appointment is void. It by no means follows, however, that an action will not lie against him in his representative capacity for injuries resulting to others from such acts. While the receiver is relieved from personal liability, actions may be brought against him in his official capacity, and the judgments obtained against him so entered as to be enforced against funds properly chargeable therewith in his hands, or under his control. High, Receivers, 3d ed. § 255.

I do not believe that the receiver in this case, having taken possession of property in accordance with the court's order, should be held liable individually for so doing. But I do believe that the funds in his hands received from the sale of the property upon which the plaintiffs had a valid subsisting lien at the time the receiver was appointed should be paid over by him to the plaintiffs to the extent of their lien. The evidence in the case clearly shows that the plaintiffs had a first mortgage lien on such grain, and that the receiver marketed the grain, and has the moneys which he received therefor in his possession. I know of no reason why, in an action for conversion, the rights of the parties may not be determined upon equitable principles. See Wadsworth v. Owens, 17 N. D. 173, 177, 115 N. W. 667; Stavens v. National Elevator Co. 136 N. D. 9, 161 N. W. 559.

I agree with Mr. Justice Robinson that the plaintiffs should be awarded judgment for the amount of their mortgage lien and such of the farm laborer's liens as they show to be valid. Said judgment, however, not to be a judgment against the receiver individually, but a judgment against him in his representative capacity as receiver, and to be satisfied out of the moneys in his hands received from the sale of the grain, after the payment by the receiver of the necessary expenses actually incurred in harvesting, threshing, and marketing the grain.

GUSTAVE LOBE v. JOSEPH BARTASCHAWICH and Mary Bartaschawich.

(164 N. W. 276.)

Judgment — order vacating — appeal from — affidavits on motion — grounds for — summons and complaint not served — opposing affidavits — error not shown.

1. Upon an appeal from an order vacating a judgment and permitting the defendant to answer, where the affidavits in support of the motion present a showing that the summons and complaint were not served on defendants and that they had no notice or knowledge of the action until execution was levied upon their property, and counter affidavits were filed by the judgment creditor disputing the facts stated with reference to the service of the summons and complaint,—*held*, that error in allowing the judgment to be opened is not shown.

County court judgment — transcribed to district court — vacating — motion for — in county court — heard in district court — by stipulation — jurisdiction — parties precluded from raising question.

2. Where, after a county court judgment has been transcripted to the district court under § 8943, Comp. Laws 1913, a motion to vacate is made in county court and upon stipulation heard in the district court, the latter being a court of general jurisdiction, a party who had stipulated for the hearing of the motion in such court is precluded from questioning the jurisdiction to enter the appropriate order deciding the motion.

Opinion filed July 28, 1917.

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

Judgment for defendant.

Plaintiff appeals.

Affirmed.

McGee & Goss and *J. L. Lee,* for appellant.

The judgment in this case was a judgment of the county court, a court of co-ordinate and concurrent jurisdiction of the subject-matter. It is still the judgment of that court, even though transcribed to the district court. Comp. Laws 1913, §§ 8930, 8943.

The district court was without jurisdiction of the subject-matter, to try this case or to vacate the judgment. The district court, on motion,

can vacate only its own judgments. It may grant relief by equitable action, but it cannot vacate or otherwise modify the judgment of another lower court, except by appeal or certiorari. Comp. Laws 1913, §§ 7691, 7705, 7716, 8943, 9109; Holton v. Schmarback, 15 N. D. 38, 106 N. W. 36.

The life of the judgment of a lower court cannot be extended by the mere transcribing it to the district court. Williams v. Rice, 6 S. D. 9, 60 N. W. 153; Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292; Holton v. Schmarback, supra; Acme Harvester Co. v. Magill, 15 N. D. 116, 106 N. W. 563.

Where a lower court judgment is transcribed to the district court, the proper method of assailing it is by motion, and not by equitable action. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; 15 R. C. L. 587; Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390.

Jurisdiction cannot be conferred by any act of the parties. Brown v. Bell, 46 Colo. 163, 23 L.R.A.(N.S.) 1096, 133 Am. St. Rep. 60, 103 Pac. 380; 7 R. C. L. 1043.

Lewis & Bach, for respondents.

The judgment was a nullity for failure to present any proof, the complaint not being verified. There must be proof in order to assess damages, except in cases of a note or contract fixing the amount. Comp. Laws 1913, § 7600.

A proper affidavit of merits was presented on the motion to vacate. Such affidavit need not state the facts as to the defense to the action. Bismarck Grocery Co. v. Yeager, 21 N. D. 547, 131 N. W. 517.

BIRDZELL, J. This is an appeal from an order entered in the district court of Ward county, vacating a default judgment entered against the defendants in the county court of Ward county, and subsequently transcripted to the district court. The order appealed from is as follows:

Order Opening Default and Allowing Answer.

It appearing to the court that the above-named plaintiff heretofore brought an action against the above-named defendants in the county court of Ward county, North Dakota, and obtained judgment in said action by default on May 22, 1915, and thereafter filed a transcript of

said judgment in the office of the clerk of the district court in and for said Ward county; and that the defendants made a motion in the said county court to have said judgment opened and to be allowed to defend the said action; and that said motion was stipulated to be heard in this court, to wit, the district court for said county of Ward, on October 12, 1915, by the oral stipulation, in open court, of J. L. Lee, attorney for plaintiff, and Lewis and Bach, attorneys for defendant; and that the said motion was thereupon duly heard in this court on October 12, 1915; and the court being of opinion, and so finding, that said default ought to be opened and said judgment set aside, and the defendants allowed to defend the said action:

Now, therefore, on motion of Lewis & Bach, attorneys for the defendants herein, it is

Ordered that said judgment be, and it hereby is, vacated and set aside, and that the said action be, and it hereby is, remanded to the county court in and for Ward county, North Dakota, with instructions to allow the defendants to defend the same upon answering the complaint within fifteen days from this date, to wit, by October 27, 1915, and paying to the plaintiff $10 costs.

Dated at Minot, N. D., October 12, 1915.

(Signed) K. E. Leighton,
Judge.

The motion papers were entitled "In the County Court of Ward County, before the Hon. William Murray, Judge," and the notice of motion notified the plaintiff that the motion would be heard in said court. By the affidavits supporting the motion, it appears that the moving party relied upon the failure of the plaintiff to serve the summons and complaint as constituting excusable neglect to defend the action. The motion was also accompanied by an affidavit of merits showing that the affiants had submitted all the facts constituting their defense to their attorneys, and had been advised by them that the defense was meritorious. There was also an affidavit of merits containing the substance of the proposed answer, which was signed by one of the attorneys for the defendants. Counter affidavits were filed by Jens H. Springer and J. L. Lee, which disputed the facts stated in

the affidavits supporting the motion with reference to the service of the summons and the complaint.

The appellants rely for a reversal of the order upon two main grounds of error in the entry of the order. It is contended, first, that the entry of the order was an abuse of discretion, because of the insufficiency of the showing made by the defendants; and, second, that the court was without jurisdiction to determine the motion.

The affidavit of the defendants, in support of the motion, states specifically that no summons or complaint was served on them, and that they had no notice or knowledge of such action whatsoever until an execution was levied upon their property. In the face of this showing, even though the same is controverted by the affidavits of Jensen and of Lee, the plaintiff's attorney, we are not prepared to say that the judge who heard the motion erred in allowing the judgment to be opened.

It is argued that the affidavit makes no showing of mistake, inadvertence, surprise, or excusable neglect within the provisions of § 7483, Comp. Laws 1913. Certainly a showing that no summons or complaint was served, and that defendants had no notice or knowledge of the pendency of an action against them, amounts to a showing of excusable neglect to answer and defend. In fact if there was no service, such showing was not necessary. Van Woert v. New York L. Ins. Co. 30 N. D. 27, 151 N. W. 29.

It is also argued that the affidavits in support of the motion do not make a proper showing of meritorious defense. The affidavit of the defendants is in a form which has been expressly approved by this court. In the case of Bismarck Grocery Co. v. Yeager, 21 N. D. 547, 131 N. W. 517, this court, speaking through Mr. Justice Burke, said (page 550): "There are two forms of affidavits of merits recognized by the courts,—the older form, wherein all of the facts are set out for the inspection of the courts; and the other form, wherein affiant states that he has submitted all of the facts to his attorney, and has by him been advised that his defense is meritorious. The latter form has been in general use in North Dakota since statehood, and will, of course, be recognized by this court."

The form of affidavit used in this case having heretofore received the sanction of this court, and it appearing that there is no good reason to

alter the rule thus laid down as to its sufficiency, we are content to hold that the affidavit in this case is sufficient.

In a supplemental brief devoted to the proposition that the district court was without jurisdiction to enter the order appealed from, it is argued with considerable force and earnestness that the act of the district court in entering the order was a nullity. It appears in the order that the judgment of the county court was transcripted to the district court before the application to vacate was made. Section 8943, Comp. Laws 1913, authorizes judgments to be thus transcripted, and it appears from the section referred to that the chief, if not the only object of the procedure, is to entitle the judgment creditor to resort to the same proceedings in the enforcement of the judgment that he would be entitled to were the judgment an original district court judgment. This appearing to be at least the main purpose of the statute, it is argued that a judgment so transcripted is only made a district court judgment for the purpose of collection, and that, as to any steps which a judgment debtor might desire to take by way of vacating the judgment, it is still a county court judgment. The argument presented is logical (Phelps v. McCollam, 10 N. D. 536, 88 N. W. 292), but we do not deem it necessary to determine the soundness of the position taken; for it appears that, while the motion was noticed for hearing in the county court, it was heard by stipulation in the district court. The appellant does not ask to be relieved of the stipulation, nor is the making of the same disputed in the briefs. We must therefore assume that the facts stated in the order with reference to the oral stipulation are true. In this situation, the question of jurisdiction must be determined upon different considerations than would apply if the appellant had made a special appearance in the district court for the purpose of objecting to the jurisdiction of that tribunal to hear and dispose of the motion. The appellant, having thus entered his appearance in the district court, is bound by the decision announced in the order, if the subject-matter dealt with in the motion and in the order is such that jurisdiction to determine it can be voluntarily conferred upon the court. The district court, being a court of general jurisdiction, has power to determine all controversies or questions of difference which can possibly be made the subject of civil action. Clearly a proceeding to determine the validity and binding force of a judg-

ment is one that might be brought in the form of a civil action. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721. If an action were brought attacking the judgment directly, it would make no difference that the judgment was that of an inferior court of limited jurisdiction, rather than of the district court. The judgment in such cases is only the form in which the purported obligation rests. The fight of a court of general jurisdiction to determine the binding force of a judgment is as clearly established as is its right to cancel a fraudulent promissory note. Both call for the exercise of ordinary judicial functions appealing to the equity side of the court. The subject-matter being within the scope of the jurisdiction of the court in which the motion was made, and such court having determined the controversy by consent of the parties, they are now precluded from questioning the jurisdiction. There are but few analogous cases, presumably due to the fact that parties who consent to the exercise of the judicial powers of a court of general jurisdiction seldom have the hardihood to impeach the action of the tribunal on jurisdictional grounds. Some of the authorities, in discussing questions analogous to this, base the decision upon grounds of estoppel. The mischief that might result in reversing an order of this character for lack of jurisdiction is obvious; and in order to prevent it courts are warranted in invoking the doctrine of estoppel. The time within which to appeal from the judgment of the county court might elapse while the judgment debtor, who, by the order of the district court, has been given an opportunity to put in his defense, was relying upon the stipulation; or the time for opening and vacating the judgment in the county court might run under similar circumstances. See Groves v. Richmond, 56 Iowa, 69, 8 N. W. 752. The following expression from the supreme court of Pennsylvania, in Re Spring Street, 112 Pa. 258–263, 3 Atl. 581, is pertinent in this connection. "While it is conceded as a general rule that consent will not give jurisdiction, yet we are not to lose sight of the fact that the court of quarter sessions has a general jurisdiction over the opening of streets and the assessment of damages therefor. And while in the particular portion of territory embraced within the city of Reading that jurisdiction has been transferred to the court of common pleas, the fact remains that the city not only consented to, but invoked, the jurisdiction of a court having such general jurisdiction; and having now ob-

tained the fruits of their proceeding, it does not lie in the mouth of the municipality to raise such an objection as this. Had the parties consented to the jurisdiction of a court having no general control of such matters, as, for instance, the orphans' court, the proceedings would have been absolutely void, and no consent of either party would have worked an estoppel. But as the case stands we are of opinion that good faith and fair dealing alike require the city to pay their awards." See also Chalmers v. Turnipseed, 21 S. C. 126; and Minneapolis, St. P. & S. Ste. M. R. Co. v. Stutsman, 31 N. D. 597, 154 N. W. 654.

Counsel argue that the county court will be under no obligation to recognize the order of the district court. This argument presents no question requiring decision at this time; but it may be observed that the order is in favor of the judgment debtor, and that, while failing to observe the order, it is impossible for the judgment creditor to collect his judgment. It is only reasonable to assume that his interest in the collection of a just claim, if he has one, will prompt him to again pursue his action in the county court.

The order appealed from is affirmed.

ROBINSON, J. (concurring). On May 22, 1915, in the county court of Ward county plaintiff obtained a default judgment for $254.46. He appeals from an order opening the judgment and allowing a defense. The motion to open the judgment was based on affidavits of the defendants showing a defense, and that no summons or complaint was ever served on them, and that they knew nothing of the action or the judgment until the sheriff came with an execution and levied on their property. The affidavits are denied; and the contention of counsel for plaintiff is that the question is only on the service of the papers, and that the case presents no cause for relief on the grounds of inadvertence or excusable neglect.

But, as stated in the defendant's brief, if the summons were actually served on the defendants, and they, being ignorant, did not realize the meaning or know that a suit had been commenced against them, as they themselves swear, and that they had no notice or knowledge of the action until an execution was levied on their property, that is the clearest possible showing of inadvertence and excusable neglect. As the greater contains the lesser, a statement that the summons had never been served

(though a mistake) includes a statement that the defendants did not know or realize that such service had been made. Such affidavits must appeal to the court with more force when service is made by a private person, and not by the sheriff. In this case the summons and complaint were typewritten on one sheet of paper, which was not in a cover, and the complaint was not verified. The defendants might well have received such a paper and thrown it aside, thinking it a mere advertisement. It were very different if they had been served by a sheriff. Then the papers would have meant something to the poor unlearned people who can hardly write their own names.

However, the judgment roll is grossly irregular and defective. The proof of service was made by the attorney, and not by the person who claims to have served the papers. It does not show by whom or how or where the service was made. The affidavit of service must state the time, place, and manner of service. Comp. Laws 1913, § 7436.

The order for judgment recites that the return of a private person shows that on May 10, 1915, he made due and proper service. It does not show the place or the manner of service, and it does show that judgment was entered without any evidence, though the complaint is not verified. It shows a judgment for $22.86 attorney's fees when the legal fee was $5, the same as in district court.

The motion to vacate the judgment was made in the county court when the judgment had been transcripted to the district court, and hence, by consent of counsel it was submitted to and decided by the judge of the district court. Now objection is made that the district court did not have jurisdiction, unless by an appeal from the county court. The point has no force or merit, but in any event it was waived. Parties must practise law in good faith and fairness. They may not trifle with the laws or the courts; they may not waive formalities and submit their differences to a court of general jurisdiction, and then appeal and insist that the court had no right to hear and determine the very matter submitted. Order affirmed.

P. O. PEDERSON v. ANDREW MILLER.

(164 N. W. 101.)

House and barn — building of — written contract for — complaint — cause of action stated.

This action is based on written contracts for the construction of a house and barn, with some oral modifications. The complaint does state facts sufficient to constitute a cause of action, and it is in no way possible to misunderstand it.

Opinion filed July 28, 1917.

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

Affirmed.

Miller, Zuger, & Tillotson, for appellant.

The defendant demurs generally to the complaint on the ground that the complaint does not contain a statement of facts sufficient to constitute a cause of action against him and the district erred in overruling such demurrer. Annexed exhibits are no part of a pleading, unless expressly so made. 8 Enc. Pl. & Pr. 740.

Matters of substance must be alleged in direct terms, and not by way of recitals or reference, much less by exhibits merely attached to the pleading and referred to therein. 8 Standard Enc. Proc. 808; Sweeney v. Johnson, 23 Idaho, 530, 130 Pac. 997; Sprague v. Wells, 47 Minn. 504, 50 N. W. 535; McPherson v. Hattich, 10 Ariz. 104, 85 Pac. 731; Macdonell v. International & G. N. R. Co. 60 Tex. 590; Burkett v. Griffith, 90 Cal. 542, 13 L.R.A. 707, 25 Am. St. Rep. 151, 27 Pac. 527; Brooks v. Paddock, 6 Colo. 36; Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19.

The office of an exhibit should be limited to the aiding by amplification and making more certain and definite the essential allegations of the pleading. Los Angeles v. Signoret, 50 Cal. 298; Hartford F. Ins. Co. v. Kahn, 4 Wyo. 364, 34 Pac. 895; Bank of Anderson County v. Foster, 146 Ky. 179, 142 S. W. 225; Connor v. Zachry, 54 Tex. Civ. App. 188, 115 S. W. 867, 117 S. W. 177.

Exhibits cannot supply the place of essential averments in the statement of a cause of action. First Nat. Bank v. Dakota F. & M. Ins. Co. 6 S. D. 427, 61 N. W. 439; Cranmer v. Kohn, 11 S. D. 247, 76 N. W. 937.

Where the pleader does not elect to use the statutory form in alleging his performance, he is held to a great particularity of statement. Smith v. Brown, 17 Barb. 431; Hatch v. Peet, 23 Barb. 581.

At common law it was necessary to set out all the facts that went to show performance. Crawford v. Satterfield, 27 Ohio St. 421.

Some courts hold that the pleader must use the word "duly" in stating performance. Clemens v. American F. Ins. Co. 70 App. Div. 435, 75 N. Y. Supp. 484; Griffin v. Pitman, 8 Or. 342.

Nor does the pleading allege performance in such a manner that defendant can take issue upon his statement; since he has attempted to adopt the method of pleading by alleging facts, instead of bringing himself under the statute. 4 Enc. Pl. & Pr. 632–635 and notes; Smith v. Brown, 17 Barb. 431.

Plaintiff's cause of action, if he has one, is not upon special contract, but upon quantum meruit. Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 23 L. ed. 341.

F. E. McCurdy, for respondent.

This action is based upon two contracts which are so closely related as to their conditions and the performance thereof that they are, in effect, but one contract.

According to the modern method of pleading contracts or instruments, they may be copied, attached to, identified, and referred to as a part of the complaint or pleading. Southern Surety Co. v. Municipal Excavator Co. — Okla. —, L.R.A.1917B, 208, 160 Pac. 617; Woodbury v. Tampa Waterworks Co. 57 Fla. 243, 21 L.R.A.(N.S.) 1034, 49 So. 556; Black v. Allen, 9 L.R.A. 133, 42 Fed. 618; Hutchinson v. Maxwell, 100 Va. 169, 57 L.R.A. 384, 93 Am. St. Rep. 944, 40 S. E. 655.

There are sufficient allegations of performance. The contracts were performed in so far as it was possible for plaintiff to do by reason of the acts of defendant, and the facts in this relation are fully pleaded. The amount earned under the contracts is computable and is fully

stated. Wells v. National Life Asso. 53 L.R.A. 66, 39 C. C. A. 476, 99 Fed. 222; 9 Cyc. 688, 723.

ROBINSON, J. In this case defendant appeals from an order overruling a general demurrer to the complaint. The complaint is that in June, 1916, the plaintiff and the defendant made a written contract for the construction of a barn; also, a written contract for the construction of a house, and some three modifying oral contracts. It avers the plaintiff duly performed all the conditions of the contract, and was about to complete the same when prevented by the defendant. Then it states the cost of labor and material necessary to complete the contract, and the written contracts were copied into and made a part of the complaint.

In a word, the plaintiff says to defendant: Here are the written contracts you made with me, and here are the oral modifications. I have done as I agreed, only so far as you have prevented me. I have incurred all the cost of completing your job, except a small specified amount for labor and material. I want my pay.

The plaintiff adopted the lazy method of pleading the written contracts by giving a copy of the same, but it may have been done so as to make it impossible to put in a sham or evasive answer. Most assuredly the form of pleading adopted leaves no room for misconstruction, cavil, or evasion. No person can read the complaint and fail to know just what it means. It says to defendant: We made the contracts; the work is done, except so far as you prevented it. Please pay up $937.70, with interest. Order affirmed.

STATE OF NORTH DAKOTA, EX REL. JOHN A. HAIG, Clara Struble, P. S. Berg, John Steen, E. J. Taylor, as Members of and as the Board of Trustees of the Teachers' Insurance and Retirement Fund, v. A. E. HAUGE, as County Treasurer of Ransom County.

(L.R.A.1918A, 522, 164 N. W. 289.)

County tuition fund — county treasurer — to set aside — teacher's insurance and retirement fund — act — constitutionality — tax action — object of — law shall distinctly state.

1. Section 1515 of the Compiled Laws of 1913 as amended by chapter 140 of the Laws of 1915, which provides that each county treasurer shall set aside from the county tuition fund and transmit to the state treasurer a sum equal to 10 cents for each child of school age in his county, and that the state treasurer shall credit such money to the teachers' insurance and retirement fund, is not unconstitutional or violative of the provisions of § 175 of article 11 of the Constitution of North Dakota, which provides that "no tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

Public school teachers — pensioning — tax levied for — constitutional.

2. A tax which is levied for the purpose of pensioning the public school teachers of a state is not unconstitutional nor in conflict with § 185 of article 12 of the Constitution of North Dakota, which provides that "neither the state nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor."

Taxes — levied for general school purposes — teachers' fund — in aid of — legislative act — authorization — germane to original purpose — constitutional.

3. A subsequent authorization by the legislature of the use of a portion of a tax which is levied for general school purposes to aid in the creation of a teachers' pension fund is germane to the general purposes for which the tax was originally authorized, and is not in violation of § 175 of the Constitution of North Dakota, which provides that "no tax shall be levied except in

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NOTE.—On constitutionality of Teachers' Pension Act, see annotation of this case in L.R.A.1918A, 526.

On power of legislature to require municipality to pension teachers, see note in 34 L.R.A.(N.S.) 608.

pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

Revenues of state — expenditures — exact enumeration of — Constitution does not require.

4. An exact enumeration of all of the items of expenditures to which the revenues of the state may be applied is not required by § 175 of the Constitution of North Dakota.

Taxes levied — for general school purposes — expended in the taxing district — where collected — not required — teachers' pension fund — created by taxes — levied generally — throughout state — constitutional.

5. There is no constitutional requirement in North Dakota that taxes levied for a general public purpose must be expended and disbursed in the taxing district in which they are collected, and no valid objection can be made to a state teachers' pension fund on account of the fact that the taxes are collected generally throughout the state and the pensions are not always paid to teachers who reside in the county or district where the tax is paid or collected.

State teachers' fund — establishment of — is a public purpose — within legislative power.

6. The establishment of a state teachers' pension fund is a public purpose and enterprise, and within the power of the state legislature.

Opinion filed July 28, 1917.

Mandamus to compel the county treasurer of Ransom county to set aside and transmit to the state treasurer the sum required for the state teachers' insurance and retirement fund.

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

Judgment for plaintiff. Defendant appeals.

Affirmed.

J. V. Backlund, for appellant.

The state treasurer shall credit all moneys received in accordance with this section to the fund designated as the teachers' insurance and retirement fund. Comp. Laws 1913, § 1224.

No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied. Const. art. 2, § 175.

Taxes which are set apart by the Constitution of the state for particular uses cannot be diverted by the legislature to any other purpose.

People ex rel. Kaskaskia River Nav. Co. v. Lippincott, 65 Ill. 548; People ex rel. Becker v. Miner, 46 Ill. 384; National Bank v. Barber, 24 Kan. 534; Chambe v. Durfee, 100 Mich. 112, 58 N. W. 661; Board of Education v. Macon County, 137 N. C. 310, 49 S. E. 353; State ex rel. Coleman v. Smith, 8 S. C. 127; Nashville v. Towns, 5 Sneed, 186; 45 Century Dig. title Taxation, No. 1738.

The state has no power to divert the funds and moneys received from the citizens of one county by taxation, to the use and benefit of citizens of another county. Yamhill County v. Foster, 53 Or. 124, 99 Pac. 286; Hubbard v. State, 65 Ohio St. 574, 58 L.R.A. 654, 64 N. E. 109; Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263.

A written constitution is not only the direct and basic expression of the sovereign will, but is the absolute rule of action and decision for all departments and offices of government in respect to all matters covered by it, and must control. Wright v. Hart, supra.

The Constitution of each state, so far as it is consistent with the Federal Constitution, is the fundamental law of the state, and acts passed by the legislature inconsistent therewith, are invalid. East St. Louis v. Amy (East St. Louis v. United States) 120 U. S. 600, 30 L. ed. 798, 7 Sup. Ct. Rep. 739; Com. v. International Harvester Co. 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703; Chicago, B. & Q. R. Co. v. Gildersleeve, 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749; State ex rel. Woods v. Tooker, 15 Mont. 8, 25 L.R.A. 560, 37 Pac. 840; State v. Theriault, 70 Vt. 617, 43 L.R.A. 290, 67 Am. St. Rep. 695, 41 Atl. 1030; McPherson v. Blacker, 92 Mich. 377, 16 L.R.A. 475, 31 Am. St. Rep. 587, 52 N. W. 469.

The courts should never allow a change in public sentiment to influence them in giving a construction to a written constitution not warranted by the intention of its founders. 6 R. C. L. 46; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Tuttle v. National Bank, 161 Ill. 497, 34 L.R.A. 750, 44 N. E. 984; State ex rel. Crow v. Hostetter, 137 Mo. 636, 38 L.R.A. 208, 59 Am. St. Rep. 515, 39 S. W. 270; State v. Atlantic Coast Line R. Co. 56 Fla. 617, 32 L.R.A.(N.S.) 639, 47 So. 969; Jarrolt v. Moberly, 103 U. S. 580, 26 L. ed. 492; State ex rel. Board of Educa-

tion v. Brown, 97 Minn. 402, 5 L.R.A.(N.S.) 327, 106 N. W. 477; Wilkes County v. Call, 123 N. C. 308, 44 L.R.A. 252, 31 S. E. 481.

The intention to which force is to be given is that which is embodied and expressed in the constitutional provisions themselves; and words or terms in a constitution, being dependent on ratification by the people, must be understood in the sense most obvious to the common understanding at the time of adoption. Miller v. Dunn, 72 Cal. 462, 1 Am. St. Rep. 67, 14 Pac. 27; Bishop v. State, 149 Ind. 223, 39 L.R.A. 278, 63 Am. St. Rep. 279, 48 N. E. 1038; Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82; Henry v. Cherry, 30 R. I. 13, 24 L.R.A.(N.S.) 991, 136 Am. St. Rep. 928, 73 Atl. 97, 18 Ann. Cas. 1006.

It is presumed that words appearing in a constitution have been used according to their plain, natural, and usual import. Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Holmes v. Jennison, 14 Pet. 540, 10 L. ed. 579; Tennessee v. Whitworth, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. Rep. 649; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Powell v. Spackman, 7 Idaho, 692, 54 L.R.A. 378, 65 Pac. 503; State ex rel. Childs v. Sutton, 63 Minn. 147, 30 L.R.A. 630, 56 Am. St. Rep. 459, 65 N. W. 262; Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Craig v. Missouri, 4 Pet. 410, 7 L. ed. 903; State ex rel. Childs v. Sutton, 63 Minn. 147, 30 L.R.A. 630, 56 Am. St. Rep. 459, 65 N. W. 262.

Where a statute is in violation of the fundamental law, it is not only the right, but the duty, of courts to declare such act unconstitutional. Nashville v. Cooper, 6 Wall. 250, 18 L. ed. 852; Union P. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; State v. Travelers' Ins. Co. 73 Conn. 255, 57 L.R.A. 481, 47 Atl. 299; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 20 L.R.A.(N.S.) 126, 47 So. 1001, 16 Ann. Cas. 1234; Flint River S. B. Co. v. Foster, 5 Ga. 194, 48 Am. Dec. 248.

William Langer, Attorney General, *H. A. Bronson,* Assistant Attorney General, and *E. B. Cox,* Special Assistant, for respondents.

In twenty-one states the teachers' pension fund system exists, and is

supported by public funds in part, and by contributions from the public school teachers, the same as is provided for by the act in question. The act in no respect violates the provisions of our Constitution. Const. art. 2, § 175, art. 12, § 185.

Pensions differ from salaries in that the pensioner is not under any obligation to render any service for his pension. Wilgus, Constitutionality of Teachers' Pension Legislation, 11 Mich. L. Rev. 451.

In levying taxes under an act like the one here in question, when the question of constitutionality is raised, the test is, Will it serve a recognized object of government, and will it promote the welfare of the people of the state in equal degree? Beach v. Bradstreet, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913B, 946; United States v. Hall, 98 U. S. 343, 25 L. ed. 180.

All colleges, universities, and other educational institutions of our state are under the absolute and exclusive control of the state. Const. § 152.

The act in question is for the general good of the public; it was within the power of the legislature to enact such a law; its object is certain, and its intended relief is general in its application, and in no manner does violence to the Constitution. Const. § 175; Stinson v. Thorson, 34 N. D. 372, 158 N. W. 351.

"Taxes can be collected only for public purposes. Citizens of this state are doubtless entitled to have their property assessed in the place designated, and only for the purposes permitted by the Constitution. But we are aware of no constitutional requirement that taxes levied for a general public purpose must be expended or disbursed in the district in which they are collected." State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A. —, —, 156 N. W. 561; Const. §§ 176, 179.

Bruce, Ch. J. The purpose of this action is to test the validity of the so-called Teachers' Insurance and Retirement Fund Act. It comes before us on an appeal from a judgment directing and commanding the defendant, as county treasurer of Ransom county, to set aside from the county tuition fund a sum equal to 10 cents for each child of school age, and to transmit the same to the state treasurer as required by § 1515 of the Compiled Laws of 1913 as amended by chapter 140 of the Laws of 1915.

Section 1515 as amended provides: "Each county treasurer shall annually set aside from the county tuition fund a sum equal to 10 cents for each child of school age in his county and shall transmit this sum to the state treasurer in the same manner that others are transmitted to the state treasurer at the same time that he transmits the funds received from the school boards and the boards of county commissioners in accordance with § 19, and shall certify under oath to the board of trustees of the teachers' insurance and retirement fund the amount so transmitted to the state treasurer. The state treasurer shall credit all moneys received in accordance with this section to the fund designated as the teachers' insurance and retirement fund."

The other provisions of the so-called Teachers' Insurance and Retirement Fund Act provide for an assessment on the wages of the teacher to a small amount, which is retained out of his salary. They further provide that these assessments, as well as the 10 cents for each child paid out of the county-tuition fund, shall be transmitted to the state treasurer, and together make up the general insurance or pension fund. See chap. 251 of the Laws of 1913 as amended by chap. 140 of the Laws of 1915. See also §§ 1495–1528 of the Compiled Laws of 1913.

The sections creating the county-tuition fund, from which the payment to the teachers' fund is authorized, are as follows:

Section 1224 (Compiled Laws of 1913): "The county auditor of each county shall at the time of making the annual assessment and levy of taxes levy a tax of $1 on each elector in the county for the support of public schools, and a further tax of 2 mills on the dollar on taxable property in the county, to be collected at the same time and in the same manner as other taxes are collected, which shall be apportioned by the county superintendent of schools among the school districts of the county."

Section 1225: "It shall be the duty of the county auditor on or before the third Monday in February, May, August, and November in each year, to certify to the county superintendent of schools the amount of such county-tuition fund, which the county superintendent of schools shall apportion among the several school districts in the same manner as provided for the apportionment of the state-tuition fund. The county superintendent shall file with the county auditor and

the county treasurer a certified statement showing the amount apportioned to each district."

The defendant and appellant contends that chapter 251 of the Laws of 1913, as amended by chapter 140 of the Laws of 1915, or the so-called Teachers' Insurance and Retirement Fund Act, is unconstitutional. He maintains that it is in conflict with § 175 of article 11 of the Constitution of North Dakota, which provides that "no tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

He maintains that the act, though attempting to create a teachers' insurance and retirement fund, does not provide for the levy of the tax directly, but attempts to reach into a fund created for another purpose to carry out its object. He contends that persons who have served as teachers for a specified number of years, regardless of the place or places where their services were actually rendered, are entitled to the benefits of the act. He submits that a person teaching in a school in one part of the state is not giving his service to the support of the schools in another part of the state, or, in other words, funds raised by taxation for the support of the schools in one county are used for past or present services performed in another county; and this he claims cannot be done. He maintains that the county tuition fund, created by § 1224 of the Compiled Laws of 1913, and from which the payment to the teachers' insurance fund is sought to be made, is a local tax, which is provided for a local purpose, that is to say, for the use of the respective school districts; and that when a portion of it is taken for a general fund, such as the state teachers' insurance and retirement fund, and distributed among teachers throughout the whole of the state, such moneys are unlawfully diverted.

We find no merit in any of the propositions urged. Section 1224 of the Compiled Laws of 1913, and which creates the tuition fund, appears as § 102 of chapter 62 of the Laws of 1890 and later as § 117 of chapter 266 of the Laws of 1911. The last chapter was a carefully prepared codification of the school laws of the state. Its title is: "An Act to Provide a System of Free Public Schools for the State of North Dakota."

It is very clear from a perusal of the whole act that it was not local

in its nature, nor was education deemed to be local in its nature, but an affair and concern of the whole state. It is also clear that, in maintaining the schools and in levying the taxes therefor, the counties and localities are merely acting as agencies of the sovereign state. Section 1224 of the Compiled Laws of 1913 does not, as contended by counsel for appellant, authorize the levy of these taxes by or for the use of the districts, or for a local purpose. The purpose is a state purpose, which recognizes the value of an intelligent citizenship, and is, to a large extent, that poor districts shall have a fund which is outside of, and not dependent upon, their own territory. It is levied by the county, and not by the school districts. The apportionment is not made in accordance with the values of the property in the respective school districts, but in accordance with the number of school children of school age residing therein. Furthermore, it is provided that no apportionment can be made, unless the requirements of § 1216 of the Compiled Laws of 1913 as to the length of the school year, etc., have been complied with. The statute, in short, is an act of the legislature, and not of the locality. It is an exercise of the state taxing power. It furnishes a donation to the respective schools and a fund for the common-school purposes. Such being the case, there is no reason whatever why a portion of this fund may not be used in the payment of the teachers' pensions, provided that purpose is a general public school purpose; and that the purpose is a public school purpose we have no doubt.

The "power to grant pensions," says the Supreme Court in United States v. Hall, 98 U. S. 343, 25 L. ed. 180, "is not controverted, nor can it well be, as it was exercised by the states and by the Continental Congress during the War of the Revolution; and the exercise of the power is coeval with the organization of the government under the present Constitution, and has been continued without interruption or question to the present time." Under this broad interpretation of promoting the general welfare, there is no doubt that Congress can provide pensions for civil officers *or for the school-teachers of our land,* and that the encouragement of education is a public purpose inextricably connected with the general welfare policies of our nation and states. See also Brodhead v. Milwaukee, 19 Wis. 658, 88 Am. Dec. 711. See also discussion and cases cited in State ex rel. Linde v. Taylor, 33 N. D. 76, 117, L.R.A. —, —, 156 N. W. 561.

If public education and the granting of pensions to teachers is a function of the Federal government and within its implied powers, how much more must the pensioning of teachers be a function of the several state governments, whose powers are not delegated, but inherent? That education is a matter of public concern, indeed, needs no argument. The premise was laid in the famous northwest ordinance which is copied in § 147 of our Constitution, and which provides:

"A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government, and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota, and free from sectarian control. This legislative requirement shall be irrevocable, without the consent of the United States and the people of North Dakota."

Surely, the providing of a permanent teachers' insurance fund which shall give dignity to the profession, encourage persons to enter into it, and provide for old age, is a "provision for the establishment and maintenance of a system of public schools."

A tax levied for this purpose is not a donation to any person, nor is it forbidden by § 185 of article 12 of the Constitution, which provides that "neither the state nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for [the] necessary support of the poor, etc."

It is merely in the nature of an added salary allowance to public servants. If all of the people of the state may be taxed to pay the salaries of the state superintendent of public instruction and the state high school inspector, whose duties are largely to supervise the schools and their teachers, if they may be taxed to support the normal schools and the state universities, which train teachers, they may certainly also be taxed in order to provide a fund which shall increase the efficiency of the teachers themselves, and aid and encourage them to devote their lives to a profession which, though essential to our civilization, has been but poorly encouraged, and has too often been merely looked upon as a stepping stone to other employments.

Nor does the act in any manner violate § 155 of the Constitution, which provides that "no tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

The use of a portion of the county-tuition fund for the formation of a teachers' retirement fund is germane to the general purposes for which the county-tuition fund was raised. It was for school purposes. The purpose of chapter 266 of the Laws of 1911, and the purpose of the levying of the tax, was, as given by its title, "To Provide a System of Free Public Schools for the State of North Dakota." All that the act creating the pension fund does is to state how some of this money shall be used. The granting of pensions is germane to the general purpose of the general act. An exact enumeration of all the items of expenditure to which the revenue of the state may be applied is neither practical nor required by the constitutional provision cited. See Stinson v. Thorson, 34 N. D. 372, 158 N. W. 351; 27 Cyc. 728.

Nor, as we have before said, is there any merit in the contention that the residents of one district will be compelled to pay taxes for the support of teachers in another. As was said by Judge Christianson in the case of State ex rel. Linde v. Taylor, 33 N. D. 76, 116, L.R.A. —, —, 156 N. W. 576: "We are aware of no constitutional requirement that taxes levied for a general public purpose must be expended and disbursed in the taxing district in which they are collected. If this were true, every department, not only of the state, but also of county government, would soon cease to operate."

The judgment of the District Court is affirmed."

ROBINSON, J. (dissenting). The purpose of this suit is to compel the county treasurer of Ransom county to annually transmit to the state treasurer from the county tuition fund a sum equal to 10 cents for each child of school age. The county treasurer appeals from an order and judgment sustaining a demurrer to the complaint.

The action is based on chapter 251, Laws of 1913. It is an action to create a teacher's pension fund, and to pension such teachers as may serve for a certain number of years and contribute to the fund a certain percentage of their salary. As there are few who are so stupid as to make of teaching a life business, the chances are that one hundred

persons must contribute to the fund for every person who wins a prize or pension. Hence, the action does in effect provide for a kind of lottery. One great objection to the lottery scheme was that the expense of administration amounted to 48 per cent. The same objection applies to the handling of the teachers' pension fund. The scheme is petty, wasteful, and expensive. It has nothing to commend it. The teacher is fairly well paid, and his business is not in any way laborious or hazardous. It affords more leisure than any industrial business. In each week the teacher has only thirty working hours, which are reduced by holiday vacations.

The action in question seems in direct conflict with these provisions of the Constitution:

The legislative assembly shall have no power to authorize lotteries or gift enterprises for any purpose.

No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.

Neither the state nor any county, city, township, town, or school district or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual.

Taxes shall be levied and collected for public purposes only.

Now calling it by any name, the giving of a prize, donation, or gift to a school-teacher is not giving it for public purposes. And such giving by the state, county, or any political subdivision is directly prohibited. Were it competent to give such prizes or pensions to the school-teaching class, it would be equally competent to give them to the clergy, the farming class, or to any other class of persons. The act in question does not purport to impose a tax on any person or municipality, but it directs that a part of the tax which has been imposed by law for educational purposes shall be diverted and applied to the giving of prizes or pensions.

Now, under the Constitution, every law imposing a tax must state distinctly the object of the same, to which only it shall be applied. Hence, we need not argue that when a tax is levied for one purpose the legislature may not pass an act diverting it to any other purpose. The conclusion is that the act in question does contravene the Constitution, and it is void.

CHARLES S. WAGONER v. ANTON BODAL.

(164 N. W. 147.)

New trial — motion for — grounds — excessive damages — jury — prejudice — passion — discretion — appellate court — will not interfere — unless abuse appears.

1. A motion for a new trial on the ground of excessive damages appearing to have been given under the influence of passion or prejudice is addressed to the sound, judicial discretion of the trial court, and the appellate court will not interfere unless a manifest abuse of such discretion is shown.

Trial court — discretion — new trial — granting.

2. In the instant case it is *held* that the supreme court cannot say that the trial court manifestly abused its discretion in granting a new trial.

Opinion filed July 31, 1917.

Appeal from the District Court of Bottineau County, *Burr*, J.
From an order granting a new trial plaintiff appeals.
Affirmed.
J. J. Weeks, for appellant.
Bowen & Adams, for respondent.

CHRISTIANSON, J. Plaintiff brought this action to recover damages for certain personal injuries alleged to have been sustained by his falling into an open hatchway in the sidewalk at the side of defendant's general store in the village of Maxbass, in Bottineau county. The complaint avers, and the evidence shows, that plaintiff came out of the store building through a side door, after dark, one evening about the middle of August, 1909, and ran into a push cart standing on the sidewalk, then against the open hatchway, and fell to the bottom, a distance of from 4½ to 5½ feet. Plaintiff claimed that he sustained certain injuries about the head, face, and neck by such fall, and asked damages

NOTE.—On power of appellate court to grant new trial for excessive damages, see note in 26 L.R.A. 391.

Authorities discussing the question of granting new trial because of excessive verdict as an interference with the constitutional right to jury trial, are collated in a note in 51 L.R.A.(N.S.) 860.

in the sum of $5,000. The defendant interposed an answer, wherein he admitted that he was the owner of the building and operated a general store therein. The answer admitted the existence of a hatchway leading to the basement and forming part of defendant's store, and that on the evening when the accident occurred, plaintiff was in the store building by defendant's permission for the purpose of transacting business there. But the answer denies that said hatchway had been left open, or that plaintiff had been injured or damaged as alleged in the complaint, or at all.

The action was tried to a jury upon the issues framed by the pleadings. The court submitted to the jury only one question; namely, the amount of damages. The jury returned a verdict in plaintiff's favor for $800. Judgment was entered upon the verdict. The defendant thereafter moved for a new trial on the grounds: (1) Excessive damages appearing to have been given under the influence of passion and prejudice; (2) insufficiency of the evidence to justify the verdict; and (3) that the verdict is against law. The trial court made an order granting a new trial, unless the plaintiff should consent to a reduction of the verdict to $350, and plaintiff has appealed from this order.

Under the holdings of this court, a trial court is not authorized to direct a remission of a portion of a verdict in lieu of a new trial. If a jury awards excessive damages under the influence of passion or prejudice, the verdict is vitiated, and a new trial must be ordered. Carpenter v. Dickey, 26 N. D. 176, 143 N. W. 964; Waterman v. Minneapolis, St. P. & S. Ste. M. R. Co. 26 N. D. 540, 145 N. W. 19. Nor is a trial court authorized to grant a new trial merely because it deems the damages awarded by the jury to be excessive. It is only when, in view of all the circumstances, the trial court becomes satisfied that the jury was influenced by passion or prejudice in its deliberations, and as a result thereof awarded excessive damages.

The rules of law governing both trial and appellate courts in the consideration of motions for a new trial based upon this and other discretionary grounds have been so fully stated in many recent decisions of this court that it is unnecessary to enter into an extended discussion thereof, and we shall content ourselves by citing the decisions announcing the rules:

Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; Skaar v. Eppeland,

35 N. D. 116, 159 N. W. 707; First International Bank v. Davidson, 36 N. D. 1, 161 N. W. 281; Reid v. Ehr, 36 N. D. 552, 162 N. W. 903.

In its memorandum decision, the trial court said: "The defendant's motion for a new trial strikes at the amount of damages allowed by the jury, and charges that the damages allowed are excessive and must have been given under the influence of passion or prejudice, and that the evidence does not justify the verdict of the jury herein. . . . The jury allowed him (plaintiff) $800 and this amount must have been allowed by the jury for the pain and suffering, as the question of the value of any lost time or the necessary expenses for medical treatment and the necessaries was not submitted to the jury,—there being no proof presented as to the value of any lost time, or that any medical services were rendered, or the value of medical services, or the amount and character of any medicines or surgical appliances furnished or used. *The sole question presented to this court, therefore, on a motion for new trial, is whether or not the damages allowed by the jury are excessive to such a degree as to show passion or prejudice on the part of the jury.* . . . A careful review of the testimony convinces me that the amount of damages allowed by the jury is excessive under the evidence in this case. There is testimony that the plaintiff experienced pain and suffering, but in the very nature of the case the testimony as to pain and suffering is confined largely to his own testimony. During the trial of the case it appeared that plaintiff had employed a physician, but there was no attempt to furnish the testimony of this physician to show the extent of his injuries. It is true plaintiff testified that he had been unable to work at times, but the extent of this incapacity is not shown; for all we know it may have been very trifling, and his own testimony showing the amount and the character of the work he did since shows that the injuries could not have been very serious. It seems to me, therefore, that the amount allowed by the jury is excessive. It is true that a mere difference of opinion as to the amount which should be allowed for damages will not of itself justify the interference by the court with the verdict of the jury. The matter is primarily a matter for the jury, and unless the amount is grossly excessive should not be disturbed. I believe the jury would have gone to the extreme in allowing $350."

It will be noted from the above, that the trial judge was of the

opinion that the jury, under the influence of passion and prejudice, returned a verdict for excessive damages. After a careful consideration of the evidence, and of all the facts and circumstances in the case known to the trial judge as a result of the trial, he believed the verdict was unjust and unrighteous to such a degree that the jury must have been actuated by passion and prejudice, rather than by reason, in reaching its determination. As we have already indicated, the ground upon which a new trial may be granted in cases of this kind, if at all, is not properly speaking the amount at which the damages are placed in the verdict, but the passion or prejudice which prompted the verdict. The power to grant new trials upon this ground, and the duty to do so, is expressly granted and imposed upon trial courts by our statutes. Comp. Laws 1913, §§ 7660, 7665. See also Reid v. Ehr, 36 N. D. 552, 162 N. W. 903. This power and duty exist whenever a trial court is satisfied that a verdict was dictated by passion or prejudice, regardless of whether the verdict is based upon uncontradicted or conflicting testimony. It exists even in cases where exemplary damages are recoverable. Spelling, New Tr. & App. Pr. § 231.

It is elementary that the trial court, who sees and hears the witnesses and parties, and is familiar with every incident which occurred during the trial, is vested with a wide discretion in determining whether excessive damages appear to have been given under the influence of passion or prejudice. The Constitution of this state vests in the trial courts original jurisdiction to determine questions arising in ordinary litigation, and grants to this court appellate jurisdiction only. N. D. Const. §§ 86, 103. It is for the trial court to determine whether a verdict was dictated by passion or prejudice. In determining this question the trial judge manifestly occupies a position of peculiar advantage,—not possessed by the members of this court. Hence, the reason for the wide discretion. The appellate court does not determine whether a new trial should be had. Its inquiry is limited to whether the trial court by its determination manifestly abused its discretion and effected an injustice. As a new trial merely affords the parties an opportunity to submit the questions to another jury, it is rarely, indeed, that an appellate court is justified in preventing such new trial.

A perusal of the entire record leads us to the conclusion that we cannot say that the trial court, who saw the witnesses and parties, heard their testimony, and observed their demeanor, abused his discretion in granting a new trial.

As already indicated, the trial judge was without authority to require a remission in lieu of a new trial. If the verdict was prompted by passion and prejudice, it was his duty to set it aside and order a new trial. The alternative provision, however, was rather error in favor of the plaintiff than against him, and the only portion of the order really involved on this appeal is that granting a new trial. And for the reasons already indicated, we do not feel justified in reversing that part of the order.

It follows from what has been said that the order appealed from, in so far as it grants a new trial, must be affirmed.

The costs of the action will abide the final result therein. But inasmuch as the order appealed from was in part erroneous, and is affirmed only in so far as it grants a new trial, neither party will recover costs on this appeal.

BRUCE, Ch. J. (concurring). I have signed the opinion prepared by Mr. Justice Christianson and fully concur therein. There are, however, a few observations which I desire to make in connection therewith.

I am satisfied that this court cannot say that the trial judge abused his discretion in granting a new trial. The trial court withdrew from the jury the element of medical expenses on the ground that there was no competent evidence in relation thereto. The only element of damages, then, which the jury considered, was the pain and suffering sustained by the plaintiff; and, while a large number of witnesses testified in the action, there was practically no testimony bearing upon this question except that of the plaintiff. The record shows that Doctor Durnin, the physician from whom plaintiff received his principal treatment, lived at Westhope, less than 30 miles distant from Bottineau,—where the action was tried,—and yet he was not called as a witness. It also appears from the record that the present action was commenced more than five years after the accident occurred. The undisputed evidence further shows that plaintiff, some two years after the accident, paid the defendant $78.25, which he owed for goods pur-

chased at defendant's store. On the whole, I am entirely satisfied that this court would be wholly unjustified in interfering with the order of the trial court, in so far as it grants a new trial.

GRACE, J. (dissenting). The complaint states a cause of action on behalf of the plaintiff against the defendant in damages for the sum of $5,000 for personal injuries claimed as the result of the negligence of the defendant, who kept a store for the sale of merchandise at the village of Maxbass, Bottineau county, North Dakota, in maintaining a hatchway or entrance into the basement or cellar of such store building, which hatchway is situated in an elevated sidewalk adjacent to such building, said hatchway leading immediately from the sidewalk into the cellar or basement. Plaintiff alleges that the hatchway, forming part of said store building, was, by the negligence of the defendant and his clerks and employees, left open and in no manner protected, of which fact plaintiff had no knowledge; and without fault on his part, while leaving said store through the side door to the sidewalk, he fell through said hatchway into the basement or cellar, and injured thereby his head, neck, and spine, and has been sick and disabled therefrom ever since to the extent that said injuries are now permanent. There are other allegations showing the plaintiff's age, and that he is a married man, and the reduction of his ability to perform ordinary labor on his farm; and sums of money paid out for medical treatment are also set forth in the complaint.

The answer is a general denial.

The case was tried by the court and jury, and the jury brought in a verdict for the sum of $800. The court made its order reducing the verdict from $800 to $350, or in the event that plaintiff would not accept the sum to which such verdict was reduced, then a new trial would be granted.

The motion for a new trial specifies as grounds excessive damages appearing to have been given under the influence of passion and prejudice, and insufficiency of the evidence to justify the verdict. There is no showing anywhere in the record of any influence of passion and prejudice. The testimony of the plaintiff shows that he had paid out $200 for medical treatment, and between $25 and $30 for medicines, etc. His testimony shows that he suffered considerable pain, espe-

cially in the neck, and also endured other pain and suffering, and that especially the pain in and about his neck remains and is persistent. He testifies that, when he bends over, he is afflicted in a manner as shown by the testimony. That at times he is unable to work, and that his capacity to work is not more than half what it was before, or, in other words, that he is not more than half a man physically as compared with his prior condition.

There is no dispute but that the plaintiff fell headlong into the hatchway, and that he received some injuries to his person by reason of such fall, and particularly to his neck and head. The trial court instructed the jury that there was sufficient evidence to sustain a verdict for the plaintiff. The evidence, and all the circumstances and facts of the case, became then solely, entirely, and exclusively questions for the jury. The jury are the exclusive judges of fact. With their deliberations and judgment the trial judge cannot interfere. He has no more authority to interfere with their deliberations and verdict than the jury has to tell the court what the law is in a civil case. Especially is this true where there is no element in the case showing passion or prejudice, or any testimony or circumstances from which passion or prejudice may be plainly and directly inferred. Passion and prejudice cannot be inferred from the size of the verdict alone. There is sufficient evidence to sustain the verdict. There is no doubt but that in a proper case the trial court has a right to grant a new trial, and it is a well-settled rule of law in this state that the granting or refusing of a new trial is a matter which lies within the sound discretion of the trial court; but we do not think it is the right of the trial court to grant a new trial conditioned and based upon the defendant's refusal to receive and be satisfied with the verdict as reduced by the court. If there is a cause for a new trial, it should be promptly granted, and should be based upon the merits of the motion for a new trial. Parties to a litigation have a right to have the issues of fact submitted to a jury; and the determination of the jury is conclusive upon all questions of fact; and especially where there is testimony concerning disputed questions of fact, and all the facts and circumstances of the case are submitted to the jury, their verdict is conclusive and cannot be set aside on the ground that the jury was influenced by passion or prejudice, unless the fact of such passion or prejudice is made to appear by

competent proof, or unless it is shown by some of the circumstances and facts connected with the trial of the action. The passion and prejudice of the jury must be determined the same as any other fact. If passion or prejudice of the jury exist, it must be shown to exist by competent testimony, from facts and circumstances connected with the trial of the case, some expression of the jury, or some of them, or in some other manner which appeals to the intelligence of the court. *Passion and prejudice are not proved by the opinion of the court, where such opinion is not shown to be based upon some testimony, fact, or circumstance connected with the trial of the case, which proves, tends to prove, or strongly indicates passion or prejudice of the jury.*

ROBINSON, J. (dissenting). In this case it appears that the defendant was in general merchandise business at Maxbass, and in the nighttime he left open a trapdoor in the sidewalk opposite his store, and the plaintiff fell into the same and was badly hurt. The jury gave him a verdict for $800, and the court made an order granting a new trial unless the plaintiff agree to accept $350, and plaintiff appeals. The defendant makes the usual stock argument in such cases,—that the trial judge heard the evidence, saw the witnesses, and was competent to judge of the damages; and we may say the same is true of the jury, and it was the special province and duty of the jury to hear and consider the evidence and to estimate the damages. And, as a rule, in such a case, the opinion of twelve men should prevail over the opinion of one man. If the verdict of a jury is to be lightly set aside because a judge does not agree with them, we might as well do away with trial by jury. The actual damage was purely a question of fact; and if defendant was grossly at fault in leaving a trapdoor open, without any railings, for unwary people to fall down 5 or 6 feet at the risk of their lives, it was a proper case for some exemplary damages. And the jury might well consider the difference between damages voluntarily paid or tendered, and damages recovered at the end of a long and expensive lawsuit.

In this case it appears that nineteen witnesses were sworn, and the appeal record covers 152 pages. The testimony of defendant shows that he was badly hurt and for two years his neck has been bothering him very much. He says: "It bothers me in a great many ways. It pains me in my sleep. It bothers me to sit still a certain length of time and to drive my team. In sleep I cannot rest; it always hurts.

The pain is right up over the ears and in the head. It pains me in the neck and head and I am not able to work hard. I am not half as good a man as I was before the hurt. I cannot stand digging or stooping. It hurts me a good deal in the nighttime. There is never any length of time but what it hurts me."

For two years he has been doctoring and using liniments and plasters and medical treatment, and he estimates the total expense at over $200. Objection was made to that because it is not specially pleaded as damages; that is, the complaint does not give the items. It merely avers that the plaintiff had paid out for medicine and medical treatment large sums of money. There are few who would keep a special account of medical treatment and expense running nearly two years. There was nothing in the evidence to surprise the defendant. No man can read the evidence and say for a certainty that $800 was even a full compensation for the actual damages sustained by the defendant. Hence, the order of the district court should be reversed and the judgment affirmed.

ABE GOLDSTEIN v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation.

(L.R.A. 1918A, 612, 164 N. W. 143.)

Witness — language used — construction of — matter for jury.

1. The construction of the language used by a witness in giving testimony is a matter for the jury.

Incompetent evidence — introduced without objection — must be treated as competent — for purpose offered.

2. As a general rule, incompetent evidence which is introduced without objection becomes evidence in the particular case, and must be treated as competent evidence for the purpose for which it is offered.

Baggage checks — stipulations on — schedules — recitals in — right to recover — not limited by — property intrusted to defendant for transportation — wrongful conversion of.

3. For reasons stated in the opinion, it is *held* that stipulations on baggage

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Note.—On the question of limitation of carrier's liability for passenger's baggage, see notes in 19 L.R.A.(N.S.) 1006, 34 L.R.A.(N.S.) 818, and L.R.A.1916A, 1273.

checks and recitals in defendant's schedules, limiting the value of baggage to be checked for free transportation upon a whole passenger ticket to $100, do not limit plaintiff's right of recovery in the case at bar wherein the jury found that defendant wrongfully and unlawfully converted to its own use property of the value of $182.50 which plaintiff had intrusted to it for transportation.

Jury — court — instructions.

4. Certain instructions considered and held nonprejudicial.

Opinion filed August 1, 1917.

Appeal from the District Court of Grand Forks County, *Cooley*, J. From a judgment and an order denying its alternative motion for judgment notwithstanding the verdict, or for a new trial, defendant appeals.

Affirmed.

Watson, Young & Conmy, for appellant.

Plaintiff has failed to sustain his burden and prove conversion of the property in question. There were storage charges against this property, and there is no proof that plaintiff paid or offered to pay same. There could be no conversion until such payment or offer of payment by plaintiff, followed by either refusal to deliver or failure to ship. Ray v. Green, 113 Ga. 920, 39 S. E. 470.

The testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him when it is self-contradictory, vague or equivocal. Western & A. R. Co. v. Evans, 96 Ga. 481, 23 S. E. 494; Freyermuth v. South Bound R. Co. 107 Ga. 32, 32 S. E. 668; Ray v. Green, supra; Farmer v. Davenport, 118 Ga. 289, 45 S. E. 244; Southern Bank v. Goette, 108 Ga. 796, 33 S. E. 974; Southern R. Co. v. Hobbs, 121 Ga. 428, 49 S. E. 294.

Where the testimony of such witness is open to two constructions, that one which is most unfavorable to him will be adopted, and where such testimony is of a doubtful character, equivocal and uncertain, the rule applies more strongly. 2 Moore, Carr. §§ 1260, 1261, 1269, 1270, 1272; Bennett v. Rogers, 12 Neb. 382, 11 N. W. 314; Smith & G. Mfg. Co. v. Sprague, 123 U. S. 258, 31 L. ed. 144, 8 Sup. Ct. Rep. 122; Clark Thread Co. v. Willimantic Linen Co. 140 U. S. 481, 35 L. ed. 521, 11 Sup. Ct. Rep. 846.

The amount of the recovery here is limited by the filed tariffs offered

in evidence. Ford v. Chicago, R. I. & P. R. Co. 123 Minn. 87, 143 N. W. 249; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Missouri, K. & T. R. Co. v. Hailey, — Tex. Civ. App. —, 156 S. W 1119; Louisville & N. R. Co. v. Miller, 156 Ky. 677, 50 L.R.A.(N.S.) 819, 162 S. W. 73; Barstow v. New York, N. H. & H. R. Co. 158 App. Div. 665, 143 N. Y. Supp. 983; Wright v. Southern P. Co. 181 Mo. App. 137, 167 S. W. 1137.

Such limitation of value is binding even if the passenger's attention was not called to it, or he informed of it. Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; 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; Spada v. Pennsylvania R. Co. 86 N. J. L. 187, 92 Atl. 379; Ford v. Chicago, R. I. & P. R. Co. 123 Minn. 87, 143 N. W. 249; Missouri, K. & T. R. Co. v. Walston, 37 Okla. 517, 133 Pac. 42; Chicago, R. I. & P. R. Co. v. Craig, — Okla. —, 157 Pac. 87; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541.

Conversion is not the proper remedy here. There is no proof of wilful and tortious holding. Taugher v. Northern P. R. Co. 21 N. D. 111, 129 N. W. 747.

The wholesale price or value of property is not proper proof of value in a case of this kind. Lincoln v. Packard, 25 Tex. Civ. App. 22, 60 S. W. 682; Gensburg v. Marshall Field & Co. 104 Iowa, 599, 74 N. W. 3; United Shoe Machinery Co. v. Holt, 185 Mass. 97, 69 N. E. 1056; Hunt v. Boston, 183 Mass. 303, 67 N. E. 244.

The measure of damages is the value of the property at the time of the conversion, and not what was paid for it, or for what it sold, and such value must be so fixed as of the time and place of conversion. Horine v. Bone, 69 Mo. App. 481; Trover and Conversion, 38 Cyc. 2094; Trover and Conversion, 19 Decen. Dig. § 45; Sears v. Lydon, 5 Idaho, 358, 49 Pac. 122; Greeley v. Stilson, 27 Mich. 153; First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 281, 91 N. W. 436; Towne v. St. Anthony & D. Elevator Co. 8 N. D. 200, 77 N. W. 608; Q. W. Loverin-Browne Co. v. Bank of Buffalo, 7 N. D. 569,

75 N. W. 923; Citizens' Nat. Bank v. Osborne-McMillan Elevator Co. 21 N. D. 335, 131 N. W. 266; Catlett v. Stokes, 21 S. D. 108, 110 N. W. 84.

A certain instruction by the trial court injected into this case the question of negligence. This was prejudicial error. McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685.

O'Connor & Johnson, for respondent.

There was ample evidence in the case showing the date of plaintiff's arrival at the station where his goods were and where he gave his instructions concerning their shipment, and also ample and competent evidence as to their value at that time and place. Richmire v. Andrews & G. Elevator Co. 11 N. D. 453, 92 N. W. 819; Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436; Merritt v. Great Northern R. Co. 81 Minn. 496, 84 N. W. 321, 9 Am. Neg. Rep. 61.

The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract. Comp. Laws 1913, §§ 6240, 6245.

The carrier cannot limit his liability excepting as provided by statute. Hanson v. Great Northern R. Co. 18 N. D. 324, 138 Am. St. Rep. 768, 121 N. W. 78; Hutchinson, Carr. Revised Ed. § 399ff; Moore, Carr. 1329, 1334, 1341, 1342; Cooley, Torts, 1347; Wells v. Great Northern R. Co. 59 Or. 165, 34 L.R.A.(N.S.) 818, 114 Pac. 92, 116 Pac. 1070, 1 N. C. C. A. 659.

The filed tariffs are not binding on plaintiff because he was not informed of the schedules, nor was his attention directed to the limitation of liability on the baggage check, nor was the value mentioned. Dunnell, Dig. (Minn.) §§ 1312, 1319.

There was a conversion of plaintiff's property. The railroad company imposed a condition upon the delivery of the baggage to plaintiff which it had no right to do, and that act alone is evidence of conversion. Adams v. Clark, 9 Cush. 215, 57 Am. Dec. 42; Claflin v. Gurney, 17 R. I. 185, 20 Atl. 932; Cooley, Torts, pp. 859, 860, 867, 873, note 6; Wamsley v. Atlas S. S. Co. 168 N. Y. 533, 85 Am. St. Rep. 699, 61 N. E. 896; Brewster v. Silliman, 38 N. Y. 423; Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 21 L.R.A. 117, 34 Am. St. Rep. 579, 32 N. E. 476; Cooley, Torts, 878.

Evidence of the value of the property at the time of its delivery to

the carrier is sufficient. The jury need not accept the value as fixed by an expert witness, called for that purpose. Shuman v. Ruud, 35 N. D. 384, 160 N. W. 507; Lamb v. O'Reilly, 13 Misc. 212, 34 N. Y. Supp. 235.

The correct measure of damages is the cost of replacing the goods plus transportation charges. Wehle v. Haviland, 69 N. Y. 448; Fernwood Masonic Hall Asso. v. Jones, 102 Pa. 307.

But these goods had a special value to the plaintiff, and the defendant has been apprised of this fact. 4 Sutherland, Damages, 3d ed. p. 3267; Blackmer v. Cleveland, C. & St. L. R. Co. 101 Mo. App. 557, 73 S. W. 913; Comp. Laws 1913, § 7179.

The goods were in the court room and before the jury during the trial. They were inventoried by appellant's own witness, and each article considered separately before the jury. Craig v. Durrett, 1 J. J. Marsh. 365, 19 Am. Dec. 103; Louisville & N. R. Co. v. Mason, 11 Lea, 116.

An instruction may be erroneous and technically incorrect; yet this court will not reverse the judgment and order a new trial as a matter of course. State v. Reilly, 25 N. D. 373, 141 N. W. 720.

CHRISTIANSON, J. The plaintiff brought this action in the district court of Grand Forks county against the Northern Pacific Railway Company to recover $379.25, the alleged value of a certain stock of goods which it is alleged the railway company converted.

The complaint alleges that on or about November 22, 1915, the plaintiff purchased a ticket of the defendant at its station in Forest River, entitling him to travel from Forest River to Drayton, and that at the same time and place he checked as baggage two parcels, which contained the goods involved in this case, and received from the defendant's agent two baggage checks for such parcels. That thereafter on November 23, 1915, the plaintiff purchased a ticket from the defendant's agent at Drayton, entitling him to travel from Drayton to Grafton, and that the defendant engaged as part of the same transaction to carry the two parcels heretofore mentioned as baggage from Drayton to Grafton. That defendant knew the contents of said parcels, and accepted the same with full knowledge of such contents, and with full knowledge of the fact that the goods so checked as baggage were to be

delivered by plaintiff to customers upon his arrival at Grafton. That the plaintiff thereafter called at the baggage office of the defendant at Grafton on the 23d, 24th, 25th, and 26th of November, 1915, and inquired for and demanded delivery of such parcels, but was advised by the defendant's agent at that place that the same had not arrived. That thereafter and on or about November 28 or 29, 1915, the plaintiff was advised by the defendant's baggage agent at Grafton that said parcels had arrived, but that said agent refused to deliver the same to plaintiff on his demand therefor. That plaintiff was the owner of the goods contained in such parcels, and that upon the dates heretofore mentioned and also on or about February 10, 1916, he demanded a return and delivery to him of said goods so checked and carried as baggage, and that defendant refused to deliver the same, and wrongfully converted the same to its own use to plaintiff's damage in the sum of $379.25.

To this complaint defendant interposed an answer wherein it admits that the plaintiff purchased a ticket from its agent at Forest River, entitling him to transportation as a passenger over defendant's railway from Forest River to Drayton; that defendant checked two parcels of baggage from Forest River to Drayton, and alleges that the defendant had the same in its possession at Drayton, North Dakota, ready and willing to turn the same over to plaintiff, but that plaintiff neglected to call for the same, and made no request as to the disposal of such parcels, until on November 25, 1915, when he notified defendant's agent at Drayton by letter, and requested him to forward the parcels to Grafton, North Dakota. That at that time 50 cents storage charges had accrued for the storage of said goods. That the defendant has been at all times and still is ready and willing to turn over said baggage to the plaintiff upon the payment of said storage charges. The answer further alleges that the parcels received and checked by it were not entitled to be checked and forwarded as baggage, under the duly filed tariff schedules of the defendant, and that according to such tariff the defendant's liability was limited to $100.

The case was tried to a jury upon the issues framed by these pleadings, and resulted in a verdict in favor of the plaintiff for $182.50. Judgment was entered pursuant to the verdict, and defendant appeals from

the judgment and from the order denying its alternative motion notwithstanding the verdict or for a new trial.

Appellant's assignments of error on this appeal are predicated upon two grounds: (1) Insufficiency of the evidence to sustain the verdict; (2) errors in instructions given and refused.

Appellant specifies two particulars wherein the evidence is insufficient to justify the verdict. Appellant's first specification of insufficiency is to the effect that the evidence shows that the plaintiff arrived at Drayton on the evening of November 22, 1915, and did not leave there until the morning of November 24, 1915. That consequently there was at that time due storage charges against the two parcels amounting to 50 cents. And that, in view of the conceded fact that plaintiff never tendered this or any other sum to the defendant in payment of such storage charges, defendant had a right to retain the possession of the goods, and would not be guilty of conversion.

While plaintiff's testimony on this proposition is somewhat ambiguous, it was for the jury to construe the language used (14 Enc. Ev. 215), and we are agreed that the evidence, as a whole, fully justifies the conclusion reached by the jury and the trial judge; *viz.*, that plaintiff arrived at Drayton in the evening of November 22d, and left on the train for Grafton on the morning of November 23d.

Appellant's second specification of insufficiency is that "the evidence is insufficient to justify the verdict in that there is no proper proof of damages in the case, or proper proof of the value of the goods in question here at Grafton on the date of the claim of conversion."

Plaintiff testified that he had been engaged in selling goods of the kind involved in this controversy for the last twenty years. That during the last fifteen or sixteen years he had personally bought the goods so sold, and that he personally purchased the goods involved in this controversy.

On direct examination the following questions were propounded to plaintiff, and the following answers given thereto by him:

Q. Tell us the value of these,—the wholesale value of these goods in November on the days that I gave you awhile ago in November, 1915?

A. Well, between $375 and $390.

Q. What did you say?
A. About $375.
Q. $375?
A. Yes.

It is true that plaintiff also testified that this was the price he paid for them, but this fact does not destroy his testimony as to value, but if anything tends to corroborate his testimony on this point. A list prepared by plaintiff and under his direction, showing the contents of the two parcels and the prices paid by plaintiff for these goods in November, 1915, was offered and received in evidence without objection. In fact all the testimony of the plaintiff with respect to such value was received without objection.

As a general rule, "incompetent evidence which is introduced without objection becomes evidence in the particular case, and must be treated as any other competent evidence. . . . When evidence has been offered for a particular purpose, and no objection is made thereto, it must be treated as competent evidence for the purpose for which it is offered." 9 Enc. Ev. 111, 112. See also 19 Decen. Dig. Trial, § 105.

Plaintiff was the owner of the goods. And ordinarily an owner may testify to the value of his property. It also seems as though plaintiff had shown sufficient qualification to testify as an expert to the value of the property involved in this case. But even though the testimony was incompetent, the objection to its competency cannot be raised for the first time after the verdict by motion or specifications challenging the sufficiency of the evidence.

Appellant's next contention is that the court erred in denying its request to instruct the jury to the effect that plaintiff could in no event recover more than $100. This contention is based upon the schedules of passenger rates of defendant and the stipulation on the baggage checks limiting the value of baggage to be checked for free transportation upon a whole passenger ticket to $100. There is much force in appellant's argument that, in view of the present statutes of this state (Comp. Laws 1913, §§ 4724, 4725, and 4727), which require railroads to print and keep for public inspection schedules showing the rates, fares, and charges for the transportation of passengers and

property, the rule announced by the United States Supreme Court in similar cases arising under the Interstate Commerce Act should apply. The rule announced by the United States Supreme Court in such cases being that, where a common carrier offers to passengers or shippers a choice of alternate rates, fairly based upon valuation, a railroad may not only limit its liability by special contract, but may limit such liability in its schedules for passenger or freight tariffs; and that a limitation in, and made a part of, such schedules, thereby becomes an essential part of the rate, binding upon, and controlling of the rights of, the contracting parties. Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, Ann. Cas. 1915D, 593; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 60 L. ed. 1022, L.R.A.1917A, 265, 36 Sup. Ct. Rep. 555. It is not necessary for us, however, in this case to determine whether, in view of §§ 6240 and 6242, Compiled Laws of 1913, a common carrier may under our laws limit its liability except by contract signed by the shipper, as we are satisfied that the limitation of liability is not available to the defendant in this case. Under the recognized common-law rule, a common carrier is liable, not only for its negligence, but is also liable as an insurer. The purpose of the limitation of liability is not to enable the carrier to commit wilful and intentional wrongs against the passenger or shipper and escape liability therefor, but merely to relieve the carrier from a certain amount of the liability incident to the contract of carriage. It is not necessary for us to determine whether, under the laws of this state, a carrier may by contract be relieved from liability arising by reason of negligence or gross negligence. While we agree with the United States Supreme Court that a passenger or shipper may not, by a mere change of the form of action, change the rights, which in reality are based upon the shipping contract (Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541), still we are aware of no case wherein it has been held that, by reason of a limitation of liability in the contract of carriage, a carrier may become the owner of goods intrusted to it for carriage, by wrongfully converting them to its own use, and paying the shipper a mere fraction of their actual value. To so hold would give to the stipulation limiting liability a force, and apply it for a purpose, never contemplated by the contracting parties. Such stipulations when valid should be enforced

in accordance with their terms to carry out the intent and the purposes contemplated by the contracting parties. In this case the record shows that the defendant has the goods involved herein in its possession. It produced them upon the trial. It is not a case wherein the goods have been misdelivered, injured, or lost. The court, at defendant's request, instructed the jury that "this is a suit in conversion, and the question of the delay in forwarding baggage or loss of sale or prospective profits of sale is here immaterial. . . . If the plaintiff seeks to recover damages for delay or loss of profits, he must bring a different form of action entirely." The court further instructed the jury that the burden was upon the plaintiff to show by a fair preponderance of the evidence that the plaintiff owned the property claimed; that the defendant has wrongfully detained it in its possession, and refused to deliver it to plaintiff upon demand therefor; and that defendant's refusal to deliver was unlawful and wrongful.

In an action like the one at bar, this court has appellate jurisdiction only, and reviews only the errors assigned upon the proceedings had in the trial court. N. D. Const. § 86; Erickson v. Wiper, 33 N. D. 193, 225, 157 N. W. 592. And the appellant has the burden of proving error, and must present a record affirmatively showing error. Erickson v. Wiper, supra. Consequently, we must assume that the evidence upon all the other features of the case, except the two particulars heretofore enumerated, is sufficient to sustain the verdict under the issues as framed by the pleadings, and that the record is free from error, except those specified and argued on this appeal. In view of the verdict as well as the special findings returned by the jury, we must assume that the evidence showed a wrongful and unlawful conversion by the defendant of property belonging to the plaintiff, of the value of $182.50. We are aware of no decision holding that a limitation of liability will avail a carrier under these circumstances. In George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 287, 59 L. ed. 576, 583, 35 Sup. St. Rep. 351, the United States Supreme Court refused to say whether a carrier, in addition to the liability stipulated, would also be liable for the value of what was left of property after a wreck. The trial court properly refused to instruct the jury that plaintiff's recovery be limited to $100.

Defendant also assigns error upon an instruction to the jury to the effect that, if the defendant negligently failed to forward plaintiff's

baggage from Drayton to Grafton within a reasonable time after plaintiff took the train from Drayton to Grafton, then the defendant would be entitled to make no charge for the storage. The specific objection to the instruction is that the court used the word "negligently," and thereby injected the question of negligence which it is contended was not an issue in the case. As the instruction, and the term "negligently" as used therein, went to the conduct of defendant with respect to the forwarding of the baggage; and inasmuch as the court had elsewhere in its instructions specifically charged the jury that no recovery could be had against the defendant if the baggage was forwarded from Drayton to Grafton within a reasonable time after plaintiff had departed from Drayton; and inasmuch as the court had further instructed the jury, at defendant's request, that plaintiff was not entitled to recover if there were any lawful storage charges whatever against the baggage,—we are unable to see wherein the defendant could possibly have been prejudiced by the giving of the instruction, or the use of the term "negligently" therein.

This disposes of all the errors assigned on this appeal. It follows from what has been said that the judgment and the order appealed from must be affirmed. It is so ordered.

ROBINSON, J. (concurring). I concur in the opinion of Mr. Justice Christianson. My criticism is that he has given this small case too much consideration. When parties go to law over a dispute of 50 cents or $2.50, they both deserve to lose, and their case deserves no consideration.

T. E. MILLER and Julia Miller v. JAMES LITTLE.

(164 N. W. 19.)

Land mortgaged for much less than its value — second or third mortgage — foreclosure of — obtaining title under — merger of prior mortgages — discharge of mortgage debts — suit by owner to recover — cannot maintain.

When land is mortgaged for much less than its value, and a party obtains title under the foreclosure of a second or third mortgage, there is a merger of

prior mortgages and a discharge of the mortgage debts. In such a case the owner of the title may not bring a suit and recover judgment for the mortgage debt.

Opinion filed July 21, 1917.

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

Affirmed.

Thos. H. Pugh, for appellant.

There was an obligation resting upon plaintiffs to have protected their property and the security given to the defendant thereon. There was no duty devolving upon defendant to make redemption from the foreclosure sale, of any prior mortgage, nor by reason of not redeeming would defendant be deemed guilty of laches in his duty to plaintiffs. If defendant had not purchased the sheriff's certificate it would have run to deed in name of purchaser, and the deed would have stood as a bar to the enforcement by defendant of his mortgage against the land. Bailey v. Hendrickson, 25 N. D. 500, 143 N. W. 136, Ann. Cas. 1915C, 739.

The purchaser at foreclosure by advertisement ordinarily acquires an equitable interest in the land which he may, during the period of redemption, transfer in full to another. His assignee, if there is no redemption, will take the legal title when it matures exactly as the original bidder himself would have done. Gage v. Sanborn, 106 Mich. 269, 64 N. W. 32; Roff v. Miller, 189 Mich. 558, 155 N. W. 518; Lieblien v. Hansen, 178 Mich. 11, 144 N. W. 496; Frisbee v. Frisbee, 86 Me. 444, 29 Atl. 1115; 27 Cyc. 1866.

Purchasing and obtaining an assignment of a certificate of sale is a transaction wholly different in its nature and legal consequence from a redemption. Shroeder v. Bauer, 140 Ill. 135, 29 N. E. 560.

A junior mortgagee may become a purchaser at the sale under the foreclosure of a prior mortgage.

He can also purchase the certificate issued to another at such sale. Whether or not there was a redemption must depend upon what was done, and not upon the intention of the party doing the act. Any act which amounts to either a purchase or a redemption cannot be aided or prejudiced by the intention of the party doing the act. Streeter v. First

Nat. Bank, 53 Iowa, 177, 4 N. W. 915; Sprague v. Martin, 29 Minn. 226, 13 N. W. 34.

A junior mortgagee's claim is not merged by his purchase of land at a sale by a prior mortgagee. Union Bank v. Bates, 24 Manitoba L. R. 619; Cornell v. Woodruff, 77 N. Y. 203; Ten Eyck v. Craig, 62 N. Y. 406.

The mortgage lien transfers no title to the land. Comp. Laws 1913, § 6709; Joyce, Defenses to Commercial Paper, § 682.

"If from all the circumstances a merger would be disadvantageous to the party, then his intention that it should not result will be presumed and maintained." 2 Pom. Eq. Jur. ¶¶ 788, 792; May v. Cummings, 21 N. D. 281, 130 N. W. 826; Davis v. Randall, 117 Cal. 12, 48 Pac. 906; Scrivner v. Dietz, 84 Cal. 295, 24 Pac. 172; Carpentier v. Brennan, 40 Cal. 221; Kilmer v. Hannifan, 113 Iowa, 281, 85 N. W. 16; Gilman v. Stock Exch. Bank, 64 Kan. 87, 67 Pac. 551; Wettlaufer v. Ames, 133 Mich. 201, 103 Am. St. Rep. 449, 94 N. W. 950; Jones, Mortg. §§ 848, 856, 857, 870, 872 and 873.

A merger only comes into existence where the junior lien holder purchases direct from the mortgagor. 27 Cyc. 1378, 1379 and cases cited; Fouche v. Delk, 83 Iowa, 297, 48 N. W. 1078; Milner v. Home Sav. & L. Asso. 64 Minn. 500, 67 N. W. 346; National Invest. Co. v. Nordin, 50 Minn. 336, 52 N. W. 899; Burnet v. Denniston, 5 Johns. Ch. 35; Weston v. Livezey, 45 Colo. 142, 100 Pac. 404.

J. P. Cain, for respondents.

The obtaining of the sheriff's certificate of sale and subsequent deed by the defendant merged in him both the legal and equitable title to the land in question, and that prior mortgage indebtedness was discharged. Such mortgage debts being discharged, they cannot be set up as counterclaims by defendant against plaintiffs in this action. Nor can defendant plead the same as a set-off against plaintiff's valid claim for wages, and at the same time retain as fee-title owner the property he took as security for the debt which he now attempts to collect. Pom. Eq. Jur. ¶ 778; Tiffany, Real Prop. ¶¶ 101, 547, pp. 246, 1251, 1252 and cases cited in notes; 27 Cyc. 1329, § 2, 1378, ¶ C; McDonald v. Magirl, 97 Iowa, 677, 66 N. W. 904; Belleville Sav. Bank v. Reis, 136 Ill. 242, 26 N. E. 646; Agnew v. Charlotte, C. & A. R. Co. 24 S. C. 18, 58 Am. Rep. 237; National Invest. Co. v. Nordin, 50 Minn.

336, 52 N. W. 899; Waters v. Waters, 20 Iowa, 363, 89 Am. Dec. 540; First Nat. Bank v. Kreig, 21 Nev. 404, 32 Pac. 641; Mathews v. Jones, 47 Neb. 616, 66 N. W. 622; Clark v. Clark, 76 Wis. 306, 45 N. W. 121; Byington v. Fountain, 61 Iowa, 512, 14 N. W. 220, 16 N. W. 534; Crowley v. Harader, 69 Iowa, 83, 28 N. W. 446; Moore v. Olive, 114 Iowa, 650, 87 N. W. 720.

Where the mortgagor purchases the equity of redemption the whole estate is vested in him. Jackson v. Tift, 15 Ga. 557; Lyman v. Gedney, 114 Ill. 388, 55 Am. Rep. 871, 29 N. E. 282; Clarke v. Peak, 15 La. Ann. 407; Marston v. Marston, 54 Me. 476; Eldridge v. Eldridge, 14 N. J. Eq. 195; 35 Century Dig. title Mortgages, ¶¶ 815 and 823.

ROBINSON, J. The plaintiffs aver that from October 5, 1914, to December 1, 1915, the plaintiffs did farm work and labor for and at the request of the defendant, for which he promised to pay $544.67; and that he paid only $228.01; and the balance due is $316.66. In September, 1916, the plaintiff recovered a judgment, and the defendant appeals.

The answer is a counterclaim. It avers that on September 13, 1911, the plaintiff made to the defendant a promissory note to pay $325 on September 13, 1916, with interest, and that to secure the same they gave defendant a mortgage on a certain 80 acres of land in Adams county, subject to a prior mortgage for $150. That under the power in the mortgage the defendant declared the note to be due. The reply admits the making of the note and the mortgages, and that the prior mortgage was foreclosed by a sale of the premises. That defendant redeemed and obtained a sheriff's deed to the land; that the total debt against the land did not exceed $600, and that it was worth $2,000.

It also appears that on March 24, 1911, the plaintiffs made to P. D. Norton a mortgage on the same land to secure $22.50, which mortgage was foreclosed for the sum of $67.63 and the sheriff's certificate assigned to the defendant, and under the assignment defendant obtained a sheriff's deed to the land.

On the value of the land the plaintiffs both testified that it was worth $20 an acre; and the defendant testified that he contracted to sell the land at $10 an acre. The court found that the value of the land was from $800 to $1,000, and that the total mortgages against it did not

exceed $650, and that by the merger of the title the mortgage for $325 was paid. The decision of the district court is manifestly fair and just, and it could not be otherwise. National Invest. Co. v. Nordin, 50 Minn. 336, 52 N. W. 899; McDonald v. Magirl, 97 Iowa, 677, 66 N. W. 904; Crowley v. Harader, 69 Iowa, 83, 28 N. W. 446; Moore v. Olive, 114 Iowa, 650, 87 N. W. 720.

The judgment of the District Court is affirmed.

BIRDZELL, J. (concurring specially). The evidence in this case seems to establish beyond question that the property acquired by the junior mortgagee in the foreclosure proceedings was worth considerably more than the amount standing against the land, including his mortgage. Under the circumstances disclosed by the record, it would be grossly inequitable to allow the junior mortgagee, who has acquired the property pledged for an amount only equivalent to the prior liens and foreclosure costs, to hold the property thus obtained, and at the same time enforce the security. 2 Pom. Eq. Jur. 3d ed. § 794. When a redemptioner acquires property by sheriff's deed, under the circumstances disclosed in this case, it is only equitable that his security should be discharged completely, if the value of the property warrants such finding, and *pro tanto* if the surplus value over prior liens is insufficient.

CHRISTIANSON, J. (dissenting). I dissent from the conclusions reached in the majority opinion prepared by Mr. Justice Robinson.

The material and undisputed facts in this case are as follows: On September 13, 1911, the plaintiffs executed and delivered to defendant a promissory note for $325, payable September 13, 1916. At the same time plaintiffs executed and delivered to defendant a third mortgage upon an eighty (80) acre tract of land in Adams county. The holder of the second mortgage thereafter caused such second mortgage to be foreclosed by advertisement, and the premises were sold upon such foreclosure on August 16, 1913, and certificate of sale issued to one Hall, the purchaser at such sale. The defendant Little thereafter purchased the certificate of foreclosure sale from Hall, and received an assignment thereof on August 10, 1914, which assignment was recorded in the register of deeds office on the same day. On August 27, 1914, the sheriff executed and delivered to Little a sheriff's deed upon the cer-

tificate of sale. The only question, therefore, which arises on this appeal is whether the third mortgage held by Little became merged in, and the notes secured thereby extinguished by, the purchase of the sheriff's certificate issued on the foreclosure of the prior mortgage and the sheriff's deed issued thereon.

It is elementary that merger, as a rule, depends "upon the intention, actual or presumed, of the person in whom the interests are united." Pom. Eq. Jur. 3d ed. § 791; 27 Cyc. 1379 et seq. And where a mortgagee takes a conveyance to land covered by his mortgage, there will be no merger where such a result would be injurious to his interest, by depriving him of his rights which he could claim and exercise by keeping the two estates distinct; for, "the result depending on his intention in the matter, if there is no proof of what such intention was, the law will presume that he intended what would best accord with his interests, and therefore will prevent a merger, in accordance with such presumed intention." Pom. Eq. Jur. 3d ed. §§ 791–793; 27 Cyc. 1381. This principle is recognized in the authorities cited in the majority opinion. Thus, in Moore v. Olive, 114 Iowa, 650, 653, 87 N. W. 721, the supreme court of Iowa said: "It may be well to state that merger, as a rule, depends on the intention of the owner; and if there be no evidence of such intent, equity will not treat a mortgage as merged when it is to the interest of the owner, or those claiming under him, that it should continue in force." Not a single authority cited in the majority opinion is in point on the question here presented. The cases cited, which have any bearing on the questions here involved, presented situations where a person holding both a first and second mortgage foreclosed the second mortgage and purchased the land at such foreclosure sale. In fact these authorities merely recognized and applied the doctrine announced by this court in Sletten v. First Nat. Bank, ante, —, 163 N. W. 534, that the purchaser at a foreclosure sale stands in the same position as a grantee by voluntary sale, and that the amount bid will be presumed to be the price or value of the property, less the amount of the encumbrances. The theory being that the amount of the encumbrances has been deducted from the purchase price, and that the land becomes the primary fund for the discharge of the mortgage debt.

Obviously, that doctrine can have no application here. If it has, then

the purchaser of land at a mortgage foreclosure sale must be deemed to have purchased such land subject to all encumbrances, those subsequent as well as those prior to the mortgage under which he purchased. It must be remembered that the defendant Little either had to obtain the certificate of sale, by purchase or redemption, or have his third mortgage extinguished. I am unable to see upon what possible theory it can be held that he manifested any intent to merge the third mortgage or extinguish the obligation secured thereby, by the fact that he purchased the certificate of sale and procured a sheriff's deed thereon. So far as I have been able to discover, no judicial tribunal has so declared, and I am aware of no legal or equitable principle upon which any such holding can be predicated.

A. H. RUNGE, Fire Marshal of the State of North Dakota, v. I. GLERUM.

(164 N. W. 284.)

State fire marshal — office of — cities and villages — local government — interference with — law — Constitution.

1. Chapter 169 of the Laws of 1913, being §§ 201 to 223 of the Compiled Laws of 1913, and which creates the office of state fire marshal, is not an unconstitutional interference with the local government of cities and villages, and is therefore not for that reason invalid.

State fire marshal — powers of — buildings — removal — destruction — repair — may order — constitutionality of act — due process of law — appeal.

2. Chapter 169 of the Laws of 1913, being §§ 201 to 223 of the Compiled Laws of 1913, and which gives to the state fire marshal, under certain conditions and subject to appeal to the district court, the power to order the removal, destruction, or repair of buildings, is not unconstitutional as depriving persons of property without due process of law.

State fire marshal — destruction of building — ordered by — appeal — interfered with — clear abuse of discretion.

3. Where, under the provisions of chapter 169 of the Laws of 1913, being §§ 201 to 223 of the Compiled Laws of 1913, the state fire marshal has ordered the destruction of a building, his order will only be interfered with upon appeal where a clear abuse of discretion has been shown.

State fire marshal — order of — appeal from — contemplates hearing record before marshal — not new trial.

4. The appeal from the order of the fire marshal provided for in chapter 169 of the Laws of 1913, being §§ 201 to 223 of the Compiled Laws of 1913, contemplates a hearing upon the record before the fire marshal, and not an entire new trial.

Destruction of property — order directing — building — loss by fire — 50 per cent — local ordinances — provisions of.

5. It is not necessary to the validity of an order directing the destruction of a building under §§ 201 to 223 of the Compiled Laws of 1913, that it shall be shown that such building has sustained a loss by fire to the extent of 50 per cent of its value, even though the local ordinances provide that unless such loss is shown the building may be rebuilt.

Fire marshal — orders of — appeal from — district court — new judgment in.

6. In case of an appeal from the order of the fire marshal under the provisions of §§ 201 to 223 of the Compiled Laws of 1913, a new judgment is entered in the district court.

Opinion filed August 18, 1917.

Appeal to the District Court of Ramsey County, *A. G. Burr,* Special Judge, from an order of the state fire marshal. Order affirmed.

Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, Ch. J. This is an appeal from a judgment of the district court of Ramsey county affirming the order of the fire marshal issued on an appeal or complaint to the fire marshal from an order of the chief assistant fire marshal condemning the property of the defendant, I. Glerum, and ordering the removal of the remnants of the building. The appeal to the fire marshal and the order issued thereon were as follows:

Appeal or Complaint to Fire Marshal.

Department of Insurance, Fire Marshal's Office,

State of North Dakota, } ss.:
County of Ramsey. }

In the matter of the proceedings regarding one story frame building

located on lot 16, block 25, of the city of Devils Lake, N. Dak., A. H. Runge, Fire Marshal,

Bismarck, North Dakota.

Dear Sir:

I received yesterday, January 15, 1915, a copy of an order directing me to tear down a one story frame building injured by fire on or about November 14, 1914, located on lot 16, block (25) of the city of Devils Lake, N. D., under the ordinances of the city of Devils Lake, N. D., the owner is entitled to repair a frame building within the limits injured by fire, when the damage does not exceed 50 per cent of the value, exclusive of foundation. I have had a board of arbitration appointed, consisting of John Marshall, architect and builder, and P. L. DePlazes, and Math. Peters, contractors and builders, these men fixed the damage to not exceed 35 per cent; besides I have had several other carpenters to go over the building, and none of them fixed the damage to more than 40 per cent, now I would ask you to kindly modify your order, so as to allow me thirty days, within which to repair the building and put it in good shape.

If you are unwilling to do this, I demand a hearing under the provision § (8), chapter 169, of the Session Laws 1913.

Respectfully submitted,

I. Glerum, Owner.

Title

Order

H. L. Reade, the chief assistant fire marshal of the state of North Dakota, having on the 10th day of January, A. D. 1915, visited and inspected that certain frame structure located on lot 16, block 25, of the city of Devils Lake, Ramsey county, North Dakota, and having found and reported the same had been visited by fire and that the same is now in a dangerous condition and a menace to adjoining property as a fire hazard, and that thereafter and on the 14th day of January, A. D. 1915, the said chief assistant fire marshal of the state of North Dakota made his order condemning said structure located on the premises hereinbefore described; and further order as follows, to wit:

"You are hereby ordered to tear down and remove the remnant of this building within thirty days from the date of this order, and

thereby lessen the fire hazard to adjoining property and the city of Devils Lake."

Which said order was duly and legally served on I. Glerum, the owner of the said building, and from which order the said I. Glerum duly appealed to the fire marshal of the state of North Dakota; and hearing on the said appeal having come on pursuant to adjournment taken on the 4th day of February, A. D. 1915, at the hour of 10 o'clock A. M. in the city fire hall in the city of Devils Lake, Ramsey county, North Dakota, the appellant, I. Glerum, appearing in person and being advised of his rights with respect to an attorney, stated that Siver Serumgard, Esq., who appeared for him as his attorney in a certain action wherein Nicholas Rothecker was plaintiff and himself defendant, was not to appear for him in his proceedings as his attorney, and further that he desired no attorney; and, being advised that he was entitled to have witnesses subpœnaed on his behalf to testify in said proceedings, stated that he desired no further witnesses; and said appellant having offered in evidence his own sworn statement, and for consideration by the fire marshal copies of the affidavits of Fred Bassford, Math. Peters, P. G. Miller, P. A. DePlazes, and John Marshall, which affidavits were copies of a part of the files in the action wherein Nicholas Rothecker was plaintiff and said I. Glerum defendant, an injunctional proceeding pending in the district court of Ramsey county, North Dakota, relative to the subject-matter in issue in this proceeding; and C. O. Russell, chief engineer of the fire department of the city of Devils Lake, North Dakota, and by his attorney Arthur R. Smythe, and having offered in evidence the testimony of said C. O. Russell and J. A. Shannon, together with the exhibits A and B, photographs of the building or structure located on the premises hereinbefore described; and the undersigned chief fire marshal of the state of North Dakota having on this day reviewed and inspected that certain structure located on the hereinbefore described premises, and having duly considered all the statements, evidence, and exhibits in this case, and on motion of Arthur R. Smythe, attorney for the chief engineer of the fire department of the city of Devils Lake, it is hereby,

Ordered, adjudged, and determined, that that certain order heretofore and on the 14th day of January, A. D. 1915, made by the chief assistant fire marshal of the state of North Dakota, and duly served on

the defendant, I. Glerum, be and the same hereby is in all things affirmed; and it is further ordered that under and by virtue of my office under the provisions of chapter 169 of the Session Laws of 1913, you, I. Glerum, are directed and required to tear down and remove the remnants of that certain structure located on lot 16, block 25, original plat of the city of Devils Lake, Ramsey county, North Dakota, thereby lessening the fire hazard to adjoining property and the city of Devils Lake. You are advised in no way to omit complying with this order under penalty of said law.

Witness, my signature at Devils Lake, Ramsey county, North Dakota, this 4th day of February, A. D. 1915.

A. H. Runge,
Fire Marshal of the State of North Dakota.

The findings of fact and conclusions of law by the trial court were as follows:

That I. Glerum is now and at all times hereinafter mentioned has been the owner of lot 16, block 25, of the original plat of the city of Devils Lake, Ramsey county, North Dakota, and of that certain frame building, or remnant of that certain frame building remaining thereon.

That on or about the 24th day of November, A. D. 1914, the said frame building located on said lot 16, block 25, of the original plat of the city of Devils Lake, North Dakota, was visited by fire and suffered damage and injury thereby to the extent of more than 50 per cent of the value of said building, and that said frame structure on the said described premises suffered such injury and damage by said fire as to become an unusual and extraordinary fire hazard to adjoining property and the city of Devils Lake, Ramsey county, North Dakota.

That the Honorable A. H. Runge, fire marshal of the state of North Dakota, did on the 4th day of February, A. D. 1915, make an order in the said above-entitled matter, confirming the order previously made by Honorable H. L. Reade, assistant chief fire marshal of the state of North Dakota, wherein and whereby amongst other things it was ordered that the said I. Glerum be, and "you are hereby ordered to tear down and remove the remnants of this building within thirty days from the date of the order, thereby lessening the fire hazard to adjoining property and the city of Devils Lake, and further ordered, ad-

judged, and determined that that certain order heretofore and on the 14th day of January, A. D. 1915, made by assistant chief fire marshal of the state of North Dakota, duly served on the defendant, I. Glerum, and the same hereby is in all things affirmed; and it is further ordered that under and by virtue of the authority vested in me by virtue of my office under the provisions of chapter 169 of the Session Laws of 1913, you, I. Glerum, are directed and required to tear down and remove the remnants of that certain structure located on lot 16, block 25, of the original plat of the city of Devils Lake, Ramsey county, North Dakota, thereby lessening the fire hazard to adjoining property and the city of Devils Lake. You are hereby advised in no way to omit complying with this order under penalty of said law." And from which said above order the said owner, I. Glerum, appealed.

Conclusions of Law.

That the said order heretofore and on the 4th day of February, A. D. 1915, made by the Honorable A. H. Runge, fire marshal of the state of North Dakota, wherein and whereby amongst other things it was "ordered, adjudged, and determined that the certain order heretofore and on the 14th day of January, A. D. 1915, made by assistant chief fire marshal of the state of North Dakota duly served on the defendant, I. Glerum, and the same hereby is in all things affirmed; and it is further ordered that under and by virtue of the authority in me vested by virtue of my office under the provisions of chapter 169 of the Session Laws of 1913, you, I. Glerum, are directed and required to tear down and remove the remnants of that certain structure located on lot 16, block 25, of the original plat of the city of Devils Lake, Ramsey county, North Dakota, thereby lessening the fire hazard to adjoining property and the city of Devils Lake. You are hereby advised in no way to omit complying with this order under penalty of said law," be and the same hereby is in all things affirmed, and costs of this appeal to be taxed and allowed by the clerk of the district court in favor of respondent and against the appellant, I. Glerum.

Let judgment be entered accordingly.

Dated this 5th day of August, A. D. 1915.

By the Court,

A. G. Burr, Judge.

Siver Serumgard, for appellant.

To justify the courts in declaring a statute invalid, it is not essential that it should contravene some expression of the Constitution. If the act is inhibited by the general scope and purpose of the fundamental law, it is invalid as though forbidden by the letter of the instrument. State ex rel. Atty. Gen. v. Moores, 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175.

The district court has no power to interfere with the action of the city council in a purely local matter. All political power is inherent in the people. Const. art. 1, §§ 24, 130; Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023; Ex parte Corliss, 16 N. D. 470, 114 N. W. 962.

The burden of proof is upon the fire marshal to justify his acts. It is the duty of the fire marshal to remedy the dangerous condition without destruction of property.

"These restrictions on wooden buildings within fire limits are strictly construed as being not only in derogation of the common law, but of a highly penal nature." Comp. Laws 1913, § 206; 13 Am. & Eng. Enc. Law, 397.

The question of percentage of damage to a building by fire arises by reason of a valid city ordinance of the city of Devils Lake. The ordinance does not provide, nor is it a fact, that a wooden building, when more than half destroyed, becomes dangerous as a fire hazard. The ordinance simply means that when a wooden building has been so damaged and has been fully repaired, it becomes a new building, and a new wooden building cannot be erected within the fire limits. 13 Am. & Eng. Enc. Law, 2d ed. 398, ¶ 4.

Wm. Langer, Attorney General, *H. A. Bronson,* Assistant Attorney General, *E. B. Cox,* Special Assistant Attorney General, *D. V. Brenan,* Assistant Attorney General, *Cuthbert & Smythe,* and *Henry J. Linde,* for respondent.

The act of the legislature creating the office of state fire marshal and fixing his duties thereunder is not unconstitutional as abridging the right of local self-government of cities. State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A. —, —, 156 N. W. 561; Ex parte Corliss, 16 N. D. 470, 114 N. W. 962; State ex rel. Faussett v. Harris, 1 N. D. 194, 45 N. W. 1101; Elliott, Mun. Corp. 2d ed. 258.

"We cannot declare an act of the legislature invalid because it abridges

the privileges of self-government in a particular, in regard to when such privileges are not guaranteed by the provisions of the Constitution." Brodbine v. Revere, 182 Mass. 598, 66 N. E. 607; State ex rel. Bulkeley v. Williams, 68 Conn. 131, 48 L.R.A. 465, 35 Atl. 24, 421; Brown v. Galveston, 97 Tex. 1, 75 S. W. 488; Re Senate Bill, 12 Colo. 188, 21 Pac. 481; Daley v. St. Paul, 7 Minn. 390, Gil. 311; David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174; State ex rel. White v. Barker, 116 Iowa, 96, 57 L.R.A. 244, 93 Am. St. Rep. 222, 89 N. W. 204; Goodnow, Mun. Corp. p. 9; 1 Bryce, Am. Com. p. 630; State ex rel. Atty. Gen. v. Moores, 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175.

"A police regulation not operating unreasonably beyond the occasions of its enactment is not invalid because it may affect incidentally the exercise of some right guaranteed by the Constitution." Re Anderson, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; Ex parte Boyce, 27 Neb. 299, 65 L.R.A. 47, 75 Pac. 1, 1 Ann. Cas. 66; Stone v. Mississippi, 101 U. S. 817, 25 L. ed. 1079; Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302; Metropolitan Bd. of Excise v. Harris, 34 N. Y. 657.

"Neither the state nor a municipal division thereof to which the power is delegated can, by affirmative action or by inaction, permanently devest itself of the authority and power to exercise it." State ex rel. Minneapolis v. St. Paul, M. & N. R. Co. 98 Minn. 380, 28 L.R.A. (N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; State ex rel. Laclede Gaslight Co. v. Murphy, 130 Mo. 10, 31 L.R.A. 798, 31 S. W. 594, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. Rep. 505; Iler v. Ross, 64 Neb. 710, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869.

All rights of property are held subject to reasonable and fair precautions and measures for the safety and welfare of all the citizens, and the law may provide for such, and may prescribe for the enforcement of such measures. Com. v. Alger, 7 Cush. 53; Salem v. Eastern R. Co. 98 Mass. 431, 96 Am. Dec. 650; Blair v. Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; Salem v. Maynes, 123 Mass. 372.

The police power extends to the protection of the lives and health of the people, and to the protection of all the property within the state. Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Raymond v. Fish, 51

Conn. 80, 50 Am. Rep. 3; People v. Bennett, 83 Mich. 457, 47 N. W. 250; Ogden City v. McLaughlin, 5 Utah, 387, 16 Pac. 721; Bittenhaus v. Johnston, 92 Wis. 588, 32 L.R.A. 380, 66 N. W. 805.

It is not necessary that the owner of property damaged by fire be given the right to repair it. The fire marshal is clothed with authority, and a sound discretion in all such matters as come within the province of his office and its duties and his decision will not be interfered with unless it clearly appears that he has abused that discretion. Comp. Laws 1913, § 206.

BRUCE, Ch. J. (after stating the facts as above). The first error assigned by counsel for appellant is "that the court erred in failing to find that chapter 169 of the Session Laws of 1913 is unconstitutional for the reason that it interferes with the local government of cities, and in failing to find that the fire marshal was without authority to enforce the provisions of §§ 6 and 7 of that act, and §§ 206 and 207 of the Compiled Laws of 1913, as the matter of establishing fire limits and the regulations for erecting and repairing wooden buildings in such fire limits is purely a matter of local regulation, and the central power of the state has no constitutional right to interfere with or infringe upon such local regulations, as the records show the fire marshal undertook to perform in this case."

Section 1 of chapter 169 of the Laws of 1913, being § 201 of the Compiled Laws of 1913, provides for the appointment by the governor of "a fire marshal and a chief assistant fire marshal who shall be under the management of the Commissioner of Insurance. Section 2 of the act, being § 202 of the Compiled Laws of 1913, makes it the general duty of the fire marshal and assistant fire marshal to enforce the laws in respect to fires.

Section 4 of the act, being § 204 of the Compiled Laws of 1913, requires the chiefs of the fire department of every city or village in which a department is established, or the mayor or president of the village board of any incorporated city or village in which no such department is established, to report the cause and origin of every fire exceeding $25 to such fire marshal to record and investigate the same.

Sections 6 and 7 of the act, being §§ 206 and 207 of the Compiled

Laws of 1913,—and these are the sections which are particularly involved and attacked in the case at bar,—are as follows:

Section 206: "If the fire marshal, chief assistant fire marshal, or any other officer mentioned in the preceding sections upon an examination or inspection finds a building or other structure, which, for want of proper repair by reason of age and dilapidated condition, defective, or poorly installed electric wiring, or equipment, defective chimneys, defective gas connections, defective apparatus, or for any other cause or reason is especially liable to fire, and which building or structure is so situated as to endanger other buildings or property, such officer shall order such buildings to be repaired, torn down, demolished, materials removed, and all dangerous conditions remedied and abated. If such officer finds in a building or upon any premises any combustible or explosive material, rubbish, rags, waste, oils, gasolene, or inflammable conditions of any kind, dangerous to the safety of such buildings or property, he shall order such material removed and such dangerous conditions remedied and abated. Such order shall be made against and served personally, or by registered letter, upon the owner, lessee, agent, or occupant of such building or premises, and thereupon such order shall be complied with by the owner, lessee, agent, or occupant within the time fixed in such order. Any person who shall interfere in any way with the fire marshal, chief assistant fire marshal in the performance of their duties shall be guilty of a misdemeanor."

Section 207: "If the fire marshal or chief assistant fire marshal shall find on any premises or in any building conditions that are a menace and dangerous to the safety of life and limb of the occupant of said building or adjacent buildings, they are empowered to issue the necessary order for removal, or correction of the dangerous conditions forthwith, and any owner, agent or occupant of said premises upon whom said order is issued failing to comply with said order within the time specified, shall be guilty of a misdemeanor."

The principal cases, and in fact the only cases, which are cited and relied upon by counsel for appellant in favor of this proposition, are the cases of State ex rel. Atty. Gen. v. Moores, 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175; Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023; and Ex parte Corliss, 16 N. D. 470, 114 N. W. 962. The case of Glaspell v. Jamestown is hardly in point. All that it holds is that

§§ 2440 and 2441, Revised Codes of 1899, authorizing district courts to exclude territory from the corporate limits of cities in certain cases, are unconstitutional for the reason that they vest legislative powers in the courts.

It will also be readily seen that the decision in the case of Ex parte Corliss, supra, though announcing a doctrine of home rule and local sovereignty, is by no means conclusive of the case at bar. The *dicta* involved sustain, rather than invalidate, the statute which is before us.

The gist of the decision is that the legislature may not create officers to supersede and displace those whose offices are created by the Constitution and embedded therein, and provide for the appointment by the governor of officers whom the Constitution requires to be locally elected. It holds that sheriffs and district attorneys are constitutional officers, and therefore cannot be displaced without a constitutional amendment. It announces a doctrine of local home rule, it is true, but only such as is "embedded in the Constitution," and which the Constitution preserves. It expressly concedes that cities and villages are creatures of the statutes alone, and not of the Constitution; and it must be apparent to all that there is a wide distinction between a statute which attempts to create a temperance commissioner with the power to supersede and control constitutional county officers, such as sheriffs and state's attorneys, and the statute which is before us.

The fire marshal, indeed, who is created by § 201, Compiled Laws of 1913, is nothing more or less than a fire health commissioner. In relation to the protection of lives and property from fire, he possesses much the same power, and in many respects has the same duties to perform, as have the members of the state board of health, the state veterinarian, and the State Pure Food Commissioner, in regard to the protection of the public from impure food and disease, infected cattle, and premises and goods. He supplants no constitutional officer. He makes no arrests and conducts no prosecution. He merely investigates, and furnishes to the proper prosecuting officer the results of his investigations so that he may prosecute. Constables and sheriffs may ply their trades and exact their fees as of yore, and the state's attorney still reigns. He, in short, is a complaining witness, rather than a prosecutor or a law officer. Under the so-called "Temperance Commissioner Statute" as construed by the case of Ex parte Corliss, the

Commissioner and his appointees superseded not only the locally elected state's attorneys, but the locally elected sheriffs also.

It is true that the fire marshal may condemn buildings and order repairs, etc., but appeals to the courts are provided for in all cases, and from all orders. See §§ 208 and 209.

It is also true that the act provides that the various fire departments, and in some instances the mayors of cities and the presidents of villages, shall report fires, etc., to such fire marshal, but we can find nothing in the Constitution which forbids this. Indeed, as has been pointed out by Mr. Justice Christianson in the case of State ex rel. Linde v. Taylor, 33 N. D. 76, 113, L.R.A. —, —, 156 N. W. 561, the power of the legislature to control cities and villages in North Dakota in matters of public concern is only limited by the provision that the laws shall be general. See N. D. Const. art. 6, § 130, and in this respect the restriction is very different in North Dakota from what it is in some other states, such as Michigan, where the Constitutions guarantee the right of local self-government in so far as cities and villages are concerned, in far more comprehensive and extensive terms than does the Constitution of this state. This is true of the state of Nebraska, and it is on the Nebraska case of State ex rel. Atty. Gen. v. Moores, supra, that appellant largely relies. Here in North Dakota the municipality is created by the legislature under a general law. See Const. art. 6, § 130. There (Nebraska), under the earlier Constitution, there was no reference to cities, except that limiting their bonded indebtedness and right to vote money for private purposes, while under the latter the additional purpose is that cities of over 5,000 inhabitants (and the city of Omaha belonged to that class) may frame their own charters for their own government. See Neb. Const. art. 11, § 2; see also Constitution of 1877.

This, indeed, this court in the case of Ex parte Corliss, supra, has expressly conceded, for it is there stated that "it must not be overlooked that there is a wide distinction in this respect [local self-government] between counties and municipalities, the former by express provisions of the Constitution having been made political subdivisions of the state, while cities and other municipalities, so far as this state and most other states are concerned, are mere *creatures of the legislative department,* and, being such, are, of course, in all respect subject to legislative regulation and control." See page 477.

We realize that there may be statements in the quotation from the article by Mr. Amasa Eaton with regard to local self-government (13 Harvard L. Rev. 441, and 14 Harvard L. Rev. 20, 116), which occur later in the opinion, which may appear to announce a contrary holding and a larger municipal authority, but this quotation must be taken with the qualification as to municipalities heretofore given. It is also to be remembered that in Mr. Eaton's state of Rhode Island municipalities and settlements antedated the state; and that there is there, therefore, much to the contention that the localities created the state, rather than that the state created the localities. Here the state created the municipalities, and unless the Constitution has interfered, which we think it has not, in the case of cities and villages, the control of the legislature is supreme. See State ex rel. Linde v. Taylor, 33 N. D. 76, L.R.A. —, —, 156 N. W. 561; State ex rel. Faussett v. Harris, 1 N. D. 194, 45 N. W. 1101; Elliott, Mun. Corp. 2d ed. 258.

To quote the language of the court in Com. v. Plaisted, 148 Mass. 375, 384, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224: "We find no provision of the Constitution with which . . . [the provisions of the act which are complained of] conflicts, and we cannot declare an act of the legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the Constitution."

It is also urged that "§§ 206 and 207 of the Compiled Laws of 1913 do not confer upon the fire marshal the power to arbitrarily order the destruction of wooden buildings, but the proper construction of these two sections would give the owner the right to repair, as the object sought to be obtained by the fire marshal is to see that all dangerous conditions are remedied and abated. And if the dangerous condition can be remedied without such destruction, to order such destruction would be to destroy property without due process of law."

It is also maintained that the fire marshal gives as the basis of his order to tear down the structure the reason that it is a menace to adjacent buildings as a fire hazard; and that there is no showing made anywhere in the record that this is a fact. There is no merit, however, in these objections.

Section 206, Compiled Laws of 1913, provides: "If the fire marshal, chief assistant fire marshal, or any other officer mentioned in the

preceding sections, upon an examination or inspection finds a building or other structure, which, for want of proper repair by reason of age and dilapidated condition, defective or poorly installed electric wiring, or equipment, defective chimneys, defective gas connections, defective apparatus, or for any other cause or reason, is especially liable to fire, and which building or structure is so situated as to endanger other buildings or property, such officer shall order such buildings to be repaired, torn down, demolished, materials removed, and all dangerous conditions remedied and abated. If such officer finds in a building or upon any premises any combustible or explosive material, rubbish, rags, waste, oils, gasolene, or inflammable conditions of any kind, dangerous to the safety of such buildings or property, he shall order such material removed and such dangerous conditions remedied and abated. Such order shall be made against and served personally, or by registered letter, upon the owner, lessee, agent, or occupant of such buildings or premises, and thereupon such order shall be complied with by the owner, lessee, agent, or occupant within the time fixed in such order. Any person who shall interfere in any way with the fire marshal, chief assistant fire marshal in the performance of their duties, shall be guilty of a misdemeanor."

Section 208 provides: "If the owner, lessee, agent, or occupant deems himself aggrieved by an order of an officer under the preceding section and desires a hearing he may complain or appeal, in writing, to the fire marshal within five days from the service of the order, and the fire marshal shall at once investigate said complaint, and he shall fix a time and place not less than five days nor more than ten days thereafter when and where said complaint will be heard by the fire marshal, and the fire marshal at said hearing may affirm, modify, revoke, or vacate said order, and unless said order is revoked, modified or vacated by the fire marshal, it shall remain in force and be complied with by such owner, lessee, agent or occupant within the time fixed in said order, or within such time as may be fixed by the fire marshal at said hearing."

Section 209 provides: "If a person is aggrieved by the final order of the fire marshal, as made at the hearing provided for in the preceding section, such person may, within five days thereafter, appeal to the district court in the county in which the property is situated, notify-

ing the fire marshal of such appeal within three days thereafter, which notice shall be in writing, and delivered personally to the fire marshal or left at his principal office in the city of Bismarck. The party so appealing shall within two days thereafter file with the clerk of the district court in which appeal is made a bond in an amount to be fixed by the judge of the judicial district in which the property is situated, but in no case less than one hundred dollars ($100) with at least two sufficient sureties, to be approved by said court, conditioned to pay all the costs of the appeal in case the appellant fails to sustain the same, or the appeal be dismissed for any cause. The district court shall hear and determine the appeal within ten days, or as soon thereafter as possible, from the date of the filing of the same at any place in the judicial district to be designated by the judge of said court. The fire marshal shall make a complete transcript of the proceedings had before him and certify the same together with all the original papers filed in his office, and transmit them to the district court at least three days prior to the date of hearing as fixed by the court. In case the decision is against the appellant, or for any cause the appeal be dismissed, judgment for the costs shall be ordered against the appellant."

An examination of the record will disclose: (1) That an examination and inspection of the property was made by the chief assistant fire marshal as provided for in § 206. (2) That as provided for in said section, an order was issued and served upon the appellant herein, ordering the structure in question to be demolished. (3) That an appeal was taken from the order of the chief assistant fire marshal to the state fire marshal by virtue of the provisions of § 208 of the Compiled Laws of 1913, that it appears from the order of the state fire marshal confirming the order of his assistant above described, that the hearing upon said appeal was held in the city of Devils Lake, the residence of the appellant, and that the appellant appeared in person and was advised of his right of being represented and advised therein by counsel, and was further advised that he was *entitled to have witnesses subpœnaed on his behalf to testify in said proceeding,* and that at such time before the said state fire marshal, *the appellant offered in evidence his sworn statement, and in addition numerous affidavits, all of which became a part of the files and the record in this case,* and in addition

the said state fire marshal personally viewed and inspected the property described by the order issued by the assistant fire marshal. (4) That an appeal was taken by the appellant herein from the final order of the state fire marshal to the district court of the second judicial district as provided for by § 209 of the Compiled Laws of 1913; and that all of the testimony, both oral and documentary, was transmitted to the district court.

It is clear to us from an examination of the statute that the primary duty of determining whether premises are dangerous or not is vested in the fire marshal, and it is only when the trial court is convinced that the fire marshal has abused his discretion that his judgment will be interfered with. We agree with the trial judge that, although the testimony is conflicting, there is much in support of the decision of the fire marshal; and since the trial judge himself inspected the building and came to the same conclusion, we, on appeal, would be usurping authority if we interfered with the judgment of either. We agree with counsel for the appellant that the fire marshal is not vested with arbitrary power. We are not prepared to hold, however, that he acted in an arbitrary manner.

It is also urged that the phrase, "to hear and determine," as used in § 9 of the Session Laws of 1913 and § 209 of the Compiled Laws of 1913, makes it incumbent upon the district court, on appeal from the fire marshal, to try the matter anew and to take testimony, and that the defendant should have been allowed to take testimony on his own behalf (as he offered to). We do not, however, so hold. The statute contemplates a fair and full hearing before the fire marshal. It also provides that upon appeal to the district court the fire marshal shall make a complete transcript of the proceedings had before him, and certify the same, together with all the original papers filed in his office, to the district court. The statute says nothing about a trial *de novo,* nor does it specifically provide for the method of procedure. The district judge should no doubt acquaint himself thoroughly with all of the circumstances of the case, and, when the order of the fire marshal is challenged on account of an alleged erroneous determination of a question of fact, may no doubt summon additional witnesses, and may, as was done in the case at bar, himself examine the premises. We find nothing, however, in the act of the legislature which commands this to be done.

In the case at bar not only was a full hearing held before the fire marshal, but the testimony was taken down in shorthand and a full transcript and record transmitted to the district court. When a person has had a fair and complete hearing before an administrative officer, such as the fire marshal, and an ultimate appeal to a court upon the complete record, this is all that due process of law requires.

It is further contended that the fire marshal has failed to prove by competent testimony that the structure was damaged 50 per cent or any amount over 40 per cent; that the record gives a clear preponderance of testimony in favor of defendant's and appellant's contention; that the fire marshal has failed to prove by any testimony whatever that the structure in question is a menace to adjoining property and the city of Devils Lake as a fire hazard. We think there is no merit in this contention. We are dealing with the statutes, and not with the ordinances of the city of Devils Lake. All that the statute requires is that the fire marshal shall be satisfied that the property is dangerous. It must be manifest to all that the fact of the amount of damage thereto, and whether to the extent of 50 per cent or not, would in no manner be determinative of this fact.

It is further contended that, if the district court did not have the power to try the case *de novo,* it did not have the power to enter formal judgment, as was done in the case at bar, but merely to issue an order either affirming, reversing, or modifying the order of the fire marshal. We think there is no merit in this contention. The statute (§ 209) requires a complete transcript of the proceedings and of the original papers, to be transmitted to the district court. It also provides that in case of a decision against the appellant, or in case the appeal is dismissed for any cause, judgment for the costs shall be ordered against the appellant. It clearly contemplates the entry by the district court of a judgment such as that rendered in the present case, and which was to the effect that it be "adjudged, determined, and decreed that that certain order heretofore made and rendered by the said A. H. Runge as fire marshal of the state of North Dakota, under date of the 4th day of February, A. D. 1915, be and the same hereby is in all things affirmed; and it is further adjudged, determined, and decreed that the said I. Glerum, owner of said lot 16, block 25, of the original plat of the city of Devils Lake, North Dakota, and that certain remnant of

a frame building thereon, be, and the same hereby is, required to tear down and remove the remnant of said certain frame structure within thirty days from the date hereof, thereby lessening the fire hazard to adjoining property and the city of Devils Lake, and you are advised in no way to omit complying with said order hereby affirmed, and this judgment, under penalty of the statute in such cases made and provided, together with costs taxed in the sum of $18."

The judgment of the District Court is in all things affirmed.

GRACE, J. I dissent.

STATE OF NORTH DAKOTA EX REL. M. C. GAULKE v. A. F. TURNER.

(164 N. W. 924.)

Public grain-storage warehouses — building of — within state — Commissioners of Railroads — may create fund for — legislature — act — title — subject expressed in — must be but one — constitutionality.

1. The clause of senate bill No. 314, legislative assembly of 1917 [Laws 1917, chap. 56], which provides that the Commissioners of Railroads shall set aside 25 per cent of all fees collected to create a fund for building public grain-storage warehouses within the state, is not expressed in the title to the act, and is therefore unconstitutional.

Legislature — act of — Constitution — in violation of — subject of — must be embraced within title — constitutionality — upheld so far as expressed.

2. An act of the legislature which violates the provisions of § 61 of the Constitution of North Dakota, which provides that no bill shall embrace more than one subject which shall be expressed in its title, is invalidated only as to so much thereof as is not so expressed.

Habeas corpus proceeding — constitutionality of act — may be raised in.

3. The constitutionality of an act of the legislature may be raised in a habeas corpus proceeding.

NOTE.—The note in 18 L.R.A.(N.S.) 713, on power of legislature to delegate to commission the right to fix rates to be charged by public service corporation, referred to in the opinion above, is brought down in 32 L.R.A.(N.S.) 649.

Subject of act — single — expressed in title — plurality of subjects — will not invalidate — as to part singly expressed.

4. Where the subject of an act is single and the same is expressed in its title, the act will not be invalidated by the fact that the title announces a plurality of subjects.

Act — title of — one subject — valid.

5. The title of the act under consideration examined, and *held* not to contain more than one subject.

Constitutional provision — act of legislature — title to embrace but one subject — must be therein expressed.

6. The constitutional provision which provides that "no bill shall embrace more than one subject, which shall be expressed in its title," is not intended to forbid or to prevent including in the bill such means as are reasonably adapted to secure the objects indicated by the title.

Title to act — provisions in body of — germane thereto — determination of — general subject — must be considered — express words — implication — meaning of terms — body of act — purpose of.

7. In considering the title to an act, and determining whether the provisions in the body are germane thereto, the general subject must be considered and the specific wording of the title is not always important. It is sufficient if the title, either by express words or by necessary or reasonable implication from the meaning of its terms, includes the subject and the purposes of the body of the act.

General purpose of act — expressed in title — agricultural products — marketing of — grains — inspection — grading — licenses — officers — compensation — germane to title and general purpose.

8. Under a title which expresses the general purpose and subject of the regulation of the marketing of the agricultural products of a state, it is perfectly proper and germane for the body of the act to contain provisions for inspecting and grading the creation of markets, the granting of licenses and the fees and charges for such licenses and inspection and grading, as well as for the officers and deputies to be appointed and the compensation of such

Ministerial officers — powers of — legislature may delegate — grades of grain — enforcement of act.

9. The legislature may delegate to ministerial officers the power to create and to enforce grades.

Ministerial board — powers of — employees — number of — compensation — general inspection law — terms of — necessary to carry out — cost of inspection — must not be exceeded — fees and licenses — fund — expenses paid from.

10. The legislature may delegate to a ministerial board the power to fix

the salaries, and to determine the number of employees necessary to carry out and enforce the provisions of a general inspection law, provided that the total sum to be paid and expended shall not exceed the reasonable cost of such inspection, and is paid from a fund created by fees for licenses and for inspection and grading, and no part of which is to be used for any other purpose.

License fees — expenses of regulation — must not exceed.

11. License fees cannot be exacted which are in excess of the sum reasonably necessary for the expenses of regulation.

Economic facts — conclusions of legislature — conditions to be remedied — courts may review.

12. The courts cannot review the economic facts on which the legislature of a state bases its conclusions that an evil exists and should be remedied.

Legislature — discretion — public welfare — means employed to promote — propriety of its action — as to measure of means provided — courts cannot decide.

13. The legislature of a state is given a large discretion with reference to the means it may employ to promote the public welfare, and the courts cannot undertake to decide whether the means adopted are the only or even the best means possible to attain the end sought.

Ministerial boards — officers — power to perfect details — may be given — legislature — general outlines — laid down by.

14. Ministerial boards and officers may be given the power to perfect the details of a plan, the general outlines of which have been laid down by the legislature.

Marketing of agricultural products — regulations of — legislature may provide — public money — expenditure of — in aid of private persons — act does not require.

15. Senate bill No. 314 of the legislative assembly of 1917, and which seeks to regulate the marketing of agricultural products in North Dakota, is not invalid or repugnant to the provisions of § 185 of article 12 of the Constitution, which forbids the loaning or giving of public moneys in aid of any individual, association or corporation.

Constitutions — state — national — legislature — sovereign power of — limited only by Constitutions.

16. Except where limitations are imposed by the state or national Constitutions, the sovereign power of the legislature is practically unlimited.

Appropriations — general — special — later made by separate bills — embracing but one subject — system of regulation — provisions — carrying out of — act may provide.

17. All that § 62 of the Constitution of North Dakota requires in regard to special, as opposed to general, appropriations, is that they "shall be made by

separate bills embracing but one subject;" and an appropriation may be made in an act creating a system of regulation, and for carrying out its provisions, and as a part of such act.

Habeas corpus — writ of — liberty of person arrested — only affected by — other persons — intervention by — not permissible.

18. A writ of habeas corpus affects only the liberty of the person arrested, and intervention on the part of other persons is not permissible.

Legislature — directions of — carrying out — persons appointed for that purpose — bias or prejudice — not for courts to determine.

19. Whether the persons directed by the legislature to carry out the provisions of an inspection or grading act are liable to bias or prejudice is a matter for the legislature, and not for the courts, to determine.

Opinion filed August 20, 1917.

Proceeding on a writ of habeas corpus.

Writ quashed.

O'Connor & Johnson, for petitioner, with brief by *E. T. Burke,* as *amicus curiæ.*

William Langer, Attorney General, *H. A. Bronson,* and *D. V. Brennan,* Assistant Attorneys General, and *T. B. Elton,* States Attorney (with *S. L. Nuchols,* of counsel) for respondent.

BRUCE, Ch. J. This is a proceeding on a writ of habeas corpus. In it is involved the determination of various constitutional questions arising out of an act passed by the legislative assembly of 1917, numbered senate bill No. 314, to be found on page 188 of the popular edition of the Session Laws, and generally known as the Uniform State Grading Act [Laws 1917, chap. 56]. An attack, indeed, is made upon the constitutionality of the whole law.

Although the question has been somewhat mooted, and although a proceeding in equity is much preferable, as in it various parties may be allowed to intervene and the act may thus be more thoroughly scrutinized, and from all standpoints, it seems now to be well established that the constitutionality of an act may be passed upon on habeas corpus. See 12 R. C. L. 1198; State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970.

The petitioner, M. C. Gaulke, is an operator of a public elevator and

warehouse at Thompson, North Dakota. More specifically, he is the agent and buyer of a co-operative farmers' elevator. He was arrested under the provisions of the act under consideration for the offense of having "purchased, weighed, graded, and inspected grain and seeds without first having obtained a license as deputy inspector of such grain and seeds thus purchased, graded, weighed, and inspected, said grain and seed not having first been inspected, weighed, and graded by a deputy state inspector of grades, weights, and measures."

The provisions of the act in question, and under which the arrest was made, are that "it shall be unlawful for any person operating a public warehouse to purchase, weigh, grade or inspect grain or seed who is not licensed as deputy inspector, provided that any person without a license may buy any article that has been graded, weighed and inspected by a deputy state inspector of grades, weights and measures."

The act as a whole is as follows:

"The Commissioners of Railroads, of North Dakota, shall appoint a member of the faculty of the North Dakota Agricultural College (who shall be an expert in the grading and weighing of all kinds of grain, seeds, and other agricultural products) to be the state inspector of grades, weights and measures and shall receive in addition to his other compensation the sum of $1,000 per annum. It shall be the duty of said inspector to proceed at once to define and establish proper grades and weights for grain, seeds and other agricultural products, also for flour meal and products made therefrom, which grades and weights shall be approved by the Commissioners of Railroads.

"The Commissioners of Railroads shall authorize the employment of such clerical help as is necessary for carrying out the provisions of this act, and determine the compensation to be paid for such service.

"The state inspector of grades, weights and measures shall cause said formula or scale of grades, weights and measures to be published in not more than five newspapers of general circulation in the state of North Dakota, two of which shall be devoted to the benefits of agriculture and three shall be papers of general circulation.

"The said standards of grades shall be published each year not later than August 1st.

"The state inspector of grades, weights and measures shall have power to appoint skilled and competent deputies who shall be stationed

at any town or place where grain, seed and other agricultural products are marketed; provided that the town or community where such deputy is stationed shall at their own expense provide a suitable building and scales for housing said deputy, the upkeep of said building and scales shall be borne by the state out of funds secured on account of fees collected for inspecting and weighing.

"It shall be the duty of the deputy to weigh, inspect and grade all grain, seeds and produce that shall be offered for sale at said market place, and to issue a signed certificate stating the kind, grade and weight of such grain, seeds or produce, also the amount of dockage, if any, and such other facts as he may find relative to its condition. It shall also be the duty of said deputy to accurately sample and grade carload shipments destined for some central market either within or outside the state, and to make and attach a signed inspection certificate to a sealed package containing the sample, and forward same to a deputy in charge of said central market.

"The Railroad Commissioners shall appoint such number of inspectors of public warehouses as may be necessary who shall be men of expert and practical knowledge of the grain business; who shall visit the public warehouses in the state for the purpose of ascertaining whether a sufficient bond is in force to protect the holders of storage tickets for grain stored therein; whether such institution is amply protected by insurance; to advise with local managers and board of directors as to proper methods of accounting; to assist local warehousemen in making proper reports, and to enforce the rendering of annual or other reports required by the Railroad Commissioners; to see that all laws as regards public warehouses are complied with, and to advise and assist local warehousemen in any way that will make for efficiency and for the safety of the grain marketing business of the state. Should such inspectors find any condition prevailing in any public warehouse that would impair the safety of such institution, they shall report same to the Board of Railroad Commissioners and to the local board of directors of the institution in question. Failure to remedy such condition will empower the Board of Railroad Commissioners to suspend the license of such warehouse, or in extreme cases, if after full notice, and reasonable time being allowed to comply with the instructions of the Board of Railroad Commissioners such local

warehouse refuses to remedy said complaint; the Board of Railroad Commissioners may cancel the license of such warehouse.

"The Commissioners of Railroads may establish as they see fit central markets for the display of samples of grain, seeds and other agricultural products, and may install a deputy in charge of said central markets at the cities of Duluth, St. Paul and Minneapolis, in the state of Minnesota, also Superior, Wisconsin, Fargo, Fairmont, Wahpeton, and Grand Forks, North Dakota, and such other stations as in the judgment of the Commissioners of Railroads shall be necessary to provide adequate marketing facilities; that said markets shall be open to any and all persons desiring to buy or sell on said market, and that the charges for said services shall be fixed and determined by said Commissioners of Railroads. They shall also establish uniform fees for grading, weighing, inspecting and selling. All of said fees so collected shall be paid into the treasury of the state of North Dakota. They shall also fix the salary or compensation to be paid to deputies and employees. They shall also provide a system of bonding said deputies and other employees. They shall also require that any and all persons purchasing or receiving grain on consignment at central market shall give an indemnity bond in a sufficient sum to fully protect the seller against fraud or loss. They shall also formulate rules and regulations governing the conduct of all public warehouses where grain, seed and other agricultural produce is bought, sold or received for storage, and such warehouses shall be bonded in a sum sufficient to amply protect all persons transacting business with them against loss.

"Said state inspector of grades, weights and measures may with the approval of the Commissioners of Railroads, license as deputy inspector the buyer or agent of a privately owned warehouse, provided that said deputy inspector shall pass such examination as to competency as may be prescribed, and give a bond in a sufficient amount, as required according to regulations prescribed by the state inspector of grades, weights and measures.

"All licenses issued to deputy inspectors in private warehouses shall be for the term of one year.

"The conditions of such licenses shall require the holders thereof to well and truly fix grades and actual dockage of all grains inspected by

them at their respective places of business and to correctly weigh the products so inspected and graded.

"Each licensee shall cause his license to be posted in a permanent and conspicuous place at his regular place of business, and shall not be authorized to inspect, grade, or weigh grain at other places, except with the approval of the Commissioners of Railroads.

"The inspector of grades, weights and measures, shall collect a fee of $10 for each license issued. Licenses are subject to cancelation by the Commission for violation of rules or other good cause.

"It shall be unlawful for any person operating a public warehouse to purchase, weigh, grade or inspect grain or seed who is not licensed as deputy inspector, provided that any person without a license may buy any article that has been graded, weighed and inspected by a deputy state inspector of grades, weights and measures.

"The state inspector of grades, weights and measures shall receive all appeals from the decisions of all deputy inspectors under such rules as shall be approved by the Commissioners of Railroads for reinspection, and the state inspector of grades, weights and measures shall consider the flour and bread producing qualities where such final decision is necessary.

"Any person violating any of the provisions of this act shall be guilty of a misdemeanor and for the first offense shall pay a fine of not less than $10 and not more than $100, or be confined in the county jail not less than ten days nor more than thirty days, or both such fine and imprisonment.

"For each succeeding offense he shall pay a fine of not less than $100, or more than $500 or be confined in the county jail not less than thirty days or more than ninety days, or both such fine and imprisonment.

"There is hereby appropriated the sum of $10,000 for the purpose of putting this law in force and effect, said appropriation to be known as the state public grain grading and weighing fund, which sum shall be replenished and maintained by adding thereto all fees for licenses of deputies and inspecting, weighing and grading, and all salaries or compensation of deputies and employees shall be paid out of this fund. The Commissioners of Railroads shall fix the fees for weighing, grading and inspecting and marketing at a sum sufficient to make the

state grading, inspecting, weighing and marketing department self-sustaining, and in addition, to set aside 25 per cent of all fees collected to create a fund for building public grain storage warehouses within the state."

The first challenge to the constitutionality of the act is to the effect that more than one subject is embraced in its title, and that the act, therefore, violates § 61 of the Constitution of North Dakota, which provides that:

"No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed."

It is also claimed that the act itself contains more than one subject.

The title of the act is as follows: "An Act Creating a Uniform State Grade for Wheat, Oats, Barley, Flax, and All Other Grains, Seeds and Agricultural Products; Creating and Establishing the Office of State Inspector of Grades, Weights and Measures and Providing for State Aid for Marketing Facilities and the Establishment of State-Owned Marketing Places and Providing for Inspection of Licensed Warehouses by Competent Accountants, and Expert Grainmen, and Authorizing the Employment of Such Accountants, and Making an Appropriation therefor; and Providing Penalties for the Violation of Any of the Provisions of This Act."

It is first urged by the petitioner and conceded by the attorney general, that the subject of the last clause of the act, which provides that in addition to the "sum sufficient to make the state grading, inspecting, weighing, and marketing department self-sustaining," the Commission "shall raise by fees and license moneys and set aside 20 per cent of all fees collected to create a fund for building public grain-storage warehouses within the state," is not embraced within the title of the act, and is therefore unconstitutional.

This point and this concession are no doubt correct, and we are satisfied that the act is to this extent unconstitutional. This fact and this concession, however, does not of itself nullify the whole statute. We are satisfied, indeed, that the clause may be eliminated and the remainder of the act considered without it, and this under the provisions of § 61 of article 2 of the Constitution, which provides that "no bill

shall embrace more than one subject, which shall be expressed in the title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as *shall not be so expressed.*" This indeed appears to be the general rule of constitutional construction even in the absence of an express provision to that effect. Cooley, Const. Lim. 3d ed. 211; State v. Bickford, 28 N. D. 36, 87, 147 N. W. 407, Ann. Cas. 1916D, 140; Malin v. Lamoure County, 27 N. D. 149, 50 L.R.A. (N.S.) 997, 145 N. W. 582, Ann. Cas. 1916C, 207.

We can therefore now consider both the title and the body of the act from the standpoint that this clause has been eliminated. And, first, as to the alleged multiplicity in the title itself.

Granting for the sake of argument, that the title does contain more than one subject, this in itself would not be fatal to the validity of the statute. The constitutional provision in question is directed, as far as multiplicity is concerned, to the body of the act, rather than to the title. It provides that "no bill shall embrace more than one subject, which shall be expressed in its title."

As far as the title is concerned, it merely states that it shall express the subject of the act. In the case of Eaton v. Guaranty Co. 11 N. D. 79, 88 N. W. 1029, we hold that "where the subject of a statute is single and the same is expressed in its title, the act will not be invalidated by the fact that the title announces a plurality of subjects."

But the concession we have above made was only made for the sake of argument, as we are satisfied that the title does not in fact contain more than one subject. The subject of the act is the marketing of agricultural products. All else that is contained either in the body of the act or in the title is merely incidental thereto. The constitutional provision "is a very wise and wholesome provision, intended to prevent legislators from being entrapped into the careless passage of bills on matters foreign to the ostensible purpose of the statute as entitled, but it is not designed to require the body of the bill to be a mere repetition of the title; neither is it intended to prevent including in the bill such means as are reasonably adapted to secure the objects indicated by the title." Kurtz v. People, 33 Mich. 279.

The title to an act, indeed, is nothing more or less than an index, and it bears much the same relation to the legislation that is to follow that a crossroads sign does to public traffic. The purpose of the consti-

tutional provision is to prevent the practice which formerly was so common in all legislative bodies, and which even to-day is the standing disgrace of our congressional legislation, of embracing in the same bill incongruous matters having no relation to each other or to the subject specified in the title, and which measures were often adopted without attracting attention; and of combining distinct subjects representing diverse interests, in order to unite the members of the legislature who favored either in support of all. By this means, not only were legislators misled and coerced into voting for measures which otherwise they would have opposed, but the public was misled also. The purpose of the provision, indeed, was, not only to prevent the incorporation in one act of various and diverse subjects, but to serve as a notice or sign-board, not only to the legislators, but also to the public. It was designed to give all parties general notice of what the act contained so that the legislators might protest against unsatisfactory measures and clauses, and the public could in turn protest to their representatives. The mere fact, however, that a signboard states that "this road leads to Buffalo, Casselton, and Fargo," and that the names of Buffalo and Casselton are included as well as Fargo, does not preclude such sign from giving notice to all that the road leads to Fargo. See Sutherland, Stat. Const. § 78.

"If the legislature is fairly apprised of the general character of an enactment by the subject as expressed in its title, and all its provisions have a just and proper reference thereto and are such as, by the nature of the subject so indicated, are manifestly appreciated in that connection, and as might reasonably be looked for in a measure of such character, then the requirement of the Constitution is complied with. It matters not that the act embraces technically more than one subject, . . . so that they are not foreign and extraneous to each other, but 'blend' together in the common purpose evidently sought to be accomplished by the law." State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765; Winters v. Duluth, 82 Minn. 127, 84 N. W. 789. See also McKone v. Fargo, 24 N. D. 53, 138 N. W. 967; Lewis's Sutherland, Stat. Constr. ¶ 131.

But it is further contended that several subjects are included in the act which are not expressed in the title. It is contended, and no doubt is true, that the act contains provisions as follows:

(1) That the Commissioners of Railroads shall appoint a member of the faculty of the North Dakota Agricultural College to be the state inspector of grades, weights, and measures.

(2) That such state inspector shall receive, in addition to his other compensation, the sum of $1,000 per annum.

(3) That he shall establish and define proper grades and weights for grain, seeds, and other agricultural products; also flour, meal, and products made therefrom.

(4) That such grades and weights shall be approved by the Commissioners of Railroads.

(5) That the Commissioners of Railroads shall authorize the employment of such clerical help as is necessary for the carrying out of the provisions of the act, and determine the compensation to be paid for such service.

(6) That the state inspector shall cause said formula or scale of grades, weights, and measures to be published in not more than five newspapers of general circulation in the state of North Dakota.

(7) That the state inspector shall have power to appoint skilled and competent deputies who shall be stationed at any town or place where grain, seed, and other agricultural products are marketed; provided that the town or community where such deputy is stationed shall at their own expense provide a suitable building and scales for housing said deputy; the upkeep of said building and scales shall be borne by the state out of funds secured on account of fees collected for inspecting and weighing.

(8) That it shall be the duty of the deputy to weigh, inspect, and grade all grain, and to issue certificates therefor, and to sample and grade carload shipments.

(9) That the Railroad Commissioners shall appoint such number of inspectors of public warehouses as may be necessary who shall ascertain whether sufficient bonds and insurance are provided for by each warehouse, to provide methods of accounting, to assist local warehousemen in making public reports, to enforce the rendering of annual and other reports, to see that all laws as regards public warehouses are complied with, to advise and assist local warehousemen in any way that will make for the efficiency and for the safety of the grain marketing business of the state.

(10) That the Board of Railroad Commissioners shall have the power to suspend the license of such warehouses, or, in extreme cases, to cancel the license of such warehouses, who fail to comply with its directions.

(11) That the Commissioners of Railroads shall have the power to establish as they see fit central markets for the display of samples of grain, seeds, and other agricultural products, and may install a deputy in charge of said central markets, at the cities of Duluth, St. Paul, Minneapolis, Superior, Fargo, Fairmont, Wahpeton, and Grand Forks, and at such other stations as in their judgment shall be necessary to provide adequate marketing facilities. That the charges for said service shall be fixed and determined by them.

(12) That the Commissioners of Railroads shall fix the charges for the services rendered in said market; that they shall establish uniform fees for grading, weighing, inspecting and selling; that all of such fees so collected shall be paid into the treasury of the state of North Dakota; that the Commissioners of Railroads shall fix the salary or compensation to be paid to the deputies and employees; that they shall provide a system of bonding said deputies and other employees; that they shall require that any and all persons purchasing or receiving grain on consignment at a central market shall give an indemnity bond in a sufficient amount to fully protect the seller against fraud or loss; that they shall formulate rules and regulations governing the conduct of all public warehouses, where grain, seed, and other agricultural produce is bought, sold, or received for storage, and that such warehouses shall be bonded in a sum sufficient to amply protect all persons transacting business with them against loss.

(13) That the state inspector of grades, weights, and measures may, with the approval of the Commissioners of Railroads, license as deputy inspector the buyer or agent of a privately owned warehouse, provided that such deputy inspector shall pass such examination as to competency as may be prescribed, and give a bond in a sufficient amount as required, according to regulations prescribed by the state inspector of grades, weights, and measures.

(14) That each licensee shall cause his license to be posted in a permanent and conspicuous place at his regular place of business, and

shall not be authorized to inspect, grade or weigh grain at other places except with the approval of the Commissioners of Railroads.

(15) That the inspector of grades, weights, and measures shall collect a fee of $10 for each license issued.

(16) That it shall be unlawful for any person operating a public warehouse to purchase, weigh, grade, or inspect grain or seed, who is not licensed as deputy inspector, provided that any person without a license may buy any article that has been graded, weighed, and inspected by a deputy state inspector.

(17) That the state inspector shall receive all appeals from the decisions of all deputy inspectors under such rules as shall be approved by the Commissioners of Railroads.

(18) That a violation of any of the provisions of the act shall be a misdemeanor, and that for the first offense a fine of not less than $10 nor more than $100, or confinement in the county jail not less than ten days nor more than thirty days, or both such fine and imprisonment, shall be incurred, and for each succeeding offense a fine of not less than $100 nor more than $500, or confinement in the county jail not less than thirty days nor more than ninety days, or both such fine and imprisonment.

(19) That such fund shall be appropriated the sum of $10,000 for putting the law into force and effect.

(20) That there shall be replenished and maintained by adding thereto all fees for licenses of deputies, and for inspecting, weighing, and grading, and that all salaries or compensations of deputies and employees shall be paid out of this fund.

(21) That the Commissioners of Railroads shall fix the fees for grading, inspecting, and marketing at a sum sufficient to make the state grading, inspecting, and marketing department self-sustaining, and, in addition thereto, set aside 25 per cent of all fees collected to create a fund for building public grain storage warehouses within the state.

As we have before stated, the real subject of the act is the regulating of the marketing of agricultural products, and this purpose, or this subject, is, to our minds, clearly expressed in the title. In considering the title to an act and determining whether the provisions in the body of the act are germane thereto, the general subject must be, and

is, considered, and the specific wording of the title is not always important.

As was held in the case of State ex rel. Poole v. Peake, 18 N. D. 101, 120 N. W. 47, in determining the constitutionality of a legislative act under § 61 of article 2 of the state Constitution, the title is to be considered in the light of the general object and purpose of the act; and if, when so considered, the provisions of the act appear to be in furtherance of the general purposes expressed in the title, the act will be upheld. We held that it is sufficient "if the title, either by express words or *by necessary or reasonable implication from the meaning of its terms,* includes the subject and purposes of the act."

It is not necessary indeed, that the title should specifically state that the purpose of the act is to regulate the marketing of grain and agricultural products. If that purpose is clearly evident from the title, that is, if it is the subject of the act, all matters which are germane thereto, and which are contained in the body, are properly incorporated therein.

In the case of State v. Minneapolis & N. Elevator Co. 17 N. D. 23, 138 Am. St. Rep. 691, 114 N. W. 482, the title of the act was: "An Act Requiring Elevator Companies Transacting Business in This State to Return Certificate of Inspection and Weighmaster's Certificate to the Local Buyer."

The act contained a provision for the return of such certificate by the elevator companies to their local agents, and also that the latter should post the same in a conspicuous place in the elevators.

This court said: "It is asserted that the entire act is void because it contravenes the provisions of § 61 of the state Constitution, which requires that a bill shall embrace but one subject, which shall be expressed in its title. The argument, in brief, is that §§ 1 and 2 each relate to different subjects; the first, to the duty enjoined upon elevator companies to transmit to their local agents the official certificates of inspection and weights; and the second, to the duty enjoined upon the local agents to post such certificates. We are entirely clear that such contention is without merit. It is manifest that the act embraces but one subject or object, to wit, the furnishing to the public such information as may be imparted by the posting, in the elevators of the official certificates mentioned in the act. In furtherance of this general design,

§ 1 requires such certificates to be transmitted by the elevator company to its local agent, and § 2 requires the latter to post and keep posted such certificates in a conspicuous place in the elevator. It is thus apparent that these two sections are closely related to the subject-matter of the act. In fact, the provisions of one would be rendered abortive without the other. The fact that the title of the act is somewhat restricting in its terms does not render the act void, as the provisions of § 2 which are not expressly referred to in the title are, we think, clearly germane to the subject-matter embraced in the title. A reading of the title readily suggests that the body of the act might contain provisions similar to those embraced in § 2; for, without any requirements other than those expressly mentioned in the title, the act would accomplish no useful purpose."

Again, the supreme court of Illinois, in sustaining a conviction for selling liquors to minors under an act whose title was: "A Bill for an Act to Revise the Law in Relation to Licenses," said: "It may be that licenses to sell liquor were not specifically named in the title, but it was undoubtedly so expressed as to call the attention of every senator to the subject-matter of the bill, and we have no doubt that this general expression of the subject of the bill answers the constitutional requirement. The provision does not require that the subject of the bill *shall be specifically and exactly expressed in the title. Hence, we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required.*" Johnson v. People, 83 Ill. 431–436, 2 Am. Crim. Rep. 396.

Again, in the case of Cole v. Hall, 103 Ill. 30, a provision imposing a license fee upon the owners of dogs was held to be germane to and sufficiently expressed in the title: "An Act to Indemnify the Owners of Sheep in Cases of Damage Committed by Dogs."

Again, in the case of O'Leary v. Cook County, 28 Ill. 534, it was held that a provision prohibiting the sale of ardent spirits within 4 miles of a college was sufficiently referred to in and germane to the subject of an act entitled, "An Act to Amend an Act Entitled an Act to Incorporate the Northwestern University." "The object of the charter," the court said, "was to create an institution for the education of young men, and it was competent for the legislature to embrace within it everything which was designed to facilitate that object. Every

provision which was intended to promote the well-being of the institution or its students was within the proper subject-matter of that law. We cannot doubt that such was the single design of this law. . . . This provision . . . was designed for the benefit and the well-being of the institution, and this is the touchstone of the constitutionality of the enactment." See also Abington v. Cabeen, 106 Ill. 200.

Again, in the case of State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970, this court construed the title of an act "to Provide for the Organization and Government of State Banks," to embrace within its subject-matter the business of banking and receiving deposits generally, and upheld as germane to such subject a provision therein which provided that "it shall be unlawful for any individual, firm, or corporation to continue to transact a banking business, or to receive deposits for a period longer than six months immediately after the passage and approval of this act, without first having complied with and organized under the provisions of this act."

In the case of Powers Elevator Co. v. Pottner, 16 N. D. 359, 113 N. W. 703, we held that the title, "An Act Regulating the Filing and Foreclosure of Mechanics Liens upon Land," was broad enough to include within its subject a provision giving a lien to materialmen and laborers.

In the case of State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705, we held that the title, "An Act Defining the Boundaries of the Second, Eighth, and Ninth Judicial Districts of the State of North Dakota, and Providing for Terms of Court in said Districts," was broad enough to include a provision for the election of a judge of the ninth district.

It is next contended that the act in question attempts to delegate legislative powers to ministerial officers. It is claimed that it is a legislative power to limit the number of deputies and inspectors, the amount of expenditures, expenses, and salaries; and that this power has been delegated to the inspector and Board of Railroad Commissioners, and that this cannot be done. It is also claimed that it is a legislative act to fix grain grade standards and fees for inspection, and that this power also cannot be delegated.

The first case relied upon by counsel for the petitioner is the case of State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724, in which

this court declared that an attempt on the part of the legislature to delegate the power to Commissioners to fix the amount of money to be expended for building a capitol and an executive mansion, the act leaving it to the Commissioners to say how much should be devoted to the erection of the capitol and how much to that of the executive mansion, was an attempt to delegate legislative power, and this notwithstanding the fact that the aggregate cost of both buildings was limited to $600,000.

It is contended that in the case at bar the Board of Railroad Commissioners is authorized to employ necessary clerical help and determine the compensation for such service, and to appoint deputies in towns where the town at its own expense will provide scales and a building therefor.

It is claimed that there is no limit to the number of deputies or inspectors to be appointed, or to the salaries to be paid to the inspectors of public warehouses. It is also claimed that no limit is placed on the cost of the upkeep of the buildings and scales which the towns or localities are required to furnish.

Reliance is also placed upon the case of State ex rel. Miller v. Taylor, 27 N. D. 77, 84, 145 N. W. 425, in which this court said: "The act in question is invalid because it is an unwarranted delegation of purely legislative powers to the Commissioner of Insurance. It requires counties, cities, and other subdivisions of the state to pay premiums, the total sum so paid constituting the bonding fund. This fund is only limited by the number of officials and subdivisions coming within its own provisions, most of which are required to do so, while with some others it is optional. From the total fund the Commissioner is authorized to arbitrarily determine how much will be necessary to pay deputies, clerks, and other expenses of his department, and is required to set aside from such fund the amount so decided upon by him. No limit is placed by the act in question upon the amount which may be used for these purposes. It is left solely with the Commissioner, and only the remaining part of the fund is available to pay liabilities incurred during each year. *The separation of this fund into two parts—one for the payment of expenses and the other for the payment of losses—is a legislative act; and the very least that the legislature can do . . . is*

to place a limit upon the amount of the fund to be used in the payment of expenses."

It would seem, however, that the last portion of the quotation from the case of State ex rel. Miller v. Taylor, supra, and just referred to, completely distinguishes the case from that at bar. In the statute passed upon in that case the legislature was attempting to create a state bonding fund. It was requiring municipalities to contribute to that fund. It was requiring them to levy taxes and to make losses good. In the case at bar, however, with the exception of the 25 per cent which we have eliminated, there is no fund which is not created for the one and sole purpose of paying expenses. The act is a license and inspection act, and it is elementary that no fees for inspection can be exacted which are in excess of the sum reasonably necessary for the expenses of enforcement. Bartels Northern Oil Co. v. Jackman, 29 N. D. 236, 150 N. W. 576. It must be presumed, in the absence of a contrary showing, that the $10 license fee, and the other fees exacted, will not be in excess of such requirement. The only power that is delegated is the power to fix salaries and to determine the number of inspectors, etc. It is true that no limit is placed on the cost of the upkeep of the buildings where scales are kept, but this of course must be reasonable, and all of the expense must be within the limit of the sum total of the fees collected. If such a statute is unconstitutional, then all statutes are unconstitutional which create boards of trustees of our state university, agricultural college, or normal schools, and other schools and public institutions, and which appropriate sums of money for the running expenses of such establishments, but leave it to such trustees to expend the money appropriated as seems to them best, for the purposes specified to make what purchases may be necessary, and to fix the salaries of the professors and other employees. Surely the Constitution has not tied the hands of government to this extent. It has often been said that a democracy must of necessity be more or less inefficient, but surely a democracy is not required to be as inefficient as this. If these details were required, our legislators would have to be in constant session.

Counsel for petitioner also cites the case of Betts v. Land Office Comrs. 27 Okla. 64, 79, 110 Pac. 771, in which the court held repugnant to the Constitution of Oklahoma an act of the legislature which

allowed "the Commissioners of the land office may appoint such assistants and incur such expenses as are necessary in the management and handling of such property and funds, and shall pay such expenses out of the income of the school funds."

It will be noticed, however, that in this act the payment of expenses had to be made out of a general fund for school purposes, and whatever was so used for expenses was taken from the schools. There was no limit on the amount of expense that could be incurred.

In the case at bar there is no other fund but that for expenses after we eliminate the provision for the extra 25 per cent, which we have already done. As we have before said, the statute is a license and inspection statute. Its proceeds can only be used for expenses. The amount of expenses cannot exceed the reasonable cost of regulation. Even the number of deputies and inspecters must of necessity be limited to those who are reasonably necessary to the inspection and regulation, otherwise the license tax would be invalid. The case, then, is entirely different than the one passed upon by the supreme court of Oklahoma in the case of Betts v. Land Office Comrs., supra.

It also differs materially from that passed upon by our own court in State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724, and before cited; for in that case there were two funds,—one for the capitol building and one for the governor's mansion,—and the amount of each was left to the Commissioners to determine.

We have also examined the case of State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627. In that case, however, and for reasons given in the opinion, the fee was considered a tax rather than a license fee, as not coming within the police powers of the state, as not being for the purpose of the preservation of the public health, morals, safety, or welfare, and as a tax merely. In such case the tax was not limited by the amount of the expenses of inspection; and the legislature, therefore, neither expressly nor impliedly determined the amount which could be so expended. That case is entirely different from the one at bar.

But it is contended that the act is unconstitutional in that it delegates to the chief grain inspector the power to define and establish grades and weights for grains, seeds, and other agricultural products, and makes it the duty of the deputies to grade all grain, etc., which it also claimed

is a legislative or judicial power. There is no merit, however, in this contention.

The only inhibition of the law is that grain which is not graded shall not be marketed. The statute was passed to meet a peculiar exigency. Its purpose was to prevent fraud and to make it possible for the farmers of the state to ascertain the real nature and quality of their products, and not to be left entirely to the mercy or judgment of the purchaser. Though the purchaser may not buy grain which is not graded, he is still at liberty to refuse to buy the same if he believes the grade to be incorrect and not to meet the requirements of the eastern markets. It is, in fact, outside of the power of the state inspector to dictate to the eastern markets what the grades shall be, or what grades they shall accept or shall not accept. It is equally beyond his power to force a dealer to buy what he does not desire to buy, or to pay a price that he does not desire to pay. The inspector of grades and his deputies, indeed, are nothing more or less than advisers to the farmers; and the legislature seems to be of the opinion that the industry is so great and the interests of the people of the state so directly and universally involved, that the business needs to be regulated, at least to the extent that no sale shall be made unless the farmer has had an opportunity to obtain this expert advice.

With this judgment and determination the courts cannot interfere. The rule, indeed, seems to be quite generally established that "if an act of the legislature would be valid only in the event that certain circumstances existed, it will be presumed that all such circumstances did exist. If it was required that the legislature should have evidence of particular facts in order properly to pass a statute, it is presumed that such evidence was actually and properly before the legislative body, and that it acted on a full knowledge of the facts." 6 R. C. L. 102, 178; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; State ex rel. McCue v. Northern P. R. Co. 19 N. D. 45, 25 L.R.A.(N.S.) 1001, 120 N. W. 869; State v. Armour & Co. 27 N. D. 177, 203, 204, L.R.A.1916E, 381, 145 N. W. 1033, Ann. Cas. 1916B, 548; Armour & Co. v. North Dakota, 240 U. S. 510, 60 L. ed. 771, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548.

As was said by the Supreme Court of the United States in Armour & Co. v. North Dakota, supra: "We need only deal with the law

under review and the justification for its adoption. Evils attended the method of the company (in the case at bar the method of the marketing of grain) which the Food Commission of the state . . . [in the case at bar the producers of the state generally] thought should be redressed, and which the legislature reasonably believed were definite, and not fanciful, and in this belief passed the law. And the belief, being of that character, removes the law, as we have already said, from judicial condemnation."

Or, as was again said by the National Supreme Court in Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66: "This court cannot review the economic facts on which the legislature of a state bases its conclusions that an existing evil should be remedied by an exercise of the police power."

It is true that the legislature cannot delegate its power to make a law. It has, however, delegated no such power in the act which is before us. It has merely intrusted to state officials the duty to do certain acts, and has provided by law that sales shall not be made until these acts are done. Much more drastic statutes, indeed, have been sustained by the courts. In the case of Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349, it was held that "an unconstitutional delegation of legislative power to the Secretary of the Treasury was not made by the provision of the Tea Inspection Act of March 2, 1897 (29 Stat. at L. 604, chap. 358, Comp. Stat. 1913, § 8786), forbidding the importation of teas inferior to the government's standards of purity, quality, and fitness, for consumption, which authorizes him to establish such standards upon the recommendation of a board of tea experts, but such provision merely leaves to the Secretary the executive duty to effectuate the legislative policy declared in the statute."

The court, among other things, says:

"By the Act of March 3, 1883 (22 Stat. at L. 451, chap. 64), then in force, any merchandise imported 'for sale as tea,' adulterated with spurious or exhausted leaves, or containing such an admixture of deleterious substances as to make it 'unfit for use,' was prohibited; and exhausted leaves were defined to include any tea which had been deprived of its proper quality, strength, or virtue by steeping, infusion, decoction, or other means. Thus the importation of tea containing

such an admixture of leaves as to be deprived of its proper quality or virtue by any method of treatment was prohibited. The act, however, contained no provision for the establishment of government standards; and the establishment of uniform standards in the interest of the importer and of the consumer had become a recognized necessity. In a report by the Senate Committee on Commerce, in 1897, the provision was suggested as designed, among other things, to protect the consumer against 'worthless rubbish,' and insure his 'receiving an article fit for use.' The report pointed out that the 'lowest average grade of tea ever before known was now being used' by our consumers, and proposed as a remedy the establishment of standards of the 'lowest grades of tea fit for use.' As originally introduced in the House, the bill prohibited the importation of any merchandise as tea which is inferior in purity or fitness for consumption to the standards provided in § 3 of this act.' It was amended in the Senate by inserting the word 'quality' between the words 'purity' and 'fitness for consumption' wherever they occurred in the House bill. The amendment evinces the intention of the Senate to authorize the adoption of uniform standards by the Secretary of the Treasury which would be adequate to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably or possibly so because of their inferior quality. The House concurred in the amendment, and the measure was enacted in its present terms. We conclude that the regulations of the Secretary of the Treasury are warranted by the provisions of the act.

"The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the circuit court of appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495, where it

was decided that the 3d section of the Tariff Act of October 1, 1890 (26 Stat. at L. 567, chap. 1244), was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides. We may say of the legislation . . . considered in Marshall Field & Co. v. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

"Whether or not the Secretary of the Treasury failed to carry into effect the express purpose of Congress, and established standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted, is a question we are not called upon to consider. The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment, to be honestly exercised, and if that were important, there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting on him."

It seems, indeed, to be generally conceded in this age of a varied and complicated social and industrial development, where expert knowledge and supervision is everywhere necessary, that the legislature may make use of the aid of such experts, both as to the general details of supervision and as to the rates to be enforced and the fees and charges to be exacted. See 6 R. C. L. 178; People v. Harper, 91 Ill. 364; Saratoga Springs v. Saratoga Springs Gas, E. L. & P. Co. 18 L.R.A.(N.S.) 713 and note (191 N. Y. 123, 83 N. E. 693, 14 Ann. Cas. 606); Com. v. Falk, 59 Pa. Super. Ct. 217.

But it is contended that deputies can, under the provisions of the act, only be appointed in towns and localities which furnish scales and buildings to house the same; and that only such grain dealers may be licensed to inspect and grade as the state inspector may choose. It is

contended, also, that towns and localities may not choose to furnish the scales and buildings; and there is much in this objection when it comes to the practical application of the law. This is not a matter, however, with which the courts may concern themselves. "The legislature is given a large discretion in reference to the means it may employ to promote the general welfare. It is for the legislature alone to judge what means are necessary and appropriate to accomplish an end which the Constitution makes legitimate, and hence the courts cannot undertake to decide whether the means adopted by the legislature are the only means or even the best means possible to attain the end sought, for such course would vest the exercise of the police power of the state in the judicial department. It has been said that the methods, regulations, and restrictions to be imposed to attain, so far as may be, results consistent with the public welfare, are purely of legislative cognizance. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen." 6 R. C. L. p. 155, § 154. The legislature, no doubt, was of the opinion that the self-interests of the cities, towns, and localities are so deeply involved, to say nothing of the interests of the buyers of grain, that no difficulty will be experienced from the requirement that such localities shall furnish scales and the buildings necessary thereto, and with our knowledge of human nature, at any rate, with the limited power which is given to us, we do not feel justified in interfering with its discretion and judgment in this matter; nor have we any reason to believe or to act upon the assumption that the state inspector of grades would proceed arbitrarily, or, by failing to appoint and license a sufficient number of inspectors and deputies, will hamper the grain business of the state.

The same considerations apply to the objection that the Railroad Commissioners are given the power to establish markets both within and without the state, and fix charges for the service and establish fees for grading, weighing, inspecting, and selling, and that the act also contemplates the establishment of a public grain storage warehouse within the state. It is well settled, indeed that administrative boards and executive officers may be given the power to perfect the details of a plan, the general outlines of which have been laid down in a statute of the legislature. See 6 R. C. L. 178, 179; Buttfield v. Stranahan,

192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; People v. Harper, 91 Ill. 357.

Objection is also made to the act on the ground that the state is engaging in private business. Whether this can be done or not, however, we are not called upon to determine. It is sufficient to say that the state is not engaging in private business; that is to say, if we eliminate the provision for the 25 per cent for the erection of a public warehouse, and which we have already done on other grounds.

The protection of the farmers of a state from possible fraud, and advising them as to the nature and quality of their grain and other products, is especially in the state of North Dakota, which depends almost entirely upon its agricultural resources and whose whole population are either directly engaged in farming or are dependent upon the wealth which comes from the land, and which even now is being urged by the national government to enter into the farming industry and to develop its resources to their fullest extent, is certainly not private in its nature, but is essentially public.

Although, too, the *amicus curiæ,* who has appeared in this case, seems deeply solicitous for the welfare of the so-called track buyers, and urges their claims as well as those of the petitioner herein, it by no means follows that the interests of these dealers are or will be seriously affected. No track buyer at any rate is now before us, as the learned *amicus* not only does not disclose the names of any of his clients, if indeed an *amicus* can have clients, but as far as we can learn none of them have been arrested. It is also self-evident that in a habeas corpus proceeding the liberty of the petitioner is the only matter involved and the only interest concerned, and that no intervention can be had on the part of other persons, especially on the part of those who have not even been arrested.

It is a matter also of common knowledge, and of which the courts may well take judicial notice, that it is the desire of localities to reap benefits from the local retail trade in all lines which comes from a local grain market, that has largely created the local track buyer, and the legislature may well have considered that the same considerations which in the past have encouraged local co-operation in track buying will in the future cause such localities to furnish the necessary scales, and thus render track buying easy and legitimate.

One of the points, however, which the learned *amicus curiæ* especially urges goes to the validity of the whole act, and affects the petitioner Gaulke, as well as the more or less nebulous track buyer, and in order that he may raise this point the *amicus curiæ* has been allowed to join in the brief of such petitioner. This point is that the statute deprives the petitioner of liberty and property without due process of law, and denies to him the equal protection of the laws, it being urged that such petitioner is denied the right to buy from whom and as he pleases.

In support of this contention the case of Adams v. Tanner, 244 U. S. 590, 61 L. ed. 1336, L.R.A.1917F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917D, 973, is cited. In it the Supreme Court of the nation held a statute to be unconstitutional which was directed against private employment agencies, and which made it criminal in the state of Washington to collect fees from workers for furnishing them with employment or with information leading thereto, the court holding the business to be a useful business and the statute an arbitrary interference therewith. This decision, however, was dissented from by four out of the nine judges; and, even if applicable to the case at bar, is in the opinion of the writer and of four of the dissenting judges of the Supreme Court of the nation itself, contrary to a long line of decisions of the same court, and the majority of this court is firmly of the opinion that the rule therein announced will not be extended further than the particular case involved.

The contrary cases referred to are collected in the dissenting opinion of Mr. Justice Brandeis, and, to quote from the language of the eminent jurist, show: "That the scope of the police power is not limited to regulation as distinguished from prohibition. They show also that the power of the state extends equally, whether the end sought to be attained is the promotion of health, safety, or morals, or is the prevention of fraud or is the prevention of general demoralization. 'If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere unless in looking at the matter they can see that it "is a clear unmistakable infringement of rights secured by the fundamental law."' . . . Or, as it is so frequently expressed, the action of the legislature is final unless the measure adopted appears

clearly to be arbitrary or unreasonable, or to have no real or substantial relation to the object sought to be attained. Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts actual or possible,—*ex facto jus oritur.* That ancient rule must prevail in order that we may have a system of living law. It is necessary to inquire, therefore, what was the evil which the people . . . sought to correct. Why was the particular remedy embodied in the statute adopted, and incidentally, what has been the experience, if any, of other states or countries in this connection? But these inquiries are entered upon, not for the purpose of determining whether the remedy adopted was wise, or even for the purpose of determining what the facts actually were. *The decision of such questions lies with the legislative branch of the government* . . . The sole purpose of the inquiries is to enable this court to decide whether in view of the facts, actual or possible, the action of the state . . . was so clearly arbitrary or so unreasonable that it could not be taken 'by a free government without a violation of fundamental rights.'"

This quotation expresses the ruling of the Supreme Court of the United States in scores of cases, and we are clearly satisfied that the majority opinion in the case of Adams v. Tanner, supra, is outside of that line of authority. It at any rate only became a decision by the majority vote of one judge.

The rule generally announced, indeed, is stated in the case of Powell v. Pennsylvania, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257, where the court held to be valid a statute of the state of Pennsylvania which absolutely forbade the manufacture of oleomargarin or any article designed to take the place of butter, and which was not produced from milk or cream. This state legislation was, and is still, upheld in spite of the fact that in other decisions it has since been held that oleomargarin is not necessarily injurious, and, not being necessarily injurious, is entitled to the protection of the commerce clause of the Constitution. See Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768.

In passing upon this question, the court, in the Powell Case, said: "The power which the legislature has to promote the general welfare

is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property, and while, according to the principles upon which our institutions rest, 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself,' yet, 'in many cases of mere administration, *the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment,* exercised either in the pressure of public opinion or by means of the suffrage.' Yick Wo v. Hopkins, 118 U. S. 370, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064. The case before us belongs to the latter class. The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or the offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. *If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarin,* as an article of food, *their appeal must be to the legislature or to the ballot box,* not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

The real basis and holding of the case of Powell v. Pennsylvania, taken in connection with Collins v. New Hampshire and the other oleomargarin cases, is that, as long as interstate commerce is not affected, a state is free to develop its own resources in the manner that it thinks the wisest and best; and that if it considers dairying and agriculture to be its paramount interest, and that the manufacture of oleomargarin or any other business or practice unduly interferes with and threatens the prosperity of that interest, such manufacture or such practice can be made to step aside and be regulated, and even prohibited.

Again, in the case of Booth v. Illinois, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425, in passing upon a statute which prohibited the buying or selling of grain options, the United States Supreme Court said: "We . . . cannot adjudge that the legislature of Illinois transcended the limits of constitutional authority when enacting the statute in question. In reaching this conclusion we have recognized the principle long established and vital in our constitutional system, that the courts may not strike down an act of legislation as unconstitutional unless it be plainly and palpably so. The statute here involved may be unwise, but an unwise enactment is not necessarily for that reason invalid. It may be, as suggested by counsel that a steady and vigorous enforcement of this statute will materially interfere with the handling and moving of vast amounts of grain in the West which are disposed of by contracts or arrangements made in the board of trade in Chicago, but those are suggestions for the consideration of the Illinois legislature. The courts have nothing to do with the mere policy of legislation."

Again, in the same opinion, it says: "The argument, then, is that the statute directly forbids the citizen from pursuing a calling which in itself involves no element of immorality, and therefore, by such prohibition, it invades his liberty as guaranteed by the supreme law of the land. Does this conclusion follow from the premise stated? Is it true that the legislature is without power to forbid or suppress a particular kind of business where such business, properly and honestly conducted, may not in itself be immoral? We think not. A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily, or often done, in pursuing that calling, may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute, enacted professedly to protect the public morals, has no real or substantial relation to that object, but is a clear and unmistakable infringement of rights secured by the fundamental law."

The same considerations apply to statutes which are directed for the

protection of the public welfare generally, as those which are directed towards the protection of the public morals. See State v. Peel Splint Coal Co. 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000; Harbison v. Knoxville Iron Co. 103 Tenn. 421, 56 L.R.A. 316, 76 Am. St. Rep. 682, 53 S. W. 955; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Dayton Coal & I. Co. v. Barton, 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5.

No one will deny that there is an admitted evil in the grain grading and marketing in the state of North Dakota, and throughout the Northwest generally. If a state, when an admitted evil exists, may go to the extent of prohibiting a calling altogether, it may certainly go to the extent of regulating it. We, as a court, cannot say that the statute which is before us, and which was enacted professedly to protect the grain producers and the farmers of the state from the evils incident to that system, has no real or substantial relation to the object involved. Such being the case, under the decisions of the Supreme Court of the United States and of the country generally, we cannot interfere, as these matters are for legislative, and not judicial determination.

Generally speaking, too, what the people believe is for the public welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Re Viemeister, 103 Am. St. Rep. 859, and note (179 N. Y. 235, 70 L.R.A. 796, 72 N. E. 97, 1 Ann. Cas. 334), 6 R. C. L. 112.

It is further contended that the act in question is unreasonable, because it deprives one farmer of the right to sell seed grain to another without having it first properly inspected. There is, however, no merit in this contention. In the first place, no farmer is complaining. In the second place, the act is clearly confined to marketing, and does not relate to transactions such as those suggested.

Nor is the act in so far as the petitioner Gaulke is concerned invalid in that it interferes with the interstate prerogatives of the Federal Congress, and provides that any person purchasing grain through a central market within or without the state must furnish a bond, and because it is clear that purchasers who operate and live in Minnesota, etc., cannot be required to furnish the instrument, nor can the right of contract be interfered with.

Whether this clause would be valid or not if properly attacked, and

by a party interested, we are not called upon to determine, and cannot determine in this case, and an expression of opinion would be *obitum* merely. As far as we know, the Commissioners of Railroads have as yet created no central markets, nor have they required any bonds to be given. The petitioner certainly has no grievance in that respect. He is merely the agent of a local warehouse, and in the North Dakota town of Thompson. Even if the clause is invalid, it would not affect the rights of the petitioner, or afford him any relief, nor would it invalidate the whole act, as the clause in question can be easily separated from the remainder, and the remainder be allowed to stand without its incorporation. Being, too, a regulation to prevent fraud, and being applicable to all alike, we, upon the limited investigation which the necessity of a speedy determination of this case and the issues actually involved demand, can see no fault in it.

Nor is it necessary to consider the other exterritorial aspects of the statute that is before us. None of them are involved in the case at bar. When private rights are affected thereby and they are properly presented, it will be time enough to consider them.

It is also urged that the local grain buyers who have been licensed as deputy inspectors cannot be forced to inspect, grade, and weigh grain that they do not buy, without compensation, and even then cannot be compelled to render this service if they do not wish to. There is, however, no merit in this contention. In the first place, there is here no contention that the petitioner has been sought to be compelled to do any such thing. In the second place, the Commissioners of Railroads have the power given to them by the act to provide for fees if they so desire. In the third place, if the local grain buyers refuse to perform the service, other deputies may be appointed.

It is true that these local buyers may be more or less interested, but this is a matter for the legislature, and not the courts, to pass upon. "All political power is inherent in the people, Const. art. 1, § 2. And the Constitutions are the only means employed by a free people to limit the power of their agents." State ex rel. Miller v. Taylor, 22 N. D. 362, 133 N. W. 1046. Possible prejudice then is not for us to consider. Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

But it is maintained that the act as a whole is invalid on the ground

that the Board of Railroad Commissioners are given the power to establish markets both within and without the state, and to fix charges for the service, and to establish fees for grading, weighing, inspecting, and selling. It is argued that the state is thus engaging in private business, and that the Constitution prohibits it from so doing.

This question in its broadest aspects, however, need hardly be met; for, as we have before stated, the regulation of the public marketing of the products of a state is essentially a public interest, and we find no clause in the Constitution which prohibits such acts and regulations.

Counsel indeed cites us to but one provision, and that is clearly inapplicable. It is § 185 of article 12 of the Constitution, which provides that: "Neither the state or any county, city, township, town, school district, or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association, or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in any work of internal improvement unless authorized by a two-thirds vote of the people."

The acts authorized by the statutes which are before us clearly create no internal improvement as that phrase has for the last two hundred years been generally used and understood. Nor do they loan money to or make any donation to or in aid of any individual, association, or corporation.

It is true that in the case of State ex rel. Miller v. Taylor, 27 N. D. 77, 145 N. W. 425, there are expressions of opinion as to the legitimate functions of government, which express the *laissez faire* theory and would make that government a policeman merely, but these are *obiter* and expressions of opinion merely.

Generally speaking, it is a recognized principle of constitutional law that, except where limitations can be imposed by the Federal or state Constitutions, the power of the legislature is unlimited and practically absolute, and that, therefore, it covers the whole range of legitimate legislation. The general rule is that if limitations upon its exercise are not found in the Constitutions, they do not exist. It is sometimes said that an act cannot be opposed to the spirit of the Constitution, yet the spirit of a Constitution is to be collected chiefly from its terms. See Chief Justice Marshall in Sturges v. Crowninshield, 4 Wheat. 122,

202, 4 L. ed. 529, 550; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 756. And the courts are not at liberty to declare an act void because it is opposed to the spirit supposed to prevade the Constitution, or because it is against the nature and spirit of the government, or is contrary to the general principles of liberty, or the genius of a free people, unless the limitation is necessarily implied from the express words which have been used. In every case, indeed, the courts, in order to be justified in declaring an act unconstitutional, must be able to point out the specific provision of the Constitution which is violated.

"When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution upon a subject which is not even mentioned in the instrument." People ex rel. Smith v. Fisher, 24 Wend. 215, 220; Cooley, Const. Lim. 5th ed. pp. 201–206; 6 R. C. L. 104.

Even the provisions that no person shall be deprived of life, liberty, and property without due process of law, and that everyone shall be entitled to the equal protection of the laws, which are contained in the Federal Constitution, and which have been paraphrased into the Constitutions of all of the separate states, have from an early time been construed as conferring no new rights, but as merely guaranteeing the permanence of those existing at the time of the adoption of the instruments.

At these times, and for a long period prior thereto, trade and industry were and had been frequently regulated by the governments, both state and national; and in England as well as in America, and from time immemorial, restrictions had been placed on commerce and industry for the broader purposes of the common good and for the development of the industry and the commerce of the realm. Especially was and has been this true in the cases of wool, tobacco, grain, and other agricultural products. See Turner v. Maryland, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; Patapsco Guano Co. v. Board of Agriculture, 52 Fed. 690; Pittsburgh & S. Coal Co. v. Louisiana, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; People v. Harper, 91 Ill. 357; 10 Rose's Notes (U. S.) 449.

Nor is the act invalid because it attempts to compel the commission of an illegal act on the part of the municipalities, and to compel them to furnish scales, etc. In the first place there is no compulsion. In the second place, the municipalities are entirely within the legislative control, and it is just as competent for the legislature to authorize them to furnish scales, as it is to authorize them to establish local markets and market places; and of this power there can be no question.

It is also urged that the act in question is unconstitutional for the reason that, in addition to the provisions for the grading, inspecting, etc., it provides for an appropriation of $10,000 for the purpose of carrying out the provisions of the act. The claim is generally made that an act containing an appropriation may not contain any other provisions. Although this is undoubtedly true under the Constitutions of a number of the states (see Ritchie v. People, 155 Ill. 99, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454), it is not true under the Constitution of North Dakota. Here it is only the general appropriation bill which is required to contain nothing but appropriations. See Const. § 62. As far as other measures and other appropriations are concerned, the only requirement is that such "appropriations shall be made by separate bills each embracing but one subject." Const. § 62. The subject of the bill is, as we have before said, the regulation of marketing, and the appropriation, which is to be used for the general purpose or subject, is merely an incident thereto. This we believe to be the clear import of the language of the constitutional provision. Hill v. Rae, 52 Mont. 378, L.R.A.1917A, 495, 158 Pac. 826, 830. It is certainly the construction which has been placed upon it by every legislative assembly since the beginning of statehood.

The motion to quash the writ of habeas corpus is granted.

ROBINSON, J. (dissenting). This is a habeas corpus case arising under an act for the inspection of grain and many other things. For the buying of wheat that had not been inspected the defendant was arrested as a common criminal, charged with the commission of a misdemeanor. He claims that the Grading and Inspection Act is unconstitutional; that it is contrary to the Constitution of the state and the 14th Amendment of the Federal Constitution. The act is a long, ill constructed, ungrammatical, multifarious, hodgepodge document. It

was senate bill 314 [Laws 1917, chap. 56]. Without any consideration the bill was rushed through toward the close of the last session of the legislature. It was not read at length as required by the Constitution.

Sec. 63. Every bill shall be read three several times, and the first and third readings shall be at length.

Sec. 61. No bill shall embrace more than one subject, which shall be expressed in its title.

The title when subdivided into its leading parts or subjects is as follows:

(1) An act creating a uniform state grade for wheat, oats, barley, flax, and other grains.

(2) An act creating the office of state inspector of grades, weights, and measures.

(3) An act providing state aid for marketing facilities and the establishment of state-owned marketing places.

(4) An act providing for the inspection of licensed warehouses by competent accountants, authorizing the employment of accountants and making an appropriation therefor, and providing penalties for the violation of the act.

So far as material to the case, the act is in effect:

The Railroad Commissioners may appoint an inspector of grades, weights, and measures from the faculty of the Agricultural College, and the inspector shall proceed at once to define and establish proper grades and weights for grain. He may appoint deputies at any town or place where grains are to be marketed, and if the town or community shall, at its own expense, provide a suitable building and scales for housing the deputy, the upkeep of the building and scales shall be borne by the state. The Commissioners may appoint any number of inspectors they may deem necessary. They may establish central markets, either within or without the state, and install deputies in charge of the same and fix the charges for their services. They shall also establish uniform fees for grading, weighing, inspecting, and selling, and fix the salary and compensation to be paid deputies and employees. The inspector shall charge a fee of $10 for every license issued to a deputy.

Obviously the subject of the act is not expressed in its title, and it does contain more than one subject. As shown by its title, the

leading purpose of the act is *to establish a uniform state grade for wheat, oats, and other grains,* and yet the act nowhere creates or attempts to create a uniform state grade or any grade whatever. It merely undertakes to delegate the power of creating such a grade and the power of doing numerous other things which have no necessary connection. That is all clear and manifest. The leading subject of the act is *to create a uniform state grade.* This, the act does not attempt to do.

In the majority opinion it is said the title does not contain more than one subject, and that the subject of the act *is the marketing of agricultural products.* But that is obviously untrue. The subject as expressed in the title of the act is not the marketing of agricultural products, and if we may amend the title by a reference to the body of the act, contrary to the decision of this court in Turnquist v. Cass County Drain Comrs. 11 N. D. 514, 92 N. W. 852, we may as well say it should be entitled thus: "An Act to Create a Huge Grafting System and to Deny Farmers the Right to Sell their Grains without Paying to Some Inspector an Unknown and Unlimited Graft on Each and Every Load." As there can be no sale without a purchaser, the denial of the right to purchase is a denial of the right to sell. The graft is such a sum as may be fixed by the chief inspector and his deputies without consulting any seller of grain. It may be fixed at 10 cents or $1 on each load of grain. The inspector is given the discretion, and it is not subject to review by the courts.

In marketing a load of grain, the farmer has no time to adjust the graft. He must pay whatever is demanded, though it be a gross imposition. The act gives him no protection. The rates are to be fixed by those who profit by the graft. The farmer who hauls his grain to market may have to haul it home again, as he has no guaranty of finding a deputy inspector.

The first section of the penal clause reads thus: "It shall be unlawful for any person operating a public warehouse to purchase, weigh, grade or inspect grain or seed who is not licensed as deputy inspector, provided that any person without a license may buy any article that has been graded, weighed and inspected by a deputy state inspector." The right to purchase without inspection is not forbidden only to: *"Any person operating a public warehouse."*

But as the act does purport to give the Commissioners and the

inspector a legislative power, they declare that it is unlawful for a track buyer to purchase grain without inspection by a deputy, and thus the track buyer is put out of business, unless he can purchase a license as a deputy inspector. That does away with competition which has been of great value to the sellers of grain. The deputy inspector and weigher must have scales to weigh. In all grain elevators the weighing scales are on the main floor, which is from 5 to 6 feet above the level of the ground, to give place for a grain pit under the floor. The farmer drives his load onto and off the main floor by going up and then down an incline of about 15 per cent. When the load and wagon are weighed, the grain is dumped into the pit under the main floor and the wagon is weighed, and the difference gives the net weight. No man drives a load of grain up and down the inclined plane, sells it to a track buyer, and then drives up and down the plane to have his wagon weighed. If he should undertake to do it, he might be forced to wait an hour for every weighing. And in driving his loaded wagon down the inclined plane he might find it very dangerous. The track buyer must go out of business if he cannot weigh on scales of his own, or city scales, or on some private scales.

The grower of grain is not a chump or a dolt. In grain matters he does not need a guardian. He may have scales of his own; he may weigh on the scales of a neighbor. He may weigh his grain by measuring it in the wagon box. He may ascertain the proper dockage by measuring and weighing and cleaning a bushel of grain. When a man lives by growing and handling grain, he soon learns how to grade it, to measure it, and to weigh it; but how may he sell his grain if the law makes it a crime to purchase it?

Now, under the plain words of the state Constitution, every person has a right to acquire and dispose of property, and to pursue and obtain safety and happiness. He has a right to buy and sell grain without paying a graft to anyone. The graft of the inspection and weighing of a load of grain may be 10 cents or it may be $1. The act does not limit the amount which may be fixed and demanded. The constitutional validity of the statute is to be determined by what may be done under it by the worst set of grafters.

Defendant claims the benefit of the 14th Amendment of the Federal Constitution. It declares no state shall make or enforce any law which

shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

This great Amendment has been given a liberal construction. In a recent case the United States Supreme Court held void an initiative measure adopted by the people of the state of Washington. The design of the measure was to put out of business all persons conducting an employment agency. The court cited with approval former decisions holding that the liberty mentioned in the amendment means not only the right of the citizen to be free from the mere physical restraint of his person, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work when he will and to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper and essential to his carrying out to a successful conclusions the purposes above mentioned.

The right of a person to make fair and honest contracts of sale or purchase cannot be legally hampered by any arbitrary actions of third parties. The legislature may not delegate to a third party the right to fix the terms and conditions on which a farmer may sell or buy a load of grain.

So far as the act provides for the state aiding and mixing into private grain business, it is in conflict with this section of the Constitution:

"Section 185. Neither the state nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor."

For these several reasons the act in question is clearly void.

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APPEAL AND ERROR.

From order of magistrate, see Justice of the Peace.

Appellate Jurisdiction Generally.

1. The defendant made an alternative motion for judgment notwithstanding the verdict or for a new trial. The trial court made its order denying the first request, and grating a new trial. The defendant appealed from the whole order. *Held* that the order is not appealable. Stratton v. Rosenquist, 116.

Supersedeas; Stay.

2. Section 7836 of the Compiled Laws of 1913, which provides that "when the court or the judge thereof from which the appeal is taken or desired to be taken shall neglect or refuse to make any order or direction not wholly discretionary, necessary to enable the appellant to stay procedings upon an appeal, the supreme court, or one of the justices thereof, shall make such order or direction," does not give an intending appellant a right to supersede a portion of a judgment or decree that is executed prior to the taking of an appeal. Random v. Random, 287.

Raising Questions in Lower Court.

3. An erroneous ruling upon a motion for a directed verdict on a counterclaim is an error of law, and is reviewable on appeal from the judgment; and it is not necessary to such review that a motion for a new trial should have been made, or that on such motion or on appeal the particulars in which the evidence was insufficient to support such counterclaim should be specified. Jensen v. Bowen, 352.

Discretionary Matters.

4. An application, under § 7483, Compiled Laws 1913, to be relieved from a default judgment on the ground of mistake, inadvertence, surprise, or excusable neglect, is addressed to the sound judicial discretion of the trial court on the particular facts existing in the case, and the trial court's ruling will not be disturbed on appeal unless an abuse of discretion is shown. State Bank v. O'Laughlin, 532.
5. It is the general rule upon application to vacate a judgment entered by default, where there is a sufficient affidavit of merits, and the answer tendered discloses a meritorious defense, and a reasonable excuse is shown for the default, and no substantial prejudice is shown to have arisen from the de-

Tax Sale.

TREATIES.

1. The prohibitions of article 1 of § 10 of the Federal Constitution, which provide that "no state shall enter into any treaty, alliance, or confederation; . . . No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power," are directed against the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States. They are not directed against agreements which in no way encroach upon or weaken the general authority of Congress and which are in no way political, such as the obtaining of the consent of the authorities of the neighboring state or nation to the construction of a drain for the carrying away of surface waters which otherwise could be allowed to flow across the national boundary. McHenry County v. Brady, 59.
2. The action of the joint boards or drain commissioners of the counties of McHenry and Bottineau in securing an outlet in the province of Manitoba for a drain constructed along the Mouse river for the purposes of draining lands in such counties, and constructed under the provisions of §§ 1821 and 1822 of the Revised Codes of 1905, as amended by chapter 93 of the Laws of 1907, Comp. Laws 1913, §§ 2464, 2465, and in obtaining a license from the municipality of Arthur, in said province, so to do, and in entering into an agreement to keep said drain open, is not in violation of the treaty between the United States and Canada known as treaty series No. 548 and ratified by the President of the United States April 1, 1910, and by Great Britain on March 31, 1910. McHenry County v. Brady, 59.

TRIAL.

Review of verdict on appeal, see Appeal and Error, 11.
Prejudicial error in remarks of counsel, see Appeal and Error, 19.
Prejudicial error as to instructions, see Appeal and Error, 15–18.
New trial, see New Trial.
As to witnesses, see Witnesses.

Reception of Evidence.

1. As a general rule, incompetent evidence which is introduced without objection becomes evidence in the particular case, and must be treated as competent evidence for the purpose for which it is offered. Goldstein v. Northern P. R. Co. 602.

Questions of Law and Fact.

2. As applied to the tribunal which tries issues of both law and fact, the court is not composed of the judge who is presiding at the trial. The court in such case is composed of the judge who presides or is acting at the trial of the issues of law and fact in such court, and also of the jury. The judge is only one of the constituent parts of such court, and as such his duty is to define the law of the case. The jury is also a material constituent part of the court in such case, and its exclusive duty is to pass and render judgment upon the facts in the case. Each constituent element of the court, as just defined, has exclusive jurisdiction within its own sphere. Peterson v. Fargo-Moorhead Street R. Co. 440.
3. Where the conductor of a street car maintains an action against the defendant, his employer, a street railway company, on the ground of the defendant's negligence in keeping and maintaining its switch in a loose, improper, and imperfect condition, which caused the car of which the plaintiff was in charge to be thrown from the track while passing over such switch, the condition of the switch and the negligence of the defendant in maintaining such switch in its imperfect or improper condition, if it were so maintained. was a question exclusively for the jury; and where there was conflicting testimony as to the rate of speed of the car at the time such car passed over such switch, the contributory negligence of the servant or servants, if any, was also a question exclusively for the jury under the statute hereinbefore referred to. All questions of negligence and contributory negligence are exclusively for the jury. Peterson v. Fargo-Moorhead Street R. Co. 440.
4. The defendant railroad company, in constructing its railroad, intersected a trail or roadway which had long been used by the public, constructed therein a deep cut, and failed to guard the same,—*held* the question of negligence is one of fact for the jury. Chambers v. Minneapolis, St. P. & S. Ste. M. R. Co. 377.
5. The questions of contributory negligence and proximate cause are questions of fact for the jury, and the verdict of a jury determining such facts adversely to the defendant will not be set aside, unless the evidence is such that, in the mind of the court, reasonable men would necessarily arrive at a different conclusion, and there is no reasonable basis for them to differ in this conclusion. Chambers v. Minneapolis, St. P. & S. Ste. M. R. Co. 377.
6. Under § 4805, Compiled Laws of 1913, the questions of negligence and contributory negligence are exclusively questions for the jury; and where the negligence of the employer is gross as compared with the contributory negli-